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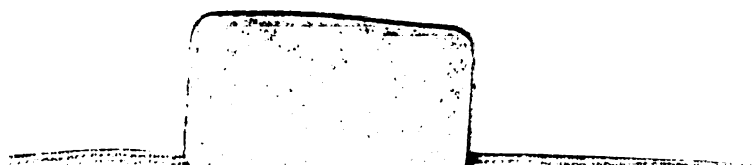
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CHITTY'S *C. P. Whittier*
TREATISE ON PLEADING

AND

PARTIES TO ACTIONS,

WITH

A SECOND VOLUME CONTAINING

MODERN PRECEDENTS OF PLEADINGS

AND

PRACTICAL NOTES.

Nihil simul inventum est et perfectum. — Co. Lit. 230 a.

IN TWO VOLUMES.

VOL. I.

THE SEVENTH ENGLISH EDITION,

CORRECTED AND ENLARGED, BY

HENRY GREENING, ESQ.,

OF LINCOLN'S INN.

SIXTEENTH AMERICAN EDITION,

WITH NOTES, AND REFERENCES TO THE ENGLISH AND AMERICAN
DECISIONS,

By J. C. PERKINS, LL. D.

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TO THE

SIXTEENTH AMERICAN FROM THE SEVENTH ENGLISH
EDITION OF CHITTY'S TREATISE ON PLEADING.

It is well said by the Author of this treatise, that "pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence; it is the formal mode of alleging that on the record, which would be the support of the action or the defence of the party in evidence. It is, as observed by Mr. Justice Buller, 'one of the first principles of pleading, that there is only occasion to state facts, which must be done for the purpose of informing the court, whose duty it is to declare the law arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it.' The grand object contemplated by the system is the production of a certain and material issue between the parties upon some important part of the subject-matter of dispute between them."

Pleading, then, under some form or system, lies at the very foundation of any reasonable and intelligent administration of the law, and must always have a leading and controlling influence in its enforcement. No change in forms, no adoption of different codes can abrogate the necessity for a resort to its rules and principles in the institution and conduct of causes. It must always be necessary to any regular administration of law that the plaintiff shall make a clear, distinct, and intelligible statement of his claim in order that the defendant may know what he has to meet; and it must always be equally necessary that the defendant shall state the

grounds on which he proposes to make defence against the claim, either by way of denial or avoidance, in order that some issue or point of controversy may be made for the presentation of the case to the consideration of the appropriate tribunal.

Whatever may be the name of the system, and whatever the forms prescribed, the essential principles of pleading, must remain a necessary element in the conduct of all legal controversies. In New York it is held that although the code of procedure has abolished the distinctions between forms of action, yet the intrinsic difference between actions, in their nature, remains; and the principles by which the different forms of action were previously governed, still remain, and control in determining the rights of parties. In *Goulet v. Asseler*, 22 N. Y. 225, 228, Mr. Justice Selden said: "Although the Code has abolished all distinction between different forms of action, and every action is now in form of a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights, by taking and disposing of his property, the same thing in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before."

In another case, *Booth v. Farmers' and Mechanics' National Bank*, 65 Barb. 458, Mullin P. J. said: "The codifiers, while professing to abolish the distinction between forms of actions, found it impossible, or impracticable, in many cases, to effect their object." So in North Carolina, Wisconsin, Missouri, Massachusetts, and many other states, similar observations have been made by learned judges with regard to the changes in their systems of procedure. The rules of pleading at common law have not been abrogated by them. In *Parsley v. Nicholson*, 65 N. Car. 207, 210, Dick J. said: "The essential principles still remain, and have only been modified as to technicalities and matters of form. The object of plead-

ing, both under the old and new system, is to produce proper issues of law and fact, so that justice may be administered between parties litigant with regularity and certainty." See, also, *Cooper v. Landon*, 102 Mass. 58, 60; *Lubert v. Chaviteau*, 3 Cal. 458; *Kewaunee County v. Decker*, 30 Wisc. 624; *Magwire v. Tyler*, 47 Missou. 115.

The rules and principles which are discussed and developed in Mr. Chitty's treatise, the seventh edition of which is now for the first time published in this country, are those which underlie every system of pleading in any and all states where the common law is administered; and in no work are they more clearly and fully stated for practical use than in this volume. This treatise is full of elementary instruction for the student, and of practical observation for those more advanced in the legal profession. It teaches upon what facts and circumstances an action may be instituted; the kind and form of action to be adopted upon a given state of facts; the manner in which those facts are to be set forth in the declaration or complaint; and the appropriate mode of making answer to those facts under any circumstances of defence that may exist.

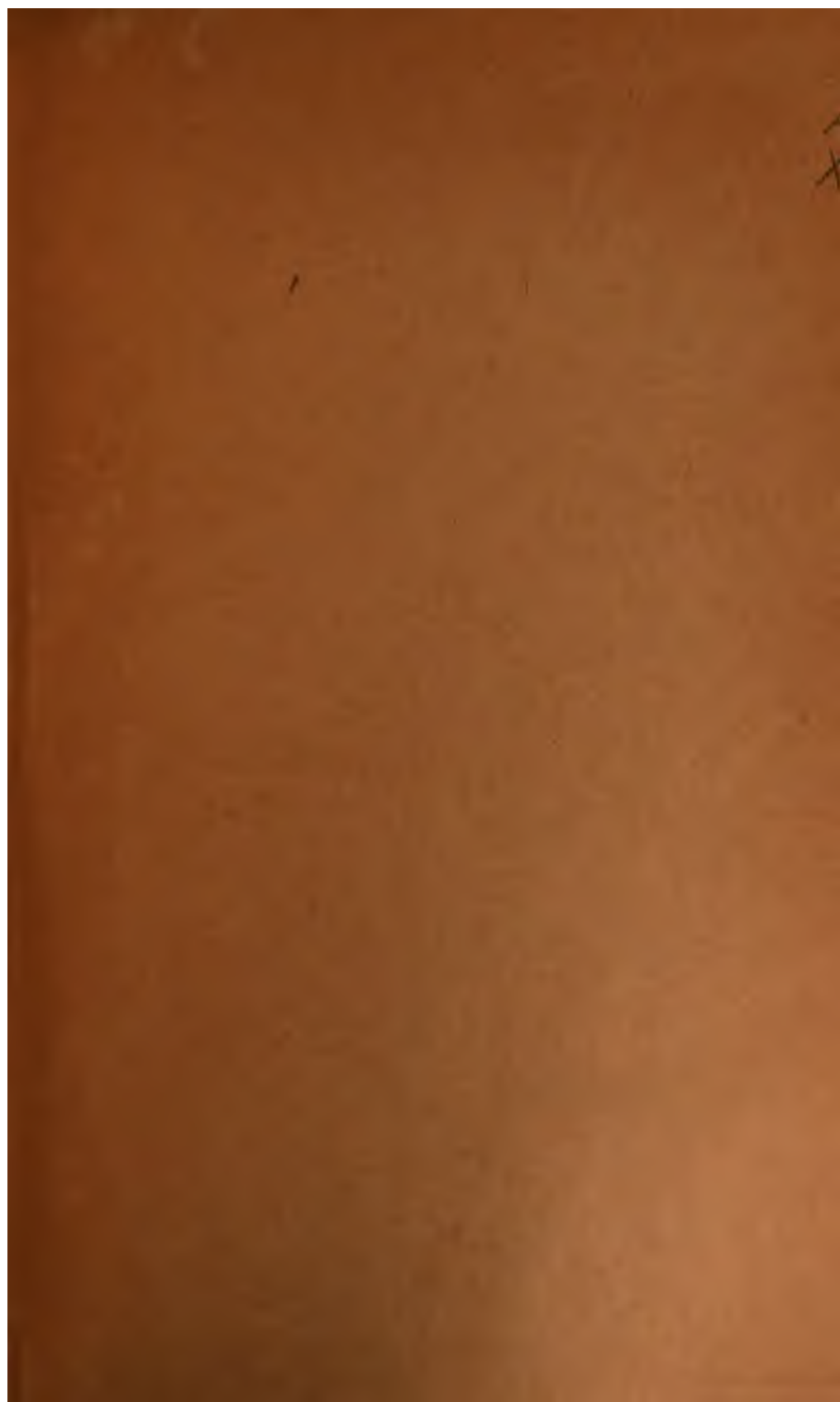
In this edition the American notes have been very much enlarged and many additions of new notes have been made; and they have all been blended and made homogeneous with the English notes.

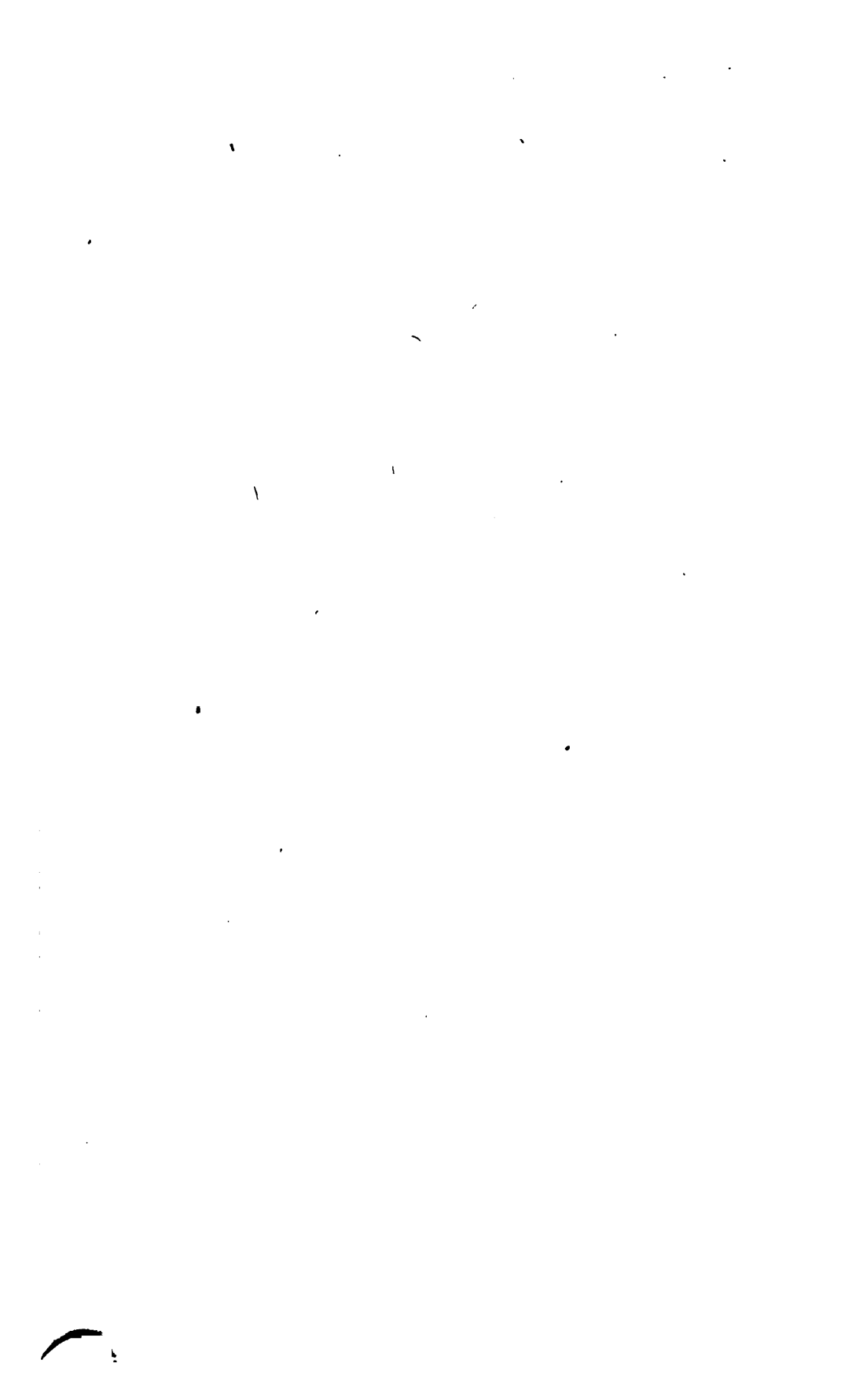
The rules adopted and the cases decided under the new systems of pleading and procedure in the several states have been referred to so far as it has been supposed it would be useful.

In consequence of the great changes which, in modern times, have been made in abridging, compressing and simplifying the forms of precedents in pleading, the second and third volumes, which are composed of forms founded on very much antiquated precedents, and which have heretofore been connected with, and published as a part of, Mr. Chitty's treatise on Pleading, have become for the most part practically obsolete, and have not, therefore, been republished with this edition of the treatise.

But in the place of those volumes and as a substitute for them, a single volume of precedents carefully adapted to







ment, and costs therein in general ; the consequences of mistake ; the *Joinder* of different *Forms* and of different *Rights* of action ; the consequences of *Misjoinder* ; and the *Election* of the best remedy, where the plaintiff has the choice of several. In considering each personal action, namely, assumpsit, debt, covenant, detinue, case, trover, replevin, trespass, and ejectment, I have endeavored to confine my observations to the cases where the action is sustainable, or when it is preferable to another remedy, without inquiring into the nature of rights or of injuries, which would have been foreign to the object of this treatise.(a) I have, however, in one instance, thought it advisable to depart from this plan, in order the better to explain the distinction between the action of *trespass* and that of *trespass on the case* ; and for this purpose I have endeavored to state the distinctions between torts committed in fact, or in legal consideration, with and without force, and between torts immediate and consequential, and how far the legality of the original act, or the defendant's intention, may affect the form of action, and the difference arising from the circumstance of the defendant's having acted under color of process. The consequences of mistake in the form of action are also stated.

The *Joinder* of different *Forms* and of different *Rights* of action, and the consequences of mistake, are of the greatest importance to the success of a cause, and I have, therefore, with some minuteness, pointed out the particular instances of *joinder*, which may be most likely to arise in practice.

In various cases the plaintiff has an *Election* of several different forms of action for the same injury, and a judicious choice is so material, that it may frequently enable the plaintiff to enforce his claim, which would be defeated or delayed by the adoption of a different course ; I have therefore stated several leading points, which may direct the pleader in his choice of the various remedies.

In the *third chapter*, a few *General Rules relating to*

(a) In many works, under the title of a particular action, we find the nature of *rights* considered ; as, for instance, under the head "Assumpsit," after stating that it lies on a bill of exchange, we find the whole law upon bills of exchange is collected. This is not a convenient mode of arranging the subject in a *pleading* point of view, where the object of inquiry is merely the application of the *form* of action and not the *right*.

Pleading are collected, and pursuing the definition of pleading (namely, a statement in a *logical and legal form* of the *facts* of which the courts are not bound *ex officio* to take notice), I have first pointed out *what facts* are necessary to be stated, distinguishing those of which the court will *ex officio* take notice, without their being shown in pleading; and secondly, *the mode* of stating those facts with reference to certainty, and other particulars; and thirdly, I have considered the *rules of construction*, concluding the chapter with the division of the parts of pleading.

The *fourth* chapter relates to the form and requisites of the *Præcipe*, when the plaintiff proceeds by special original, and of the *Declaration* in personal actions; and with respect to the latter, are stated, first, *the general requisites*, and secondly, *the different parts*, and *more particular requisites*, whether in actions founded on contracts or for torts. In *assumpsit*, the appropriate special and common counts are fully examined, and the structure of declarations in *debt* and *covenant* is separately and distinctly considered.

Actions in form *ex delicto* are so multifarious, that I have thought it better to refer the reader to the Precedents and Notes in the Second Volume, than to attempt in the First to point out the structure of the declaration in *each particular case*; I have, however, considered the *general rules* to be observed in forming declarations in actions for torts, and which will be found to relate to the statement of, 1st, the matter or *thing* affected; 2dly, the plaintiff's *right* or interest; 3dly, the *injury*; and, 4thly, the resulting *damages*.

The utility of *Several Counts* in the same declaration, and the forms thereof, are also treated of in this chapter, which concludes with the summary of the instances in which different defects in a declaration will be aided.

The *Claim of Conusance*, statement of the defendant's *Appearance* and *Defence*, the *Demand of Oyer*, and statement of a Deed upon it, and the different descriptions of *Imparlançes*, being connected with Pleading, are examined in the fifth chapter.

In the remaining chapters are considered in their natural order — *Pleas to the Jurisdiction* and in *Abatement*, and the

proceedings thereon ; pleas in *Bar* to the action ; and *Avowries* and *Cognizances* in replevin ; and pleas and notices of *Set-off* ; *Replications* and *New Assignments* ; and pleas in bar to avowries and cognizances in replevin ; *Rejoinders*, and the *subsequent Pleadings* ; *Issues*, *Repleaders*, *Pleas Puis Darrein Continuance* ; *Demurrers*, and *Joinders in Demurrer* ; and this Volume concludes with a copious Index of the Contents.

The utility of a work of this description must depend on the mode in which the subject is arranged, the correctness of the positions supported by legal decisions, for selection of the best authorities, and the facility of access by means of a full and accurate Index. To these points, therefore, I have endeavored to pay attention, and besides the Reports which I have consulted, the reader is frequently referred to the Digests and Elementary writers. Indeed, it was impracticable to write on the subject upon which the authors alluded to had touched, without occasionally finding some parts preoccupied, and the matter so ably treated of as to leave it open to me to do little more than enlarge upon and arrange such parts of the subject according to my own plan. When this has occurred, I have considered that it would be the most candid mode of acknowledging the assistance I have derived from these works, and at the same time most useful to the profession, if, in the notes, I referred to those authors, in addition to the reported decisions, sanctioning my own view of the subject by the weight of their authority.

The kindness of my friends has so engaged me in professional avocations, that I have with difficulty prepared this work for publication, and the various interruptions which I have experienced, must, I fear, have occasioned some inaccuracies, for which, however, I hope the candor of the reader will make allowance.

J. CHITTY.

TEMPLE,
November 7th, 1806

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A PRACTICAL TREATISE

ON

PLEADING.

CHAPTER I.

OF THE PARTIES TO ACTIONS.

THERE are no rules connected with the science and practice of pleading so important as those which relate to the *persons* who should be the *parties to the action*; (a¹) for if there be any mistake in this respect, the plaintiff is, in general, compelled to abandon his suit, and to proceed *de novo*, after having incurred great expense; whilst, with respect to most other objections, they do not thus affect the proceeding *ab initio*, and occasion comparatively but small expense. An attorney, special pleader, or barrister, before he can safely advise his client what is his remedy, must, before he can venture to issue a writ, be *certain* who ought to be the *plaintiff* or *plaintiffs*, and also the *defendant* or *defendants*, and unquestionably an extensive knowledge of the law regarding the *parties to an action* is of *paramount importance*. *The general rule is, that the action should be brought in the name of the party whose legal right has been affected, (a) against the party who committed or caused the injury, (b) or by or against his personal representative*; and therefore a correct knowledge of *legal rights*, and of *wrongs* remediable at *law*, will, in general, direct by and against whom an action should be brought. But as in the *application* of this rule

(a¹) [For a definition of the word "action," see 1 Burrill Law Dict.; 1 Tomlins Law Dict.; New York Code, §§ 2, 3; Iowa Code (Laws of Iowa, 1860), p. 439, §§ 2606, 2607; Co. Litt. 285 a, § 492; 1 Bac. Ab. 63; Bank of Commerce v. Rutland & Wash. R. R. Co. 10 How. Pr. 9; Harris J. in Bendon v. County Judge of Rensselaer, 13 How. Pr. 400; Potter J. in Sanders v. Colborne, 20 How. Pr. 381; Coe v. Coe, 37 Barb. 233; Ex parte Hewitt, 40 Ala. 300; Kramer v. Redman, 9 Iowa, 114; Didier v. Davison, 10 Paige, 515; Lockyer v. Lockyer, 1 Edm. (N. Y.) Sel. Cas. 107.]

(a) In general, courts of law do not directly recognize mere equitable rights, but leave

them to the protection of courts of equity. That rule, however, prevails more strictly as regards *real property* than with respect to injuries to the *person*, or *personal property*. See, fully, and the reasons, 1 Chitty's Gen. Prac. 6, 7; Britten v. Perrott, 2 Cr. & M. 602; Foreman v. Jervis, 5 B. & Ad. 836; see qualification, and when a court of law will restrain the proceedings of a plaintiff contrary to justice and equity, Jones v. Bramwell, 3 Dowl. 488; 3 Chitty's Gen. Prac. by Lush, 524, &c.

(b) Randall v. Bell, 1 M. & Sel. 722; Maerberly v. Robins, 1 Marsh. 260; Dawes v. Peck, 8 T. R. 332; Anderson v. Martindale, 1 East, 449.

difficulties frequently occur, and as there are many particular rules relating to the *joinder* of persons in actions, whether as plaintiffs or defendants, and to the *mode* in which, and the *time* when, a mistake of parties should be objected to or be rectified, it is advisable, before we consider the *form of the action*, and the **pleadings* therein, to take a concise view of these rules, which we will examine under two general heads. *First*, when the action is in *form ex contractu*, and, *secondly*, when it is in *form ex delicto*; and under each of those heads we will examine, *first*, who are to be the *plaintiffs*, and, *secondly*, who are to be the *defendants*.

I. IN ACTIONS IN FORM EX CONTRACTU.

The rules which direct *who are to be the parties* to an action in *form ex contractu*, whether as plaintiffs or defendants, are to be considered, *first*, as between the *original* parties to the contract; and, *secondly*, where there has been a *change* of parties, interest, or liability. Under the *first* head, the rules may be considered with reference to the interest or liability of the parties, as whether *legally* or *only beneficially interested*, or acting merely as agents, or standing in the situation of joint-tenants, tenants in common, partners, &c.; and in the case of several contracting parties, who must or may join, or be joined. Under the *second* head, the subject will be examined with relation to the instances of an assignment of interest or a change of credit; of survivorship of one of several; death of all; bankruptcy; insolvency; and marriage of one of the contracting parties. We will consider these rules, *first*, as they relate to the *plaintiffs* in an action.

I. Who to be Plaintiffs.

In general the action on a *contract*, whether express or implied, or whether by parol, or under seal, or of record, *must be brought in the name of the party* in whom the *legal interest* in such contract was vested; (c) and in general *with his knowledge and concurrence*, or, at least, a sufficient indemnity must be tendered before his name can properly be used by the party beneficially interested. (d) The courts of *law* will not in general notice mere *equitable rights*, as contradi-

I. PLAINTIFFS.

1st. As between the original parties, and with reference to the interest of the plaintiff in the contract.

(c) *Anderson v. Martindale*, 1 East, 497; *Dawe v. Peck*, 8 T. R. 332; *Eccleston v. Clipsham*, 1 Saund. 153, note (1); *Thimblethorp v. Hardesty*, 7 Mod. 116; 2 *Sanders on Uses and Trusts*, 222; *Doe v. Staple*, 2 T. R. 696; *Baumerman v. Radenius*, 7 T. R. 667; *Anderson v. Clerk*, 2 Bing. 20; *Place v. Delegal*, 4 Bing. N. C. 426; *Seaton v. Booth*, 4 A. & E. 528; *Poole v. Hill*, 6 M. & W. 835; *Story v. Richardson*, 6 Bing. N. C. 123; [*Dickinson v. Burr*, 7 Ark. 34; *Commercial Bank v. French*, 21 Pick. 489; *Allen v. Ayers*, 3 Pick. 298; *Warden v. Burnham*, 8 Vt. 390; *De*

Cordova v. Atchison, 13 Texas, 372; *Taylor v. Steamboat Robert Campbell*, 20 Missou. 254; *Garland v. Reynolds*, 20 Maine, 45. The legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes, and he is the one to bring the action on such contract. *Hall v. Huntoon*, 17 Vt. 244; *Lapham v. Green*, 9 Vt. 407; *Weathers v. Ray*, 4 Dana, 474; *Morton J. in Commercial Bank v. French*, 21 Pick. 491.]

(d) *Spicer v. Todd*, 2 Tyrw. Rep. 172; 1 Dowl. 306, S. C. If this be not done be-

tinguished from the strict *legal* title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt legal proceedings in his own name, although the equitable right embrace the most extensive, or even the exclusive interest in the *benefit* to be derived from the contract or subject-matter of litigation. This rule * could not be disregarded without destroying the fundamental distinction between courts of *law* and courts of *equity*, with regard to the remedy peculiar to each jurisdiction; if the *cestui que trust* were permitted to sue at law in his own name, the benefits and protection intended to result from the intervention of a trustee, clothed with a legal title, might be lost, and the advantages arising from giving courts of equity exclusive control over matters of trust would be defeated. (e) Besides, it would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his legal right; and it would be highly mischievous and unjust to permit the defendant to be harassed by two actions upon the same contract or transaction. The *right of action at law* has therefore been wisely vested solely in the party having the strict *legal* title and interest, in exclusion of the mere equitable claim. (e¹)

In general party in whom legal interest is vested must be the plaintiff.

If a bond be given to A. conditioned for the payment of money to him for the *use* or *benefit* of B., or conditioned to pay the money to B., the action must be brought in the name of A., and B. cannot sue for or release the demand. (f) In such case A. is evidently a trustee, and the obligatory part of the instrument, and the acknowledgment of legal responsibility, are to him. (f)

On bonds.

It is an inflexible rule, that if a *deed* be *inter partes*, that is, on the face of it expressly describe and denote who are the parties to it (as "between A. of the first part, and B. of the second

On deeds inter partes.

fore the suit has been commenced, or at least before any application to the court has been made to stay the proceedings, the party beneficially interested may incur the costs of a motion by the person whose name has been used without previous leave; 3 Chitty's Gen. Prac. by Lush, 97, 98, where see form of indemnity, and necessary precautions to be adopted in such cases, as well as instances where parties have been holden entitled to use the names of others legally interested. Nothing is more common than for a *cestui que trust* to sue in the name of his trustee, and if in such a case the defendant plead the bankruptcy of the plaintiff, it is a good replication that he is suing as trustee only. See Lamb v. Vice, 8 Dowl. 366; 6 M. & W. 472, 8 C. [The indorsee of a witnessed negotiable note cannot sustain an action for his own use in the name of the payee against his consent, in order to avoid the bar of the statute of limitations. Mosher v. Allen, 16 Mass. 451. But he may with his consent or

if he makes no objection. Hodges v. Holland, 19 Pick. 43.]

(e) See the observations of Lord Kenyon as to the legal title alone being recognized in an action of ejectment, in Goodtitle v. Jones, 7 T. R. 50; and his observations as to the necessity of preserving inviolate the distinction between *legal* and *equitable* rights, in Bauerman v. Radenius, 7 T. R. 667.

(e¹) [See Montague v. Smith, 13 Mass. 404, 405; How v. How, 1 N. H. 261; Smith v. Emery, 7 Halst. 53; Wolfe v. Washburn, 6 Cowen, 261; Barndollar v. Tate, 1 Serg. & R. 160; Treat v. Stanton, 14 Conn. 445; Wheelwright v. Beers, 2 Hall, 391.]

(f) 2 Inst. 673; Offly v. Warde, 1 Lev. 235; Gilby v. Copley, 3 Lev. 139, 140; Pigott v. Thompson, 3 B. & P. 149, note (a); Scholey v. Mearns, 7 East, 148; Shack v. Anthony, 1 M. & Sel. 575; 6 Vin. Ab. tit. Covenant, 374; Anderson v. Martindale, 1 East, 501; [post, 4, note (k).]

part),” C., if not expressly named as a party, cannot sue thereon, although the contract purport to have been made for his sole advantage, and contain an express covenant *with him* to perform an act for his benefit; (g) in such a case, C. is a stranger to the deed, and violence would be done to the expressed intention of the parties, were he to be allowed to sustain an action in his own name; (g) the form of the instrument, and the reciprocity of obligation between the parties to it, created by the express terms of the deed, negative and destroy any presumption that the contract was with him; and in such case, the right of suit is constituted, and must be governed, by the deed; and this rule applies, although the covenant be with the third party, C. (whose benefit is the declared object of the deed), and a person who is a party to the deed *jointly*. (g) Even in such case, C. cannot * join with the other covenantee. (h) And where a deed of composition was made between a debtor of the first part, his surety of the second part, and “the several other persons whose hands and seals are set and subscribed hereto, being creditors, &c. of the third part,” and A., one of the members of a firm to which the debtor owed money, set *his own seal only* to the deed; it was held, that A. only, and not the firm, should sue on the covenant to pay the composition, although A. subscribed the deed as for himself and partners: for the partners did not become parties and privies to the deed, as their seals were not affixed thereto. (i)

If a deed-poll, *not* being a deed *inter partes*, contain a covenant *with*
 On deeds-
 poll. A. to pay B. a sum of money, it may be doubtful whether
 B. could sue in his own name; the covenant being *with A.*, though for the benefit of another, and the contract being under seal, it would appear that in such case A. should be the plaintiff; for the terms of the express covenant seem to invest him with the legal interest; (k) and it is clear, that upon a covenant with two persons to

(g) Per Tindal C. J. in *Bushell v. Beavan*, 1 Bing. N. C. 120; 2 Inst. 673; 2 Rol. Ab. Fait, F. 1; *Storer v. Gerden*, 3 M. & Sel. 308, 322; *Barford v. Stuckey*, 5 Moore, 23; 2 B. & B. 333, S. C.; *Berkeley v. Hardy*, 5 B. & C. 355; [*Strohecker v. Grant*, 16 Serg. & R. 237; *Hornbeck v. Westbrook*, 9 John. 73; *Hornbeck v. Sleight*, 12 John. 199; *Hinkley v. Fowler*, 15 Maine, 285; *Robbins v. Ayers*, 10 Missou. 538; *Spencer v. Field*, 10 Wend. 87.] See 2 Preston on Conveyancing, 184; *Platt on Covenants*, 7, 8. This rule does not interfere with the *liability* of a party who executes the deed as a covenantor, although he is not described as one of the parties to the deed in the introductory part of it. See *Salter v. Kidgley*, Carth. 76; *Holt's Rep.* 210, S. C.; *Platt on Covenants*, 7, 8.

(h) *Lord Southampton v. Drummond*, 6 B. & C. 718.

(i) *Metcalfe v. Rycroft*, 6 M. & Sel. 75.

(k) *Anderson v. Martindale*, 1 East, 497, 501. See *Platt on Covenants*, 513; [*Chaplain v. Canada*, 8 Conn. 286. A. and B. gave a bond to C., conditioned to pay C.'s debts; the holder of a promissory note made by C., before the date of the bond, brought an action of assumpsit, on the money counts, against A. and B., to recover the amount of the note, and it was held that the action could not be sustained. *Johnson v. Foster*, 12 Met. 167; *Sanders v. Filley*, 12 Pick. 554. An action on a policy of life insurance under seal, whereby the insurer covenants with A., his heirs, executors, administrators, and assigns, to pay the sum insured to B. on the death of A., cannot be maintained by B. *Flynn v. North American Life Ins. Co.* 115 Mass. 449. In this case Gray C. J. said: "It is well settled that, upon an agreement under seal, none but a party to it can maintain an action at law." See *Millard v. Baldwin*, 3 Gray, 484; *Northampton v. Elwell*, 4

pay a sum of money to one of them, they take a joint legal interest, and must jointly sue upon the covenant. (l)

If, however, the covenant in a deed-poll be *generally* "to pay B.," or be expressly *with him* to pay the money *to him*, there appears to be no difficulty in his maintaining an action in his own name, although he did not execute the deed, and were in all other respects a stranger to it. (m)

The rule upon this subject appears to be materially influenced or affected by the nature of the instrument upon which the contract arises. If the instrument be *not under seal*, it ^{On simple contracts.} seems to be a general principle, that the party, for whose sole benefit it is evidently made, may sue thereon in his own name, although the engagement be not directly to or with him. (m¹) Thus, if A. give goods to B. of the value of 80*l.*, on condition that he pay 20*l.* to C., if B. do not pay the money, C. may have an action against him, and declare that he was indebted to him in 20*l.*, for goods of the value of 80*l.*, given to him by A. on condition that he should pay 20*l.* to C.; for when the goods were delivered to B. upon this condition, the 20*l.* became a debt to C. (n) An express privity of contract between A. and C. seems to be created by the stipulations of the parties, in a case

Gray, 81; Dicey on Parties, 101; Montague v. Smith, 13 Mass. 405; Tileston v. Newell, 13 Mass. 406; Douglass v. Branch Bank of Mobile, 19 Ala. 656; Haskett v. Flint, 5 Blackf. 69; Robbins v. Ayres, 10 Missou. 538; Wolf v. Washburn, 6 Cowen, 261; Vickory v. Walker, 1 Smith, 78; Clark v. Swift, 3 Met. 390; M'Alister v. Marberry, 4 Hamph. 426; Watson v. Cambridge, 15 Mass. 286. But as to sealed policies of insurance, see 2 Phil. Ins. 594; *post*, 8, note (a).]

(l) Anderson v. Martindale, 1 East, 496; Withers v. Bircham, 3 B. & C. 256.

(m) See Cooker v. Child, 2 Lev. 74; 3 Keb. 94, 115; Lucke v. Lucke, Lutw. fo. 305; Com. Dig. Covenant, A. 1; 2 Inst. 673. See *post*, p. 12.

(m¹) [See 1 Chitty Contr. (11th Am. ed.) 74, 75, 149, 150, 303, and notes; Potter v. Yale College, 8 Conn. 60; Edwards v. Golding, 20 Vt. 30; Hubbard v. Borden, 6 Wheat. 79; Salmon Falls Manuf. Co. v. Goddard, 14 How. (U. S.) 454, 455; Eastern Railroad Co. v. Benedict, 5 Gray, 661; Sailly v. Cleveland, 10 Wend. 156; Lapham v. Green, 9 Vt. 407; Story Agency, § 418 *et seq.*; Pitts v. Mower, 18 Maine, 361; Edmond v. Caldwell, 15 Maine, 340; Higdon v. Thomas, 1 H. & Gill, 153; White v. Owen, 12 Vt. 361; Rider v. Ocean Ins. Co. 20 Pick. 265.]

(n) Michaelmas Term, 1651, Starkey v. Milne, 1 Rol. Ab. Action sur Case, 32, pl. 13. If A. remit money to B. to pay C., and B. promises C. to pay it to him, C. can maintain an action against B. for money had and

received. Lilly v. Hays, 1 Nev. & P. 26; [Wyman v. Smith, 2 Sandf. (N. J.) 331; Mellen v. Whipple, 1 Gray, 322; Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, 17 Mass. 575. Formerly, in England, the cases were contradictory upon the question whether a person can sue upon a promise, even though it be professedly for his benefit, where he is an entire stranger to the consideration; that is, where he has neither taken any trouble or charge upon himself, nor conferred any benefit on the promisor; but such trouble has been sustained or advantage conferred, by a third person. But although, if the actual promisee be a mere agent for the person to be benefited, the latter may sue upon the agreement notwithstanding he was not known at the time to be interested therein; see Phelps v. Prothero, 16 C. B. 370; Scrimshire v. Alderton, Str. 1182; Coppin v. Walker, 7 Taunt. 237; Morris v. Cleasby, 1 M. & Sel. 579, 581; Thornby v. Lacy, 6 M. & Sel. 185; yet it is now clearly settled, that a mere stranger to the consideration cannot enforce performance of the contract, by an action thereon in his own name, although he be the party avowedly intended to be benefited thereby. Per Wightman J. in Tweddle v. Atkinson, 1 B. & S. 393, 398; per Parke B. in Jones v. Robinson, 1 Exch. 454, 456; 2 Wms. Saund. 137 d; Bird v. Lanius, 7 Ind. 615; Mississippi Central R. R. Co. v. Southern R. R. Association, 8 Phil. (Pa.) 107, reviewing former cases. It seems to be the general rule in the American states that the plaintiff in an action on a simple contract must be the person from whom the

of this nature. (n¹) A father was seised in fee of lands, and was about to cut timber therefrom to * raise a portion for his daughter ; the

consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action, by the plaintiff, on the contract. *Metcalf J. in Mellen v. Whipple*, 1 Gray, 321 ; *Ross v. Milne*, 12 Leigh, 204 ; *Morrison v. Beckey*, 6 Watts, 394 ; *Warren v. Batchelder*, 15 N. H. 129 ; *Butterfield v. Hartshorn*, 7 N. H. 345 ; *Treat v. Stanton*, 14 Conn. 445 ; *Sailly v. Cleveland*, 10 Wend. 156 ; *Dow v. Clark*, 7 Gray, 200, 201 ; *Hubert v. Borden*, 6 Whart. 79, 94 ; *Blymire v. Boistle*, 6 Watts, 182 ; *Millard v. Baldwin*, 3 Gray, 484 ; *Field v. Crawford*, 6 Gray, 116. This rule, as stated by Mr. Justice Metcalf, in *Mellen v. Whipple*, *supra*, was recognized with express approbation by Mr. Justice Gray, in *Carr v. National Security Bank*, 107 Mass. 45, and in *Exchange Bank of St. Louis v. Rice*, 107 Mass. 41. In the latter case he added : " And the recent decisions in this commonwealth and in England have tended to uphold the rule and to narrow the exceptions to it." See *Hoar J. in Colburne v. Phillips*, 13 Gray, 64, 66. The exceptions to the rule were very carefully considered by Mr. Justice Metcalf, in *Mellen v. Whipple*, *supra*, and by Mr. Justice Gray, in *Exchange Bank of St. Louis v. Rice*, *supra*, and in *Carr v. National Security Bank*, *supra*. The principal exception, stated by Mr. Justice Metcalf, and referred to by Mr. Justice Gray, to the general rule, consists of those cases in which the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication, from his acceptance of the money or property, without objection, to the terms on which it is delivered to him, to pay such creditors. See *Carnegie v. Morrison*, 2 Met. 381 ; *Brewer v. Dyer*, 7 Cush. 337 ; *Frost v. Gage*, 1 Allen, 262 ; *Putnam v. Field*, 103 Mass. 556. In this class of cases it is said, " The law creates the privity and implies the promise." *Morton J. in Putnam v. Field*, 103 Mass. 557 ; *Bigelow J. in Brewer v. Dyer*, 7 Cush. 340 ; *Goodenow J. in Stimpson v. Monmouth Mutual Fire Ins. Co.* 47 Maine, 385. As to the extent of the above exception, see further, *Carr v. National Security Bank*, 107 Mass. 47, 48. In the above case of *Exchange Bank of St. Louis v. Rice*, 107 Mass. 43, Mr. Justice Gray, referring to the case of *Lilly v. Hays*, *supra*, said : " The defendant, as the jury found, had authorized the plaintiff to be told that the defendant had received the money to his use, and thus promised the plaintiff to pay it to him. So in *Walker v. Rostrom*, 9 M. & W. 411, the defendant had promised the plaintiff to pay the sum in

question. And the rule established by the modern cases in England, as laid down in the text-books cited for the plaintiffs, does not permit the person from whom the only consideration moves, to maintain an action against the promisor, unless either the latter has also made an express promise to the plaintiff, or the promisee acted as the plaintiff's agent merely. Where the promisee is in fact acting as the agent of a third person, although that is unknown to the promisor, the principal is the real party to the contract, and may therefore sue in his own name, on the promise made to his agent. *Sims v. Bond*, 5 B. & Ad. 389 ; *S. C.* 2 Nev. & Man. 608 ; *Huntington v. Knox*, 7 Cush. 37 ; *Barry v. Page*, 10 Gray, 398 ; *Hunter v. Giddings*, 97 Mass. 41 ; *Ford v. Williams*, 21 How. (U. S.) 287." See *Farlow v. Kemp*, 7 Blackf. 544 ; *Davies v. Byrne*, 10 Geo. 329 ; 1 Chitty Contr. (11th Am. ed.) 149, 150, 303, and note (o) and cases cited ; *Winchester v. Giddings*, 97 Mass. 41.]

(n¹) [See *Morton J. in Putnam v. Field*, 103 Mass. 557 ; *Bigelow J. in Brewer v. Dyer*, 7 Cush. 340 ; *Goodenow J. in Stimpson v. Monmouth Mutual Fire Ins. Co.* 47 Maine, 385. The American cases upon this subject are numerous and to some extent discordant. See the cases cited in the next preceding note ; also, *Baker v. Bucklin*, 2 Denio, 45 ; *Schermerhorn v. Vanderheyden*, 1 John. 140 ; *Gold v. Phillips*, 10 John. 412 ; *Cumberland v. Codrington*, 3 John. Ch. 254 ; *Farley v. Cleveland*, 4 Cowen, 482 ; *Ellwood v. Monk*, 5 Wend. 235 ; *Arnold v. Lyman*, 17 Mass. 400 ; *Hall v. Marston*, 17 Mass. 575 ; *Perry v. Swasey*, 12 Cush. 30 ; *Carnegie v. Morrison*, 2 Met. 281 ; *Fitch v. Chandler*, 4 Cush. 254 ; *Robb v. Mudge*, 14 Gray, 538 ; *Crocker v. Higgins*, 7 Conn. 347 ; *Parker C. J. in Cabot v. Haskins*, 3 Pick. 91 ; *Felton v. Dickinson*, 10 Mass. 287 ; *Hind v. Holdship*, 2 Watts, 104 ; *Fleming v. Alter*, 7 Serg. & R. 295 ; *Beers v. Robinson*, 9 Penn. St. 229 ; *Keller v. Rhoades*, 39 Penn. St. 513 ; *Steman v. Harrison*, 42 Penn. St. 49 ; *Bohanon v. Pope*, 42 Maine, 93 ; *Hinkley v. Fowler*, 15 Maine, 285 ; *Delaware & Hudson Canal Co. v. Westchester Co. Bank*, 4 Denio, 97 ; *Weston v. Barker*, 12 John. 276 ; *Lawrence v. Fox*, 20 N. Y. 268 ; *Draughan v. Bunting*, 9 Ired. 10 ; *Helms v. Kearns*, 40 Ind. 124 ; *Joslin v. New Jersey Car Spring Co.* 7 Vroom, 141 ; *Huckabee v. Barry*, 14 Ala. 263 ; *Lovely v. Caldwell*, 4 Ala. 684 ; *Kreutz v. Livingston*, 15 Cal. 344 ; *Brown v. O'Brien*, 1 Rich. (S. Car.) 268 ; *Todd v. Tobey*, 29 Maine, 219 ; *Strohecker v. Grant*, 10 Serg. & R. 241 ; *Harper v. Ragan*, 2 Blackf. 39 ; *Steele v. Aylesworth*, 18 Conn. 244 ; *Hitchcock v. Lukens*, 8 Porter, 333 ; *Grover v. Sims*, 4 Blackf. 398 ; *Cove v. Riggs*, 12 Misson. 430 ; *Beet v. McLaughlin*, 12 Misson. 433. The above cases generally sustain the doctrine of the text.]

defendant, being his son and heir, verbally promised *the father*, in consideration that he would forbear to fell the timber, to pay the daughter this portion; the court of king's bench held, that the daughter might sue the son for the recovery of the money, although the consideration moved from the father to the son; the contract having been made for her benefit, the object being to secure a portion for her. (o) This decision was affirmed upon a writ of error in the exchequer chamber. This appears to be a strong authority to support the general rule, that the party to be benefited by a contract, *not* under seal, may sue thereon, although the promise be not made to him. (o¹) The court attached some weight to the nearness of relationship between the father and the daughter; (o²) but this does not appear to be a circumstance which can render the case of less utility and importance, as affording a general rule upon this subject; and Mr. Justice Buller is reported to have remarked, (p) that if one person make a promise to another for the benefit of a third, the latter may maintain an action upon it. (p¹) And in a subsequent case, (q) Eyre C. J. said, "As to the case of a promise to A. for the benefit of B. and an action brought by B., there the promise must be laid as having been made to B., and the promise actually made to A. may be given in evidence to support the declaration." (q¹) In *Martin v. Hind*, (r) the defendant, the rector of a parish, by a written certificate addressed to the bishop, appointed the plaintiff his curate, and signified that he promised to pay the plaintiff a yearly stipend; it was held, that the plaintiff might sue for the salary. (r) This case proceeded, however, upon the ground that the contract was entirely with the curate, that there was no promise to the bishop, and that the certificate was a mere assurance or information to him of a matter of fact, and the consideration was entirely between the plaintiff and defendant. The case of *Carnegie v. Waugh* (s) strongly shows, that a written or verbal promise to A. for the benefit of B. will support an

(e) *Dutton v. Poole*, Mich. 29 Car. 2, 1 Vent. 318, 332; S. C. in 2 Lev. 210; Sir T. Rayn. 302; and Sir T. Jones, 102, recognised by Lord Mansfield in *Martyn v. Hind*, Cowp. 443; and Mr. J. Burrough in *Barford v. Stuckey*, 5 Moore, 31, 32; 2 B. & B. 337, S. C.; [*Schermerhorn v. Vanderheyden*, 1 John. 139; *Sailly v. Cleveland*, 10 Wend. 156; *McMenomy v. Ferrers*, 3 John. 72.] See Ball. N. P. 133.

(o¹) [But see *ante*, 4, note (n).]

(o²) [As to this point, see *Felton v. Dickinson*, 10 Mass. 287; *Mellen v. Whipple*, 1 Gray, 317, 323; *Tweddle v. Atkinson*, 1 B. & S. 393; *Exchange Bank of St. Louis v. Rice*, 107 Mass. 42.]

(p) *Marchington v. Vernon*, in note to *Company of Felt Makers v. Davis*, 1 B. & P. 101.

(p¹) [But see *ante*, 4, note (n).]

(q) *Company of Felt Makers v. Davis*, 1 B. & P. 102.

(q¹) [But see *ante*, 4, note (n).]

(r) Dougl. 142; Cowp. 437, S. C.

(s) 2 D. & R. 277. See *Garrett v. Handley*, 4 B. & C. 664; *Sargent v. Morris*, 3 B. & Ald. 280, 281. The decision in *Crow v. Rogers*, 1 Stra. 592, is perhaps hardly to be reconciled with this doctrine. The plaintiff declared that Hardy, being indebted to the plaintiff in 70*l.*, it was agreed between Hardy and the defendant, that the defendant should pay the money to the plaintiff, and that Hardy should make the defendant a title to a house; that Hardy was ready to do so, and, in consideration thereof, the defendant promised to pay the plaintiff. "And without much debate, the court held the plaintiff was a stranger to the consideration, and gave judgment for the defendant." See, also, *Price v. Easton*, 4 B. & Ad. 434.

action in the name of the latter; (*s*¹) and the chief justice appeared to have been of opinion in that case, that the rule, that a third person cannot take advantage of a deed *inter partes*, could not be extended to contracts not under seal. (*s*²) And an action may be maintained by * the several partners of a firm upon a guaranty addressed and apparently given to one of them, if there be evidence that it was given for the benefit of all. (*t*)

There is in the case of bills of exchange and promissory notes, an *option* of plaintiff, that might be considered an *exception* to the general peremptory rule, that the right of suing can only be in *one* person, or set of persons, viz. that a party to a bill may, by arrangement between the parties, be the plaintiff, although the bill at the time be in the rightful possession of another party to the bill. (*u*)

Exception in
case of bills
of exchange.

The action against a carrier for the loss of goods sent by a vendor to a vendee must in general be brought in the name of the latter, and not of the consignor; because the law implies that by the delivery to the carrier, the goods became the property of the consignee, and at his risk (subject, of course, to the unpaid vendor's right of stoppage *in transitu*). (*x*) As the delivery to the car-

Against car-
riers.

(*s*¹) [Blymire v. Boistle, 6 Watts, 182.]
(*s*²) [See Owings v. Owings, 1 H. & Gill, 484.]

(*t*) Garrett v. Handley, 4 B. & C. 664; [Pearce v. Austin, 4 Whart. 489, and cases cited in the opinion of the court.] Or in the names of two, if the guaranty be directed to three, and the two have a separate interest. Place v. Delegal, 4 Bing. N. C. 426.

(*u*) Stone v. Butt, 2 Cr. & M. 416; 2 Dowl. 335, S. C.; Chitty on Bills, 8th ed. 566; and exceptions. *Ib.* Ibid. [An action on an indorsed note or bill of exchange may be maintained in the name of a nominal plaintiff with his consent. Demuth v. Cutler, 50 Maine, 298; Golder v. Foss, 43 Maine, 364; Granite Bank v. Ellis, 43 Maine, 367; Craig v. Twomey, 14 Gray, 486; Whiteford v. Burckmyor, 1 Gill, 127.]

(*x*) Dawes v. Peck, 8 T. R. 330; Brown v. Hodgson, 2 Campb. 36; Griffin v. Langfield, 3 Campb. 255; Wilbram v. Snow, 2 Saund. 47 h; [Abbott Shipp. (ed. 1850), 326 in note, (11th Eng. ed.) 283, 284; Potter v. Lansing, 1 John. 215; McIntyre v. Bowne, 1 John. 229; Ludlow v. Bowne, 1 John. 1; De Wolf v. N. Y. Firemen Ins. Co. 20 John. 214; Griffith v. Ingledew, 6 Serg. & R. 429; Chandler v. Sprague, 5 Met. 306; Bonner v. Marsh, 10 Sm. & M. 376; Burritt v. Bench, 4 McLean, 325; Adams v. Clark, 9 Cush. 215; Lawrence v. Minturn, 17 How. (U. S.) 100; Grove v. Brien, 8 How. (U. S.) 439; Angell Carriers, § 495 *et seq.*; Benj. Sales (1st Am. ed.) 399, and note (*e*).] But if goods are merely sent on approval or until acceptance, no property vests in the consignee, and the action against the carrier

should be brought in the name of the consignor. Swain v. Shepherd, 1 M. & Rob. 223. In fact, although the general rule is as stated in the text, yet, before determining on the party to bring the action, it is always necessary to ascertain whether the property has passed by the contract and delivery to the consignee; since, where a special property remains in the consignor, or the passing of the property depends on the performance of some condition by the consignee, and which condition has not been performed by him, or where there is no valid sale by reason of fraud or of the contract not being in writing according to the statute of frauds, it may be necessary to bring the action in the name of the consignor. Freeman v. Birch, 1 Nev. & Man. 420; Brandt v. Bowlby, 2 B. & Ad. 932; Duff v. Budd, 3 B. & B. 183; Coates v. Chaplin, 2 Gale & Dav. 552; [Price v. Powell, 3 Comst. 322; Carter v. Graves, 9 Yerger, 446; Goodwyn v. Douglass, 1 Cheves, 174; Coombs v. Bristol & Exeter Railway, 3 H. & N. 510; Coates v. Chapman, 3 Q. B. 483; Norman v. Phillips, 14 M. & W. 277. So where the carrier is employed by the consignor, and the goods are at his risk. Dunlop v. Lambert, 6 Cl. & Fin. 600. So, where the carrier has contracted with the consignor for the safe delivery of the goods. Moore v. Wilson, 1 T. R. 659; Davis v. James, 5 Burr. 2680. So, where the consignor retains a special property in the goods. Mayall v. Boston & Maine R. R. 19 N. H. 122, 128. So, where by virtue of an agreement between the consignor and consignee, the latter was not to acquire the property in the goods, and they

rier by the consignor presumptively vests the property in the goods in the consignee, it is an inference of law, that the contract for the safe carriage is between the carrier and the consignee, and consequently the latter has the legal right of action; and this rule obtains, although the consignor paid the carrier for the conveyance of the goods, and the consignee gave no express directions that the goods should be sent by the particular carrier selected by the vendor. (y) In these cases it is, however, only an assumption of law that the goods vested in the vendee and were at his risk upon the delivery to the carrier; and if by virtue of an agreement between the vendor and vendee, the goods did not become the property of the latter, and he was not at any risk with regard to the goods until they actually reached him, the consignor should be the plaintiff. But in general the property vests in the consignee by the mere delivery to the carrier, (y¹) and the consignee^{ec} ought to sue, although he ordered the goods to be sent to him, "on an insurance being effected, and on the terms of three months' credit from the time of arrival," for in such case the actual arrival of the goods is not a condition precedent to the vendee's liability to pay for them, * and the vendor having complied with the stipulation as to insurance, had provided the vendee with a remedy over. (z)

If goods by a *bill of lading* are consigned "to A." he is *prima facie* the owner, and must bring the action against the master of the ship if they be lost; but if the bill be special to deliver to A. *for the use of B.*, the latter should bring the action. (a) And where by a bill of lading the captain was to deliver the goods, *for the consignor and in his name*, to the consignee, and the latter, at the time of the shipment, had no property in the goods, it was decided that the consignor should be the plaintiff in an action for an injury to the goods, although the consignee had at his own expense previously insured the goods. (b)

were not to be at his risk until they were actually delivered to and accepted by him, and where the consignee procured the goods to be consigned to him by a fraud on the consignor, so that he obtained no property in them. *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 B. & B. 177. See *M'Intyre v. Bowne*, 1 John. 229; *Ludlow v. Bowne*, 1 John. 1; *De Wolf v. New York Firemen Ins. Co.* 20 John. 214; *Ilisley v. Stubbs*, 9 Mass. 65; *Blanchard v. Page*, 8 Gray, 281.]

(y) *Dutton v. Solomonson*, 3 B. & P. 584; *Garland v. Lane*, 46 N. H. 245, 248; *Arnold v. Prout*, 51 N. H. 587, 589; *Ranny v. Higby*, 5 Wisc. 62.]

(z) [Benj. Sales (1st Am. ed.) §§ 362, 399; *Waite v. Baker*, 2 Exch. 1; *Johnson v. Stoddard*, 100 Mass. 306; *Stanton v. Eager*, 16 Pick. 467; *Garland v. Lane*, 46 N. H. 245; *Magruder v. Gage*, 33 Md. 344; *Arnold v. Prout*, 51 N. H. 587, 589; *Putnam v. Tillot-*

son, 13 Met. 517; *London & N. W. Railway Co. v. Bartlett*, 7 H. & N. 400.]

(z) *Fragano v. Long*, 4 B. & C. 219.

(a) *Evans v. Marlett*, 1 Ld. Raym. 271; [1 Chitty Contr. (11th Am. ed.) 724; *Lawrence v. Minturn*, 17 How. (U. S.) 100; *Davis v. Bradley*, 28 Vt. 118; *Potter v. Lansing*, 1 John. 215; *M'Intyre v. Bowne*, 1 John. 221; *Sanderson v. Lamberton*, 6 Binn. 129; *Griffith v. Ingledew*, 6 Serg. & R. 429; *Everett v. Salters*, 15 Wend. 474.] *Quære*, whether there is any privity between the consignee of a bill of lading and the ship-owners, so as to enable the former to sue in case the goods mentioned in the bill should not be delivered. *Berkley v. Watling*, 2 N. & P. 178; 7 A. & E. 29.

(b) *Sargent v. Morris*, 3 B. & Ald. 277. [It was held in *Blanchard v. Page*, 8 Gray, 281, after a full discussion of the point and a careful review of the cases, that the shipper

And it seems that an agent in this country, who ships goods to the foreign principal and pays the freight, may maintain an action in his own name on the bill of lading, if it express that the goods were shipped by the agent, and that the freight was paid here; for in such case a privity of contract is established between the parties by means of a bill of lading. (c)

In general a mere *servant* or agent, with whom a contract is expressed to be made on behalf of another, and who has no direct beneficial interest in the transaction, cannot support an action thereon. (d) As where lands were let by auction, and there was an agreement between the intended lessee and the *auctioneer*, stating the terms, and subscribed by the intended lessor; it was held, that the auctioneer could not sue the intended lessee for use and occupation, or for breach of the agreement. (d) And where A. by a memorandum in writing, signed by himself only, agreed in writing to pay the rent of certain tolls which he had hired, to the treasurer of certain commissioners, (e) it was decided that no action for the rent could be supported in the name of the treasurer, the contract being in legal contemplation with the commissioners, and to pay them. (f) And where several persons took a lease of premises, to be used as a Jewish synagogue, and the seats therein were let by an officer annually appointed, whose duty it was to let them and receive the rents, and apply them partly in payment of the rent secured by the lease, and partly for general purposes connected with the establishment; it was held, that the lessees were properly made the plaintiffs in an action to recover the rent due from an occupier of one of the seats. (g) Upon the same principle, the captain of a ship cannot maintain an action in his own name upon * an *implied* promise to pay demurrage, although he may on an express contract with him to pay it. (h) And it has been determined that the mayor of a corporation, who, on the sale of certain lands by auction, of which the corporation were the vendors, signed a contract on behalf of himself and the corporation with the purchaser,

named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein.]

(c) *Joseph v. Knox*, 3 Campb. 320.

(d) *Evans v. Evans*, 1 Harr. & Wol. 239; [S. C. 3 A. & E. 132; *Fisher v. Marsh*, 6 B. & S. 411; *Russell Factors*, 240; *Buckbee v. Brown*, 21 Wend. 110; *Garland v. Reynolds*, 20 Maine, 45; *Irish v. Webster*, 5 Greenl. 171; *Levant v. Parks*, 1 Fairf. 441; *Commercial Bank v. French*, 21 Pick. 486; *Gilmore v. Pope*, 5 Mass. 491; *Sewall J. in Medway Cotton Manufactory v. Adams*, 10 Mass. 360, 362; *Bogart v. De Bussey*, 6 John. 94; *Gunn v. Cantine*, 10 John. 387; *Kinsey v. Hollinshead*, 1 Penn. 380; *Jones v. Hart*, 1 H. & Munf. 470; *Niven v. Spickerman*, 12 John. 401; *Bainbridge v. Downie*, 6 Mass. 253; *Eastern Railroad v. Benedict*,

5 Gray, 561; *Thatcher v. Winslow*, 5 Mason, 58; *Borrowdale v. Bosworth*, 99 Mass. 378. But it was decided, upon a review of the cases in *Colburn v. Phillips*, 13 Gray, 64, that an agent may sue on a written agreement made by him in his own name in behalf of his principal.]

(e) The instances in which treasurers and trustees are by statute allowed to be made plaintiffs, and the decisions on enactments of this nature, will be noticed hereafter, *post*, 16.

(f) *Pigott v. Thompson*, 3 B. & P. 147. See Sir J. Mansfield's observation in *Bowen v. Morris*, 2 Taunt. 381.

(g) *Israel v. Simmons*, 2 Stark. Rep. 356.

(h) *Brouncker v. Scott*, 4 Taunt. 1; *Jesson v. Solly*, 4 Taunt. 52. See *Evans v. Foster*, 1 B. & Ad. 118.

for the due performance of the conditions of sale, could not, in his individual capacity, maintain an action against such purchaser for the breach of his contract. (i)

But when an *agent* has any *beneficial interest* in the performance of the contract, as for commission, &c. or a special property or interest in the subject-matter of the agreement, he may support an action in his own name upon the contract; (i¹) as in the case of a factor, or a broker, (k) or a warehouseman, or carrier, (l) an auctioneer, (m) a policy broker whose name is on the policy, (n) or the captain of a ship

(i) *Bowen v. Morris*, 2 Taunt. 374, 387. See *Spittle v. Lavender*, 5 Moore, 277; [*ante*, 7, and cases cited in note (d).]

(i¹) [*Porter v. Raymond*, 53 N. H. 519-526; *Treat v. Stanton*, 14 Conn. 445; *Barnes v. Insurance Co.* 45 N. H. 21, 28; *Underhill v. Gibson*, 2 N. H. 352; *Tankersville v. Graham*, 8 Ala. 247; *Butts v. Collins*, 13 Wend. 139; or, it seems, in the name of his principal, although the contract is executed by him apparently as principal. *Colburn v. Phillips*, 13 Gray, 64; *Hoar J. in Borrowdale v. Bosworth*, 99 Mass. 383.]

(k) *Grove v. Dubois*, 1 T. R. 112; *Atkins v. Amber*, 2 Esp. Rep. 493; *Williams v. Millington*, 1 H. Bl. 62; *George v. Claggett*, 7 T. R. 359; *Johnson v. Hudson*, 11 East, 180; *Sadler v. Leigh*, 4 Campb. 195; *Morris v. Cleasby*, 1 M. & Sel. 581; [*Sailly v. Cleveland*, 10 Wend. 156.]

(l) See per Lord Ellenborough, in *Marsini v. Cole*, 1 M. & Sel. 147.

(m) *Williams v. Millington*, 1 H. Bl. 81; *Coppin v. Walker*, 2 Marsh. 497; 7 Taunt. 237, 8 C.; *Coppin v. Craig*, 2 Marsh. 501. See *Farebrother v. Simmons*, 5 B. & Ald. 333; [*Grice v. Kearick*, L. R. 5 Q. B. 340. An auctioneer, employed to sell real estate on terms which contemplate the payment of a deposit into his hands by the buyer at the time of the auction and before the completion of the sale by the delivery of the deed, may sue for such deposit in his own name. *Thompson v. Kelly*, 101 Mass. 291, 296; *Tyler v. Freeman*, 3 Cush. 261.]

(n) *Park on Ins.* 403; *Grove v. Dubois*, 1 T. R. 114; *Hagedorn v. Oliverson*, 2 M. & Sel. 485, 486; *Garrett v. Handley*, 4 B. & C. 666, but not otherwise; *Cumming v. Forster*, 1 M. & Sel. 497; *Mellish v. Bell*, 15 East, 4. In *Cosack v. Wells*, A. D. 1813, the plaintiff effected the policy thus: "I. C. agent;" and though he was jointly interested with another person, he recovered in a separate action in his own name, the declaration averring that he was jointly interested with another person. [See *Ward v. Wood*, 13 Mass. 539. An action on a policy of marine insurance may be brought, either in the name of the broker who effected it, or in the name of the party interested. *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925, 939; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Rider v. Ocean Ins. Co.* 20 Pick. 259, 265; *Farrow v. Commonwealth*

Ins. Co. 18 Pick. 53; *Williams v. Ocean Ins. Co.* 2 Met. 303; *Somes v. Equitable Safety Ins. Co.* 12 Gray, 531. "In the United States," Mr. Duer says, "by a practice so universal that it may, perhaps, be deemed to have acquired the force of law, the names of the immediate parties to the contract of insurance, that is, of the individual or company agreeing to assume the risks, and of the person effecting the insurance, must be mentioned in the policy; but the names of those on whose account and for whose indemnity the insurance is made, are not necessary to be inserted." 2 Duer Ins. 9, § 8. "In some cases the insurance is expressed to be 'on account of the owners;' in some 'on account of a person or persons, to be thereafter named;' but its most usual form is 'on account of whom it may concern.'" 2 Duer Ins. 29, § 21. Under appropriate expressions of this kind the rules of law authorize extrinsic evidence as to the parties in interest, and who may enforce their claims upon such policy, though not particularly named therein. *Finney v. Bedford Com. Ins. Co.* 8 Met. 348, 350. A policy in the name of a particular person, with the clause, "for whom it may concern," or other equivalent words, will be enforced to protect the interest of every person in whose behalf it was intended, and by whose authority it was effected. The phrase, "*whom it may concern*," is a technical one, and is understood to mean, not anybody who may have an interest in the thing insured, but only such as are in contemplation of the contract. The persons on whose account the insurance is thus made, are really parties to the contract. They have not simply a beneficial interest, but they are the persons whom the insurer directly promises to indemnify, and it is only on this ground that an action on the policy is maintainable in their name. *Newson v. Douglas*, 7 Harr. & J. 450; 1 Phil. Ins. 152; *Seamans v. Loring*, 1 Mason, 136; *Buck v. Chesapeake Ins. Co.* 1 Peters (U. S.), 151; *Graves v. Marine Ins. Co.* 2 Cranch, 419; *Finney v. Warren Ins. Co.* 1 Met. 18; *Turner v. Burrows*, 5 Wend. 541. Insurance for "*whom it may concern*," cannot inure in favor of any person, who had an interest in the subject-matter of the insurance, unless the persons effecting the insurance have an authority from him for that purpose; *Seamans v. Loring*, 1 Mason, 127,

for freight. (o) So where a contract is in terms made with an agent personally, he may sue thereon, (o¹) and if a servant personally carry on a business for his principal, and appear to be the proprietor, and sell goods in the trade as such apparent owner, he may, it seems, sustain

136; *Steinback v. Rhinelander*, 3 John. Cas. 269; 1 Phil. Ins. 153; or their act is subsequently adopted by him. *Finney v. Fairhaven Ins. Co.* 5 Met. 192; *Finney v. Bedford Com. Ins. Co.* 8 Met. 350; *Dow v. N. E. Ins. Co.* 4 Mass. 232; *United Ins. Co. v. Robinson*, 2 Caines, 284. Bringing an action on the policy has been held to be a sufficient adoption. *Finney v. Fairhaven Ins. Co.* 5 Met. 192. See *Rhodes v. Robinson*, 4 Scott, 396; *S. C.* 3 Bing. N. C. 377; *Whitehead v. Taylor*, 2 P. & Dav. 368; *Peters v. Ballistier*, 3 Pick. 204; *Oliver v. The Mutual Com. Marine Ins. Co.* 2 Curtis C. C. 295, 296. A policy "for the owners" will cover the interest of all or a part of the owners as it was intended; *Catlett v. Pacific Ins. Co.* 1 Paine C. C. 619; *S. C.* 1 Wend. 75; 4 Wend. 79; *Foster v. U. S. Ins. Co.* 11 Pick. 85; but it will extend to those only who have a legal interest in the subject insured. *Ib.* Where a policy is effected by a person named as agent generally, it may be shown whose interest was intended to be covered by the policy; *Davis v. Boardman*, 12 Mass. 80; but the agent cannot aver an interest in himself. 2 Duer Ins. 40, § 27. It is, however, otherwise where the nominal insured is not named as agent, but he insures "for the owners" or "for whom it may concern." 2 Duer Ins. 48, § 30; *Aldrich v. The Equitable Safety Ins. Co.* 1 Wood. & M. 272, 276. A policy effected by one "as agent" for a particular person, covers only the interest of that person. *Russell v. New England Mar. Ins. Co.* 4 Mass. 32; *Holmes v. United Ins. Co.* 2 John. Cas. 329. In *Rider v. Ocean Ins. Co.* 20 Pick. 259, the policy was effected by the plaintiff in his own name, "for whom it might concern, loss payable to Nathaniel Curtis." It appeared that Curtis had no interest whatever in the insurance, and it was held that the action for the recovery of a loss on account of the parties really interested, was properly brought in the name of the plaintiff. In *Farrow v. Commonwealth Ins. Co.* 18 Pick. 53, the defendants caused to be insured "Copeland & Lovering for the owners—loss payable to Copeland & Lovering." The plaintiffs were the owners really insured, and they were allowed to recover on the policy in their own names, *Copeland & Lovering* having consented thereto. See, also, *Hurlbert v. Pacific Ins. Co.* 2 Sumner, 471; *Reed v. Pacific Ins. Co.* 1 Met. 170; *Jefferson Ins. Co. v. Cothel*, 7 Wend. 82; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; 2 Duer Ins. 10, § 9, and cases in note; *Toppan v. Atkinson*, 2 Mass. 365. It must appear, that a policy was made in behalf of a person, for, otherwise, though he has an interest corre-

sponding to that described in the policy, it will not be covered. *Bauduy v. Union Ins. Co.* 2 Wash. C. C. 391; *Alliance Mar. Assur. Co. v. State Ins. Co.* 8 Louis. R. 1; *Steinback v. Rhinelander*, 3 John. Cas. 269; *Lee v. Mass. F. & M. Ins. Co.* 6 Mass. 208; *Lawrence v. Sebor*, 2 Caines, 203; *De Bolle v. Pennsylv. Ins. Co.* 4 Whart. 68. The insured must have an interest in the property when the insurance was made, and at the time of the loss. *Hancox v. Fishing Ins. Co.* 3 Sumner, 142; *Rider v. Ocean Ins. Co.* 20 Pick. 259. If there be no one of the general clauses above named in the policy, nor any other, indicating an interest in any person other than the one named, the policy will cover only the interest of the party named. *Oliver v. The Mutual Commercial Marine Ins. Co.* 2 Curtis C. C. 277, 292. If one partner insures in his own name only, the policy will cover his undivided interest in the partnership, and no more. 3 Kent, 258; *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 419, 440; 2 Duer Ins. 24, § 20. So of a part owner; *Finney v. Bedford Com. Ins. Co.* 8 Met. 348; *Finney v. Warren Ins. Co.* 1 Met. 16; *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 419; *Murray v. Col. Ins. Co.* 11 John. 302. Mr. Phillips says: "It does not appear that there is any distinction in this respect, between a policy sealed and one not sealed, provided the policy appear, on the face of it, to be made for the benefit of a party, or of parties not named in it; or if it be so framed that it imports to be applicable either to the interest of the party named or that of others, or to his interest and that of others." 2 Phil. Ins. 594. But see *De Bolle v. Pennsylv. Ins. Co.* 4 Whart. 68; *Flynn v. North American Life Ins. Co.* 115 Mass. 449. In this last case it was decided that an action on a policy of life insurance under seal, whereby the insurer covenants with A., his heirs, executors, administrators, and assigns, to pay the amount insured to B. on the death of A., cannot be maintained in the name of B. On a policy of insurance for \$1,200, "in case of loss, payable to J. S., mortgagee, to amount of \$400," the assured, if the mortgagee assent, may sue in his own name, even for a loss of less than \$400. *Jackson v. Farmers' Mut. Fire Ins. Co.* 5 Gray, 52.]

(o) *Shields v. Davis*, 6 Taunt. 65; *Brown v. Hodgson*, 4 Taunt. 189.

(o¹) [*Colburn v. Phillips*, 13 Gray, 64; *Van Staphorst v. Pearce*, 4 Mass. 258; *Harp v. Osgood*, 2 Hill, 216; *Grigaby v. Nance*, 3 Ala. 347; *Buffum v. Chadwick*, 8 Mass. 103; *Bird v. Daniel*, 9 Ala. 302; *Doe v. Thompson*, 22 N. H. 302; *Potter v. Yale College*, 8 Conn. 60; *Alsop v. Carnes*, 10 John. 396.]

an action in his own name for the price. (*p*) Where the supposed principal repudiates the contract, the agent may sue after notice of the facts to the defendant; as to recover back a deposit paid on the sale of an estate. (*q*)

Where a person assumes, on the face of the contract, the character, not of a principal, but of an agent to another named person, he cannot retract that assumed capacity and sue as a principal, without previously undeceiving the defendant, and giving him notice of the real nature and extent of his, the plaintiff's, claim and interest. (*r*) And it should be observed that in these cases the right of the agent to sue on a contract made by him for his principal, whether it be expressed that the agent contracts personally or on the behalf of another, is subservient to the right of the principal to interfere, and to bring the action in his own name upon the unperformed agreement, in exclusion of the agent's right, and although the agent has not expressly disclaimed. (*s*) There is an exception in the case of a contract *under seal* entered into with the agent personally in a matter within the scope of his authority; in this instance the implied right of action of the principal merges in the higher security taken, by his authority, by the agent, and the remedy is in the name of the latter only. (*t*)

If a principal allow his agent to appear to be the principal, and to contract in the latter character, and the defendant has thereby been induced to give credit to the agent, the principal's right of action in his own name is subject to the set-off which the defendant has against the agent, and which would be available if the latter were the plaintiff. (*u*)

If a trustee or husband object to his name being used in an action for the benefit of the *cestui que trust* or wife, the latter may, after tendering a sufficient indemnity, use his name, or may file a bill in equity for that purpose. (*x*)

Qualified right to use the name of a trustee, &c.

When the contract was made with *several* persons, (*x*¹) whether it

(*p*) *Gardiner v. Davis*, 2 Car. & P. 49; *Joseph v. Knox*, 3 Campb. 320; *Langstroth v. Toulmin*, 3 Stark. 147; *Garrett v. Handley*, 4 B. & C. 666; *Dancer v. Hastings*, 4 Bing. 2. [If an agent make a contract in his own name, for an undisclosed principal, he may sue in his own name thereon; because then he is, in contemplation of law, the real contracting party. Per Cur. Sims v. Boad, 5 B. & Ad. 389, 393; *Story Agency*, §§ 393, 396; *Lapham v. Green*, 9 Vt. 407; *Fisher v. Marsh*, 6 B. & S. 411; *Evans v. Evans*, 3 Ad. & El. 132.]

(*q*) *Langstroth v. Toulmin*, 3 Stark. 145.
(*r*) *Bickerton v. Burrell*, 5 M. & Sel. 383.
(*s*) *Scrimshire v. Alderton*, 2 Stra. 1182; *The Duke of Norfolk v. Worthy*, 1 Campb. 337; *Morris v. Cleasby*, 1 M. & Sel. 579, 580; *Bickerton v. Burrell*, 5 M. & Sel. 385, 386, 390. See *Coppin v. Walker*, 7 Taunt. 237; [*Vischer v. Yates*, 11 John. 23; *Yates*

v. Foot, 12 John. 1; *Kelly v. Munson*, 7 Mass. 324; *Foster v. Hoyt*, 2 John. Cas. 327; *Corlies v. Cumming*, 6 Cowen, 181; *Hoar J. in Borrowdale v. Bosworth*, 99 Mass. 383. It makes no difference that he is a foreign principal. *Barry v. Page*, 10 Gray, 398.]

(*t*) *Schack v. Anthony*, 1 M. & Sel. 575; *Berkeley v. Hardy*, 5 B. & C. 355; *Dancer v. Hastings*, 4 Bing. 2.

(*u*) *George v. Claggett*, 7 T. R. 359; *Waring v. Favenck*, 1 Campb. 85; *Berkeley v. Hardy*, 5 B. & C. 354; *Mann v. Forrester*, 4 Campb. 60; *Maans v. Henderson*, 1 East 335; *Westwood v. Belt*, Holt N. P. R. 124; 6 Geo. 4, c. 94, s. 4; *Carr v. Hinchliff*, 4 B. & C. 547; *Warner v. M'Kay*, 1 M. & W. 591; *Purchell v. Salter*, 1 G. & D. 682.

(*x*) *Doe d. Prosser v. King*, 2 Dowl. 580; 3 Chit. Gen. Prac. by Lush, 98.

(*x*¹) [Two incorporated companies may

2dly. With reference to the number of plaintiffs; and when they should join or sever.

Joint interest.

were under seal, or in writing but not under seal, or by parol, if their *legal interest* were joint, they must all, if living, join in an action in form *ex contractu* for the breach of it, though the covenant or contract with them was in terms joint and several. (y) And if it appear on the record that there was another covenantee who ought to have joined, the

join in an action of assumpsit to recover money deposited in a bank in their joint names. *Sharon Canal Co. v. Fulton Bank*, 7 Wend. 412.]

(y) *Eccleston v. Clipsham*, 1 Saund. 153, and note (1); *Anderson v. Martindale*, 1 East, 497, 501; *Hill v. Tucker*, 1 Taunt. 7; *Townshend v. Neale*, 2 Campb. 190; *James v. Emery*, 5 Price, 529; and see an explicit case, *Hatsall v. Griffith*, 4 Tyr. 487; [*Pickering v. De Rochemont*, 45 N. H. 77; *Pugh v. Stringfield*, 3 C. B. N. S. 2; 4 Ib. 364; *Wetherell v. Langston*, 1 Exch. 634; *Bradburne v. Botfield*, 14 M. & W. 559; *Hopkinson v. Lee*, 6 Ad. & El. N. S. 971; *Southcote v. Hoare*, 3 Taunt. 87; *Sweighart v. Berks*, 8 Serg. & R. 308; *Dob v. Halsey*, 16 John. 34; *Tapscott v. Williams*, 10 Ohio, 442; *Sims v. Harris*, 8 B. Mon. 55; *Sims v. Tyre*, 3 Brev. 249; *Hays v. Lasater*, 3 Pike, 565; *Archer v. Bogue*, 3 Scam. 526; *Lucas v. M'Alilly*, 1 McMullan, 311; *Baker v. Jewell*, 6 Mass. 460; *Halliday v. Doggett*, 6 Pick. 359; *Beach v. Hotchkiss*, 2 Conn. 697; *Gordon v. Goodwin*, 2 Nott & McC. 70; *Ehle v. Purdy*, 6 Wend. 629; *Hilliker v. Loop*, 5 Vt. 116; *Allen v. Sackett*, 3 J. J. Marsh. 165; *Ellis v. M'Lemore*, 1 Bailey, 13; *Moody v. Sewall*, 14 Maine, 295; *Darling v. Simpson*, 15 Maine, 175; *Pugh v. Stringfield*, 3 C. B. N. S. 2. If an estate be granted to three persons jointly, and covenants for title are entered into with them, and "each of them," the covenants are joint, because they have a joint estate, and the words with "each of them," are mere words of amplification. If on the other hand, they take separate and distinct estates, and the covenant be in terms joint, they shall have separate actions, by reason of their separate interests. *Slingsby's case*, 5 Co. 18 b; *Windham's case*, 5 Co. 7 b; *James v. Emery*, 5 Price, 529; S. C. 8 Taunt. 245; *Foley v. Addenbrooke*, 4 Ad. & El. N. S. 964; *Hopkinson v. Lee*, 6 Ad. & El. N. S. 964; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Southcote v. Hoare*, 3 Taunt. 87. If a bond be made to three persons to pay money to one of them, all ought to join in an action on the bond, for they are as one obligee; and if he who is to receive the money dies, the other two who survive must bring the action, although they have no beneficial interest in the sum contained in the condition. The legal interest in this contract and in the cause of action thereon is, in such case, joint only. *Capen v. Barrows*, 1 Gray, 381, per *Metcalf J.*; *Rolls v. Yate*, *Yelv.* (*Metcalf's ed.*) 177, note (1); *Anderson v. Martindale*, 1 East, 497; *Burford v. Stuckey*, 5 Moore,

23; S. C. 2 B. & B. 333. In such cases one of the covenantees has a sort of guardian over him in the person of the other, and there cannot be any separation of the interest for the purposes of the action. *James v. Emery*, 5 Price, 534.] See, also, *Chanter v. Leese*, 5 M. & W. 698. [*Calvert v. Bradley*, 16 How. (U. S.) 580.] One of such parties may lawfully use the name of the other in the proceedings without his consent; *Savile v. Roberts*, 1 Ld. Raym. 380; *Chambers v. Donaldson*, 9 East, 471; [*Wright v. M'Le-more*, 10 Yerger, 235; *Gray v. Wilson*, 1 Meigs, 394]; at least after tendering an indemnity. *Mountstephen v. Brooke*, 1 Chit. Rep. 390. See fully, and how to proceed as regards the indemnity, 3 Chit. Gen. Prac. by *Lush*, 97, 98. So a covenant with two and every of them is joint. *Southcote v. Hoare*, 3 Taunt. 87. Where the legal interest and cause of action of the covenantees are several, they should sue separately, though the covenant be joint in terms; but the several interests and several grounds of action must distinctly appear, as in the case of covenants to pay separate rents to tenants in common on demises by them; but if the cause of action be joint, the action should be joint although the interest be several. *Foley v. Addenbrooke*, 12 Law J. R. N. S. Q. B. 163. [In determining whether the right, under a contract is joint or separate, attention must be paid to the nature of the interest of the covenantees in the contract, as well as to the language of the covenant. *Harrold v. Whitaker*, 11 Ad. & El. N. S. 161; for it is a settled rule of construction, that when the legal interest in a covenant and in the cause of action thereon is joint, the covenant is joint, although it may in its terms be several, or joint and several, and although one only of the covenantees may have a beneficial interest in the covenant, or the covenantees are interested in the covenant in unequal proportions. The words of severance in such a case shall not prevail. *Capen v. Barrows*, 1 Gray, 376, 379, per *Metcalf J.*; *Bradburne v. Botfield*, 14 M. & W. 559; *Servante v. James*, 10 B. & C. 413; *Eccleston v. Clipsham*, 1 Wms. Saund. 154, note (1); *Petrie v. Bury*, 3 B. & C. 353; *Scott v. Goodwin*, 1 B. & P. 67; *James v. Emery*, 8 Taunt. 245; S. C. 5 Price, 529; *Wakefield v. Brown*, 9 Ad. & El. N. S. 209; *Magnay v. Edwards*, 13 C. B. 479; *Pugh v. Stringfield*, 3 C. B. N. S. 2; *Bartlett v. Holbrook*, 1 Gray, 114. If covenantees may all join in a suit, they must join. They cannot choose for themselves whether they will sue jointly or severally. The question, who shall be

judgment will be arrested. (z) So if one of several bankers lend money to a third person, all the members of the firm may join in an action to recover the amount. (a) And where a broker was employed to sell a ship belonging to three part-owners, two of whom communicated with *him on the subject, and to them he paid their shares of the proceeds of the sale, but, after admitting the amount of the third part-owner's share to be in his hands, refused to pay it to him without the consent of the other two, and he alone brought an action for his share, it was held, that he could not sue alone, but should have joined the other part-owners. (b) The contradictions in the decisions and difference in the opinions of particular judges are attributable to doubts upon *facts* whether the contract were only joint or several. (c) The reason assigned why all should join is, that when the interest is joint, if several were permitted to bring several actions for one and the same cause, the court would be in doubt for which of them to give judgment. (d) If a third person collude with one partner of a firm to injure the other partners, the latter may (omitting such colluding partner) maintain an action against such third person so colluding. (e)

There may, however, be cases where the employment of an agent may be *several* as well as joint, or cases of a *subsequent severance*, so as to entitle one partner to sue for his share. (f)

plaintiffs? the law settles for them in the construction of their contract. See *Petrie v. Bary*, 3 B. & C. 353; *Lord Denman C. J.* in *Foley v. Addenbrooke*, 4 Ad. & El. N. S. 208; *Slingsby's case*, 5 Co. 19 a; *James v. Emery*, 5 Price, 529; S. C. 8 Taunt. 245; *Spencer's case*, 5 Co. 16; *Spencer v. Durant*, Comb. 115; *Keightley v. Watson*, 3 Exch. 721, 723. On a contract of insurance with two jointly on their joint property, one cannot sue alone, without proof of an assignment to him of the other's interest, and of the company's assent thereto. *Tate v. Citizens' Mutual Fire Ins. Co.* 13 Gray, 79; *Blanchard v. Dyer*, 21 Maine, 111. Where a promissory note was made payable to A. or B., it was held to be evidence of a contract with A. and B. jointly, and that neither could sustain an action on it separately. *Osgood v. Pearsons*, 4 Gray, 455; *Willoughby v. Willoughby*, 5 N. H. 244. But see *Ellis v. M'Lemore*, 1 Bailey, 13, where it was held that in such a case, either may sue separately. See, also, *Spaulding v. Evans*, 2 McLean, 139.]

(z) *Lane v. Drinkwater*, 3 Dowl. 228; 1 Cr., M. & R. 599.

(a) *Alexander v. Barker*, 2 Tyr. Rep. 140.

(b) *Hatsall v. Griffith*, 4 Tyr. 487, qualifying the cases there cited; [*White v. Curtis*, 35 Maine, 534.] In an action for goods sold by the directors of a company, a director who has become bankrupt and ceased to act, must be joined as plaintiff. *Phelps v. Lyle*, 2 P. & D. 214; 10 A. & E. 113; but otherwise if, by the terms of the deed constituting the company, he ceased to be a director by his bankruptcy. *Ib.*

(c) *Semble*, see *Break v. Douglas*, cited in *Hatsall v. Griffith*, 4 Tyr. 489. [In several recent cases in England, the rules of construction applicable to covenants, as affecting the joinder or non-joinder of covenantees, have been much considered; and some expressions, at variance with each other, have been made by the court of queen's bench and exchequer, in delivering their opinions with reference to this subject. The difference seems to have originated in a doubt suggested by Mr. Preston, in his edition of the Touchstone, with reference to the language of Gibbs C. J. in *James v. Emery*, 5 Price, 529; S. C. 8 Taunt. 245. It would be of very little avail to quote the language of the different courts which have entered into this apparent conflict of opinion. It is very doubtful whether it will lead to any practical difference in the determination of any case that may arise. The reader may consult these cases in the reports. *Sorsbie v. Park*, 12 M. & W. 146; *Foley v. Addenbrooke*, 4 Q. B. 197; *Mills v. Ladbroke*, 7 M. & Gr. 218; *Bradburne v. Botfield*, 14 M. & W. 559, 564, 572; *Hopkinson v. Lee*, 6 Ad. & El. N. S. 984; *Parke B. in Wootton v. Steffenoni*, 12 M. & W. 134; *Harrold v. Whitaker*, 11 Ad. & El. N. S. 147, 161; *Keightley v. Watson*, 3 Exch. 716.]

(d) Per Lord Kenyon, in *Anderson v. Martindale*, 1 East, 501.

(e) *Longman v. Pole*, 1 Moo. & M. 223; but note, it was an action on the case, not *ex contractu*.

(f) *Semble*, see cases cited in *Hatsall v. Griffith*, 4 Tyr. 488, notes (a), (b), (c); and

The avowant and party making conuizance in replevin may join in an action on a replevin bond. (*g*)

Thus, if A. convey an estate to several persons, and covenant with them, "and to and with each and every of them," that he is lawfully seised, the action upon the covenant must be brought by all the covenantees, and the words of severalty shall not prevail. (*h*) So, if a party covenant to and with A. and B. to pay an annuity to A., this vests a joint legal interest in A. and B., although the former is to derive the sole benefit; for only one duty or act was to be performed, and there could not be a separate legal interest therein. (*i*) And where A. declared upon an account stated with him of moneys due to him and a third person, after verdict judgment was arrested, on the ground that the promise, whether express or implied, must, in point of law, be considered as made to all the persons whose debt it was, and therefore they all ought to have joined in the action. (*k*) And where A. and B. brought an action of assumpsit, and declared that their several cattle had been distrained, and that the defendant, in consideration of 10*l.* paid him by the plaintiffs, promised to procure the cattle to be redelivered to them by such a time, and that he had not done so; after * verdict for the plaintiffs, it was objected, in arrest of judgment, that the plaintiffs ought to have brought several actions, because the promise was not an entire, but a several promise made to each of the plaintiffs; but it was adjudged by Rolfe C. J. and two other judges against one, that the action was well brought jointly by A. and B.; for though the cattle which belonged to A. ought to be restored to him, and the other cattle to be restored to B., and so the thing to be performed was several, and not joint; yet as the *contract and consideration were joint*, and it was not known how much the one gave, and how much the other, the action was well brought jointly. (*l*) And if bail call together upon an attorney, and employ him to surrender their principal, one of them cannot afterwards maintain a separate action against the attorney, for neglecting to effect the render, for their situations and interests were identified. (*m*)

But when the *legal interest* and cause of action of the covenantees are *several*, each *may* and *should* sue *separately* for the particular damage resulting to him individually, although the

Break v. Douglas, 4 Tyr. 489. [Where one is liable to two or more on a joint contract, and settles with either for his part of the claim, the remaining promisee or promisees may sue without joining the others, such settlement with one being a severance of the cause of action. *Austin v. Walsh*, 2 Mass. 405; *Baker v. Jewell*, 6 Mass. 460; *Beach v. Hotchkiss*, 2 Conn. 697; *Stedman v. Shelton*, 1 Ala. 86. So, if a debtor promises to pay each of several partners his proportion of the debt, each may sue him separately. *Bunn v. Morris*, 3 Caines, 54; *Austin v. Walsh*, 2

Mass. 401; *Hall v. Hall*, 8 Cranch, 50; *Gould v. Gould*, 6 Wend. 263.]

(*g*) *Phillips v. Price*, 3 M. & Sel. 180; *Page v. Eamer*, 1 B. & P. 381.

(*h*) 5 Co. 18 b; *Dyer*, 337.

(*i*) *Anderson v. Martindale*, 1 East, 497; *Withers v. Bircham*, 3 B. & C. 256.

(*k*) *Thimblethorp v. Hardesty*, 7 Mod. 116; *Rolls v. Yate*, Yelv. 717.

(*l*) Rol. Abr. 31, pl. 9; *Styles*, 156, 157, 203; 2 Saund. 116 a, note. [See *Shearman v. Akins*, 4 Pick. 283.]

(*m*) *Hill v. Tucker*, 1 Taunt. 7.

covenant be in its terms joint. (*n*) And it is improper, as well in equity as at law, for a party to be joined in a suit who has neither legal nor beneficial interest in its subject-matter. (*o*)

Thus if A. by indenture demise Blackacre to B. and Whiteacre to C., and covenant with them and each of them (or it seems if he covenant with them in express terms jointly) that he is owner of the closes, each should sue separately in respect of his distinct interest, and they cannot jointly sue, for they have no joint or entire interest in the same subject-matter. (*p*) So, if a party covenant with A. and B. to pay them 10*l.* each, or an annuity to each, there, although the covenant be in its terms joint, yet the distinct interest of each in a separate subject-matter shall attract to each covenantee an exclusive right of action in regard to his own particular damage, and they cannot maintain a joint action, although the deed contain covenants and stipulations for securities which are joint. (*p*) So, where A., B. and C. were appointed assignees under a commission of bankrupt, and A. and B. each paid half of the solicitor's bill, it was decided that A. and B. could not

(*a*) 5 Co. 186; 1 Saund. 153 note (1); James v. Emery, 8 Taunt. 245; 2 Moore, 195; 5 Price, 529, 8 C.; Place v. Delegal, 4 Bing. N. C. 426; see *ante*, p. 9, note (*y*); Pickering v. De Rochemont, 45 N. H. 76; Dunham v. Gillis, 8 Mass. 462; Phillips v. Bossall, 2 Binn. 138, 143. But in Bradburne v. Botfield, 14 M. & W. 559, 573, Parke B. said he conceived it to be fully established by the cases that one and the same covenant cannot be made both joint and several with the covenantees. See Rolfe B. in Keightley v. Watson, 3 Exch. 716. If, however, there be two different covenants in the same contract, one of them may be joint and the other several. Gibbs C. J. in James v. Emery, 8 Taunt. 245; 8 C. 5 Price, 529; Sharp v. Conklin, 16 Vt. 354; Duval v. Craig, 2 Wheat. 45; Bigelow J. in Wall v. Hinds, 4 Gray, 269; Calvert v. Bradley, 18 How. (U. S.) 580. Where there is an agreement under seal to do certain things, in part of which two covenantees are jointly interested, and in part only one is interested, the one who is interested in part alone, may have his separate action for his proportion of the whole. Jewett v. Cunard, 3 Wood. & M. 277. But where the covenant is in its terms expressly and positively joint, the covenantees must join in an action upon it, although as between themselves their interest is several. Bradburne v. Botfield, 14 M. & W. 564, 573; Harrold v. Whitaker, 11 Ad. & El. N. S. 147, 171; Capen v. Barrows, 1 Gray, 579; Broom on Parties, 8; Haughton v. Bayley, 9 Ired. 337; Sweighart v. Berks, 8 Serg. & R. 308; Sorbie v. Park, 12 M. & W. 146. But where the language of the covenant is capable of being so construed, it shall be taken to be joint or several, according to the interest of the covenantees. Sorbie v. Park, 12 M. & W. 146; Evans v. Sanders, 10 B. Mon. 291. If the

parties to a contract have a joint interest in the fulfilment thereof, and sustain a joint damage by the breach of the engagements they have entered into, they must all bring a joint action. Wright v. Post, 3 Conn. 142; Capen v. Barrows, 1 Gray, 376, 379. A covenant with several persons for payment to them of a sum of money, is a joint covenant with all, in the performance of which they have a joint interest, so that one of them cannot sue for his particular share or proportion of the entirety, but all must join in one joint action for the whole, and the pointing out of the share, which each is to take of the entire amount, will not create a separation of interest so as to enable the parties to maintain separate actions. Wall v. Hinds, 4 Gray, 256; Lane v. Drinkwater, 1 Cr., M. & R. 599; 8 C. 5 Tyrw. 40; Byrne v. Fitzhugh, 5 Tyrw. 54; 8 C. 1 Cr., M. & R. 613; English v. Blundell, 8 C. & P. 332.]

(*o*) See the excellent arguments in The King of Spain v. Machado, 4 Russ. Rep. 231.

(*p*) *Supra*, note (*n*); Withers v. Bircham, 3 B. & C. 254. Where A., B. and C. having separate interests in lands, executed a deed of covenant among themselves for the sale of the lands, and the defendant became a purchaser under certain conditions, by which, in case he should be let into possession before payment of the purchase-money, he was to be considered tenant at will to the "vendors," and pay interest at 4*l.* per cent. as rent; and the defendant was let into possession and occupied for several years without payment of purchase-money: it was held, that A., B. and C. could not sue jointly for the 4*l.* per cent. interest either as rent, or for use and occupation. Seaton v. Booth, 4 Ad. & El. 528.

maintain a *joint* action against C. for his proportion of the money paid, but must each bring a separate action, and A. and B. having *sued jointly, were nonsuited. (q) But if A. and B. had borrowed the money, which they paid on their *joint* credit, or their attorney had paid it for them on their joint account, they might have joined in the action against C. (r)

It is competent to a *corporation*, in making a by-law, to provide that a fine shall be paid to, and recoverable by, the *head of the corporation*, for the use of the corporation; and in such case the action may be brought in the name of the officer to whom the penalty is so reserved. (s) And a corporation aggregate may maintain *assumpsit* for the by-gone use and occupation of *tolls*, although they did not grant the tolls to the occupier by any instrument under their common seal. (t) So the members of a company or partnership firm, may stipulate that in certain events one of the members shall incur a fine, and that the action for the recovery of it shall be brought by a particular person interested in the concern, for the use of the rest, excepting the defendant, and the law will give effect to such arrangement by upholding the action. (u) But if by a deed constituting a company, certain trustees are to sue a member for goods he may purchase of the company, no subsequent regulation, made without the consent of the defendant (an original member), that another party should be competent to sue, can enable the latter to maintain the action; (x) for in this instance there is no original undertaking by the defendant not to object to the non-joinder of the parties who ought otherwise to have been joined in the action. (x)

(q) *Brand v. Boulcott*, 3 B. & P. 235. See *Graham v. Robertson*, 2 T. R. 282; [*Yates v. Foot*, 12 John. 1; *Hatch v. Brooks*, 2 Mass. 293; *Doremus v. Selden*, 19 John. 213; *Gould v. Gould*, 8 Cowen, 168. Where a payment is made by several from a joint fund, they must join in a suit for reimbursement; but it is otherwise if the payment though joint is from individual funds. *Pearson v. Barker*, 3 N. H. 366; *Doremus v. Selden*, 19 John. 213; *Smith v. Hicks*, 1 Wend. 206; *Parker v. Leek*, 1 Stewart, 523; *Appleton v. Bascom*, 3 Met. 169; *Pearson v. Parker*, 3 N. H. 366; *Jewett v. Cornforth*, 3 Greenl. 107. Where partners, acting as such and in their partnership names, became sureties for a debt, which, after the dissolution of the partnership, they pay, they may maintain a joint action against the principal for money paid. *Day v. Swann*, 13 Maine, 165. But where several sureties pay the debt of their principal, and there is no evidence of a partnership, or of a joint interest, or of payment from a joint fund, the presumption is that each paid his proportion of the same, and they cannot join in an action to recover the amount. *Lombard v. Cobb*, 14 Maine, 222. It is otherwise, however, when the

sureties pay the debt jointly, or by a joint note, as they may in such case join in an action against their principal. *Appleton v. Bascom*, 3 Met. 169; *Doolittle v. Dwight*, 2 Met. 561; *Chandler v. Brainard*, 14 Pick. 285; *Clapp v. Rice*, 15 Gray, 557. See *Graham v. Green*, 4 Hayw. 188; *Williams v. Alley*, Cooke, 257; *Gould v. Gould*, 6 Wend. 263.]

(r) *Osborne v. Harper*, 5 East, 225.

(s) *Company of Feltmakers v. Davis*, 1 B. & P. 98; *Radenhurst v. Bates*, 3 Bing. 470.

(t) *The Mayor & Burgesses of Carmarthen v. Lewis*, 6 C. & P. 608.

(u) *Radenhurst v. Bates*, 3 Bing. 463.

(x) *Davies v. Hawkins*, 3 M. & Sel. 488; *Radenhurst v. Bates*, 3 Bing. 470. So in a late case where A. and B. carried on business together as solicitors in partnership, and held themselves out as such, and the defendant employed them in that capacity, and it appeared that by the agreement under which A. and B. entered into business together B. was to receive annually out of the profits a certain sum, but he was not to be in any manner liable to the losses of the business, and was to have a lien on the prof-

Where a covenant is made with two or more parties, to pay them money for themselves, or for the use of another, it is not correct to use the name of one only of the covenantees, although the others have omitted to execute the deed. (y) Where joint covenantees *may* join, they *must* do so. (z) The mere non-execution of the deed by one of them does not, even in the case of trustees, render it invalid, (a) or afford a legal excuse for not joining him as a plaintiff, for his assent is to be presumed; (a) but an express disclaimer, renunciation, or * refusal by him, would probably justify the omission to make him a party to the action. (b)

A cove-
nantee not
executing.

It is a general rule, that in the case of partners, all the members of the firm should be the plaintiffs in an action upon a contract made with the firm, (b¹) nor can any private arrangement by the firm, that one only of the partners shall bring the action, give him a right to sue alone. (c) So, although a guaranty has been given nominally to one of several partners, all may sue upon the same, if there be evidence that it was intended for the benefit of all. (d) Whether or not one member may sue alone, where he is solely interested in the concern, and the other *ostensible* partner is a mere nominal party, without any interest in the business, was a question of some difficulty. It appears that in such case the partner having the exclusive interest might sue alone; (e) and in a case, where an attorney car-

By partners.

in for any losses he might sustain by reason of his liability as a partner, it was held that A. and B. were properly joined as plaintiffs in an action for work and labor, as the money when recovered would be the joint property of both until the accounts were ascertained and the division took place. *Bond v. Pittard*, 3 M. & W. 357.

(y) *Petrie v. Bury*, 3 B. & C. 353.

(z) [*Petrie v. Bury*, 3 B. & C. 353; *ante*, 9, note (y); *Hays v. Leasater*, 3 Pike, 565; *Collyer Partn.* § 652.]

(a) *Small v. Marwood*, 9 B. & C. 300; *Com. Dig. Fait*, C. 2; *Berkeley v. Hardy*, 5 B. & C. 355; *Rose v. Poulton*, 2 B. & Ad. 522; *Gooch v. Goodman*, 2 G. & D. 139. But whenever an instrument is to be executed by several parties, the mere fact of execution by one does not conclusively bind him, if it be done on the faith that the others will execute, and any one of them refuses. *Latch v. Wedlake*, 3 P. & D. 499; 11 Ad. & El. 959. And if, as in the case of *Cardwell v. Lucas*, 2 M. & W. 111, a lease be not executed by the lessor, so that no interest passes by it, the assignee of a supposed reversion cannot maintain an action for breach of covenant on the lease. As to enforcing a contract not under seal, signed by the purchaser but not by the vendor, see *Laythorp v. Bryant*, 2 Bing. N. C. 735.

(b) *Petrie v. Bury*, 3 B. & C. 355; *Small v. Marwood*, 9 B. & C. 308.

(b¹) [*Halliday v. Doggett*, 6 Pick. 359; *Sory Partn.* § 241; *Collyer Partn.* §§ 649

et seq.; *Dob v. Halsey*, 16 John. 34; *Wilson v. Wallace*, 8 Serg. & R. 53; *U. States v. Kennan*, 1 Peters C. C. 168; *Gould v. Gould*, 6 Wend. 264; *Wright v. Post*, 3 Conn. 142; *Hewes v. Bayley*, 20 Pick. 96; *Jellison v. Lafonta*, 19 Pick. 294. And in such case it makes no difference that the partnership has been dissolved. *Wright v. Williamson*, 2 Penn. 978; *Bridge v. Payson*, 5 Sandf. 210; *Page v. Wolcott*, 15 Gray, 536.]

(c) See *ante*, 9, 10, 11; and see *Alexander v. Barker*, 2 Tyr. Rep. 140; *English v. Blundell*, 8 C. & P. 332; [*Wiggin v. Cummings*, 8 Allen, 353. When partners resort to a higher security than a simple contract, they must abide by such security, in regard to the proper persons to sue. *Collyer Partn.* § 652; *Scott v. Goodwin*, 1 B. & P. 67; *Duff v. Gardner*, 7 Lansing, 166; *Trott v. Irish*, 1 Allen, 481.]

(d) *Garrett v. Handley*, 4 B. & C. 664.

(e) *Parsons v. Crosby*, 5 Esp. 199; *Glossop v. Coleman*, 1 Stark. 25; *Davenport v. Rackstrow*, 1 C. & P. 89; *Steel v. Western*, 7 Moore, 31, 32; *Barker v. Stubbs*, 1 M. & G. 44. But the other partner must join in suing on a bill of exchange drawn in the name of the firm, including his own. *Guidon v. Robson*, 2 Campb. 302. A director of a joint stock company who has become bankrupt must nevertheless be joined as plaintiff, even although he has ceased to act, unless it be shown that he has vacated his office. *Phelps v. Lyle*, 2 P. & D. 314; 10 Ad. & El. 113.

ried on business under the firm of A. & Son, and the son was not in fact a partner, but acted as clerk to his father, and received a salary, it was held, that A. might maintain an action in his own name, to recover from a client the amount of a bill for business done. (f) But in these instances the plaintiff must adduce clear evidence, disproving that his ostensible partner, though a minor, had any interest whatever in the business, or right to participate in the profits. (g)

In the case of *dormant* partners, not privy to the contract, it seems that the other members of the firm *may omit* their names in an action; (h) and it has been decided, (i) that the joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of whale oil, (i') although the contract of purchase was made with one of the part-owners, and the purchaser did not know that other persons had any interest in the transaction, the joinder of the other parties making no difference to the defendant, and not affecting any right of set-off. (i) But where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone; it was held that the *declaration was evidence against all the partners, and consequently that they could not sue jointly upon such a contract. (k) And where a farm was demised to A. and B. jointly, and A. by written agreement between himself and C. underlet part of it to C., and gave receipts for payment of rent, and a notice to quit in his own name only; it was decided, that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the premises demised. (l)

If *tenants in common* (who hold by distinct titles) *jointly* demise premises, reserving an entire rent, they may, and perhaps should join in an *action* to recover it. (m) If the rent be

(f) *Kell v. Nainby*, 10 B. & C. 20. See *ante*, 12, note (x).

(g) *Teed v. Elworthy*, 14 East, 210.

(h) *Lloyd v. Archbowle*, 2 Taunt. 324; 1 Montag. on Part. 182. See 6 Ves. 438; *Brassington v. Ault*, 2 Bing. 177; [*Clark v. Miller*, 4 Wend. 628; *Wilson v. Wallace*, 8 Serg. & R. 55; *Lord v. Baldwin*, 6 Pick. 352; *Mitchell v. Dall*, 2 H. & Gill, 159; *Clarkson v. Carter*, 3 Cowen, 85; *Story Partn. § 341*; *Morton v. Webb*, 7 Vt. 123; *Boardman v. Keeler*, 2 Vt. 65; *Warren v. Griswold*, 8 Wend. 666; *Wilkes v. Clarke*, 1 Dev. 178; *Shropshire v. Shepard*, 3 Ala. 733; *Hilliker v. Loop*, 5 Vt. 116; *Lapham v. Green*, 9 Vt. 407; *Wood v. O'Kelly*, 8 Cush. 406; *Barstow v. Gray*, 3 Greenl. 409; *Conley v. Good, Breese*, 97; *Hawley v. Cramer*, 4 Cowen, 717; *Ward v. Leviston*, 7 Blackf. 358; *Monroe v. Ezzell*, 11 Ala. 603; *Phillips v. Pennywit*, 1 Pike, 59.]

(i) *Skinner v. Stocks*, 4 B. & Ald. 437; *Steel v. Western*, 7 Moore, 31, 32. [The defendants may set off a debt due from the os-

tensible partner only in such a case. *Skinner v. Stocks*, 4 B. & Ald. 437; *Hilliker v. Loop*, 5 Vt. 116. *Lapham v. Green*, 9 Vt. 407; *Lord v. Baldwin*, 6 Pick. 352; *Beach v. Hayward*, 10 Ohio, 455; *Ward v. Leviston*, 7 Blackf. 258.]

(i') [In an action on a contract of *maste-ship* (in regard to which, see *Baxter v. Rodman*, 3 Pick. 435), entered into by the masters of two whaling vessels, the officers and crew of one of the ships cannot be joined as co-plaintiffs with the owner. *Grozier v. Atwood*, 4 Pick. 432.]

(k) *Lucas v. De la Cour*, 1 M. & Sel. 249; *Robson v. Drummond*, 2 B. & Ad. 303, S. P.

(l) *Steel v. Western*, 7 Moore, 29. [See *Barstow v. Gray*, 2 Greenl. 409; *Wall v. Hinds*, 4 Gray, 256.]

(m) *Martin v. Crompe*, 1 Ld. Raym. 340; Litt. s. 315, 316; *Harrison v. Barnby*, 5 T. R. 249; *Powis v. Smith*, 5 B. & Ald. 851; and see *Wilkinson v. Hall*, 1 Bing. N. C. 713; 1 *Hodges*, 170, S. C.; *Foley v.*

reserved to them separately in distinct parts, they must sue separately; for in such case, as well their estates or interests, as the terms of the contract, are distinct and divisible. (n) And where, in fact, there have been *separate* demises by tenants in common of their interests, or where tenants in common, by conveyance or purchase, become landlords, they *must* sever in an action for rent or double value; (o) though where they have actually *joined* in a demise they might join, (o) and it seems that tenants in common must sever in an *avowry* for rent. (p)

Joint tenants (unlike tenants in common) have a unity of title and interest, in respect of which they *must jointly sue* upon a contract relating to the estate which is made by, or inures to, the benefit of all. (q) And for the same reason *parceners* must join in an action *ex contractu*, which relates to their tenements; (r) and accordingly it has been recently determined that an action will not lie at the suit of one of three coparceners to recover her proportion of rents of the estate received by an agent. (s)

Joint tenants and parceners.

The *consequences of a mistake*, in omitting to join a party who ought to have been made a plaintiff in an action *ex contractu*, or in adding a party improperly in such an action, are extremely serious. (s¹)

Consequences of mistake.

Addenbrooke, 12 Law J. R. N. S. Q. B. 163. [In an action of trespass brought by tenants in common in relation to their lands, or in debt for rent arising out of their land, or in any other action merely personal, they must all join as plaintiffs. *Bullock v. Hayward*, 10 Allen, 460; *Daniels v. Daniels*, 7 Mass. 137; *May v. Parker*, 12 Pick. 38, 39; *Decker v. Livingston*, 15 John. 479; *Hill v. Gibbs*, 5 Hill, 56; *Putnam v. Wise*, 1 Hill, 234; *Rich v. Penfield*, 1 Wend. 380; *Sherman v. Ballou*, 8 Cowen, 304; *Bradish v. Schenck*, 8 John. 151; *Brotherston v. Hodges*, 6 John. 108. In *Gilmore v. Wilbur*, 12 Pick. 120, 124, *Wilde J.* said: "It is well established that tenants in common not only may, but must join in an action for an entire injury done to the common property. And this principle is equally applicable to an action for the tort, and to an action of assumpsit when the tort is waived." See *Wall v. Hinds*, 4 Gray, 268, per *Bigelow J.*]

(n) *Ib.*; *Bac. Abr. Joint Tenants*, K.; *Litt. a.* 315; *Kirkman v. Newstead*, 1 Esp. N.P. Dig. 145, 4th ed.; *Harrison v. Barnby*, 5 T. R. 249. [If the separate and distinct estates and interests of tenants in common are disclosed on the face of a deed, and a separate duty is reserved to each in respect of his particular estate, and the damages are consequently in their nature severable, and apportionable according to the share of each, separate actions must be brought, although the terms of the covenant may be joint; if,

on the other hand, the deed contemplates the performance of one thing only, and of one duty, in favor of all, they must bring a joint action, though they be possessed of several estates. If two tenants in common make a lease, reserving one entire rent to themselves, they must bring a joint action to recover such rent, although the rent be reserved to them, "according to their several and respective rights and interests." *Wall v. Hinds*, 4 Gray, 256. But if there be several demises, and a separate reservation of rent to each tenant in common, then they must bring separate actions. *Litt. s.* 316; *Simpson v. Clayton*, 4 Bing. N. C. 781; *Powis v. Smith*, 1 Dowl. & R. 490; *S. C.* 5 B. & Ald. 850.]

(o) *Wilkinson v. Hall*, 1 Bing. N. C. 713; 1 *Hodges R.* 170, S. C.; *Foley v. Addenbrooke*, 12 Law J. R. N. S. Q. B. 163.

(p) *Ade*, note (m), p. 14; *Harrison v. Barnby*, 5 T. R. 249. As to the mode of avowing or declaring for in such case, *Ib.*; *post*, vol. ii.; *Henniker v. Turner*, 4 B. & C. 157.

(q) 2 *Bl. Com.* 182; *Co. Litt.* 180 b; *Bac. Abr. Joint Tenants*, K.; *Scott v. Godwin*, 1 B. & P. 67; [*Decharms v. Harwood*, 10 Bing. 529; *S. C.* 4 *Moore & Sc.* 400; *Wotton v. Cooke*, *Dyer*, 260 b.]

(r) 2 *Bl. Com.* 187, 188; *Vin. Ab. Parceners*, T.; *Rep. temp. Hardw.* 398.

(s) *Decharms v. Harwood*, 4 *Moore & Sc.* 400; 10 Bing. 526, S. C.

(s¹) [A writ of error lies to reverse a judg-

In all cases of contracts, if it appear upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be, but are not joined as plaintiffs in the action, it is fatal *on demurrer, (s²) or on motion in arrest of judgment, or in error; (t) and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by *plea in abatement*, (u) or as a ground of nonsuit on the trial, as a variance upon *non est factum*, if the action be upon a specialty, or if it be upon any other contract, upon the plea of the general issue. (x) When the objection appears on the face of the pleadings, it is sometimes ad-

ment recovered by several jointly for a sum of money bequeathed to be equally divided among them; such bequest being a separate bequest of a proportionate share of the whole sum to each. *Whiting v. Cook*, 8 Allen. 63.]

(s²) [Goodnight v. Goar, 30 Ind. 418; Debolt v. Carter, 31 Ind. 355.]

(t) *Vernon v. Jefferys*, 2 Stra. 1146; *Anderson v. Martindale*, 1 East, 497; 1 Saund. 153, note (1), 291 f. [See *Dodge v. Wilkinson*, 3 Met. 292; *Rhodes v. Dymock*, 33 N. Y. 141; *Cunningham v. White*, 45 How. Pr. 486; *Bell v. Laymans*, 1 Monr. 39; *Bragg v. Wetsell*, 5 Blackf. 95; *Armine v. Spencer*, 4 Wend. 406; *Whiting v. Cook*, 8 Allen, 63.] As against common carriers, it is now enacted that the non-joinder of a co-prioritor shall be no ground for pleading in abatement, even though the declaration be framed in assumption. 11 Geo. 4 and 1 W. 4 c. 68, s. 5. [Upon a writ of error to reverse a judgment rendered in an action jointly in favor of persons who are not entitled to maintain a joint action, the defendants in error cannot be allowed to amend by striking out the names of all but one of them, if the amount which that one would be entitled to recover is not shown by the record. *Whiting v. Cook*, 8 Allen, 63.]

(u) Com. Dig. Abatement, E. 12. See forms of plea and replication and points. *Davies v. Evans*, 6 Car. & P. 619.

(z) 1 Saund. 154, note (1), 291 f, g; *Leglise v. Champaute*, 2 Stra. 820; *Snelgrove v. Hunt*, 2 Stark. 424; [Bigelow C. J. in *Wiggin v. Cummings*, 8 Allen, 353; *Smith v. Crichton*, 33 Md. 108; *Wright v. Post*, 3 Conn. 142; *Baker v. Jewell*, 6 Mass. 460; *Converse v. Symmes*, 10 Mass. 379; *Zeile v. Campbell*, 2 John. Cas. 384; *Brown v. Belcher*, 1 Wash. 9; *Dob v. Halsey*, 16 John. 84; *Robertson v. Smith*, 18 John. 459; *Wilson v. Wallace*, 8 Serg. & R. 53; *Doremus v. Selden*, 19 John. 213; *Ulmer v. Cunningham*, 2 Greenl. 117; *Waldsmith v. Waldsmith*, 2 Ham. 156.] The good sense of this rule (which, as we shall see hereafter, does not prevail in the case of plaintiffs in *torts*, or of several *defendants*), has been questioned; but it is admitted to prevail. See 1 Saund. 291 f, g; *Scott v. Godwin*, 1 B. & P. 73; *Addison v. Overend*,

6 T. R. 770; *Snelgrove v. Hunt*, 2 Stark. 424. [It has been modified by statute in North Carolina. *Lewis v. McNatt*, 65 N. Car.] In the case of co-executors, the objection can only be taken advantage of by a plea in abatement. 1 Saund. 291 g; *Rawlinson v. Shaw*, 3 T. R. 558; *Snelgrove v. Hunt*, 1 Chit. Rep. 71; as the omission of a party is no ground of nonsuit in an action in form *ex delicto* (see *Addison v. Overend*, 6 T. R. 770; *Govett v. Radnidge*, 3 East, 62; *Bretherton v. Wood*, 3 B. & B. 58; *Pozzi v. Shipton*, 8 Ad. & El. 963; 1 P. & D. 4; 1 Selw. N. P. 10th ed. 410, 411), it appears to be advisable, where there is a doubt as to the number of persons to be made plaintiffs, and when the declaration may be in case, to adopt that form of action. So many instances occur in which a cause is defeated by the accidental non-joinder or misjoinder of a plaintiff, that it is perhaps to be regretted that no legislative provision has been made upon the subject, analogous to the enactment in the 7 Geo. 4, c. 64, s. 14, respecting *indictments*. However, in modern practice, the doctrine of amendment has been, in some instances, usefully applied to remedy or mitigate the evil, as in some cases orders have been made to strike out the name of one of the plaintiffs in a late stage of the proceedings, and in others for amending the proceedings, by inserting the name of another plaintiff who ought to have been joined in the action (*Holland v. Phillips*, 10 Ad. & El. 149; 2 P. & D. 336; *Lakin v. Watson*, 2 Cr. & M. 685; *Partridge v. Wellbank*, 5 Dowl. 93; [Pitkin v. Roby, 43 N. H. 138; *Goddard v. Pratt*, 16 Pick. 212]; but the general rule now established as to amendments is, that the court will not allow amendments of writs except for the purpose of making the same accord with the *præcipe*, or where the plaintiff would otherwise be without remedy; that is, when his claim would otherwise be barred by the statute of limitation. See *Kirk v. Dolby*, 8 Dowl. 767; 6 M. & W. 636. [The legal effect of an amendment is to put the case in the same plight and condition, as if the matter introduced by the amendment had been inserted in the original proceeding at the outset. *Wynne v. Liverpool & London & Globe Ins. Co* 71 N. Car. 121.]

visible to demur, in order to obtain costs, as each party pays his own costs when the judgment is arrested. (y)

Where the action is upon a deed, and one only of the covenantees improperly sues, the defendant may also avail himself of the non-joinder, by praying oyer of the deed, and setting it out, and then demurring generally to the declaration. (z)

If there be a legal ground for omitting to use the name of one of several covenantees as a plaintiff, as his death, &c. it is necessary to show such excuse for the non-joinder in the declaration, and to declare as surviving partner. (a)

There are various acts of parliament which, without incorporating certain bodies of individuals, &c. enable them to sue, and entitle others to sue them, in the names of their clerks, treasurers, &c. for the time being. Thus, by the General Turnpike Act, (b) the trustees and commissioners of any turnpike road may sue and be sued in the name of one of the trustees, or of their clerk or clerks *for the time * being*, that is, at the time the action is brought. (c) The East and West India Dock, (d) the London Dock, (e) and some insurance companies, (f) may sue or be sued in the names of their treasurers or clerks. (g) The 7 & 8 Geo. 4, c. 46, s. 9, enables co-

Trustees,
&c. by statute.

(y) *Cameron v. Reynolds*, Cowp. 407; *Pangburn v. Ramsay*, 11 John. 141. A misjoinder of plaintiffs, even if it appear in the declaration, may be taken advantage of by abatement, or under the general issue. *Tate v. Citizens' Mut. Ins. Co.* 13 Gray, 79. By *demurrer*, *Lippert v. Edwards*, 39 Ind. 166.

(z) 1 Saund. 154 a, note.

(a) *Jell v. Douglas*, 4 B. & Ald. 374; 2 Saund. 121, note (1).

(b) 3 Geo. 4, c. 126, s. 74.

(c) *Whitmore v. Wilks*, 1 M. & Malk. 222, 223.

(d) 39 Geo. 3, c. 69, s. 184; 1 & 2 W. 4, c. 52; 1 & 2 Vict. c. 9.

(e) 39 & 40 Geo. 3, c. 47, s. 150; 9 Geo. 4, c. 116.

(f) 53 Geo. 3, c. 216; 53 Geo. 3, c. 307; 54 Geo. 3, c. 179; 4 & 5 W. 4, c. 37; others in the name of the chairman, or any other member of the company; 44 Geo. 3, c. 12; 5 Geo. 4, c. 137; or chairman or secretary, 54 Geo. 3, c. 79, &c.; *Guthrie v. Fisk*, 3 B. & C. 178; and see *Tilson v. Warwick Gaslight Company*, 4 B. & C. 962; 7 D. & R. 376, S. C.

(g) By the statute 7 W. 4 and 1 Vict. c. 73, giving power to the crown to confer certain powers and immunities on trading and other companies, it is enacted, that the deed by which such company for trading or other purposes is formed, shall appoint two or more officers to sue or be sued on behalf of the company (s. 5), and power is given (s. 3) to the crown to provide by letters patent that all suits at law, in equity and otherwise, shall be brought by such company in the name of one of such officers for the time be-

ing; and against such company, against one of such officers for the time being, or if no such officer, then against any member of the company. Sec. 22 enacts that no suit so commenced by or against the company shall abate by reason of death or change in the officers or member so suing or sued. Actions by or against friendly societies are by the 10 Geo. 4, c. 56, s. 21, empowered to be carried on in the names of the treasurer or trustees for the time being of such societies, without any other description; and a similar provision respecting loan societies is contained in the 3 & 4 Vict. c. 110, s. 8; but as to the proper remedy to recover money lent by a loan society, see *Tims v. Williams*, 2 G. & D. 622; *Albin v. Pyke*, 11 Law J. R. N. S. C. P. 266. As the powers and provisions of the acts relating to friendly societies are extended to benefit building societies by 6 & 7 W. 4, c. 32, s. 4, it seems that the above enactments of 10 Geo. 4, c. 56, s. 21, applies to such a society. By the statute 9 Geo. 4, c. 92, s. 8, actions by and against the trustees of savings' banks are permitted in matters relating to such banks. See, also, 59 Geo. 3, c. 12, s. 17, as to actions, &c. by churchwardens and overseers with regard to parish lands and buildings, and the assistant overseer's bond; see *Doe v. Harpur*, 2 D. & R. 708; and as to actions at the suit of trustees of charity lands, see *Allason v. Stark*, 1 P. & D. 183. The acts for the establishment and regulation of railway companies contain provisions for enabling the company to sue or be sued in the name of the particular company by service of process on the secretary, &c. and the acts for regulating numer-

partners, as *bankers*, carrying on business as such under the provisions of that act, to sue and be sued, and to adopt proceedings at law and in equity, and in bankruptcy, in the name of any one of their *public officers*, nominated as therein mentioned, for the time being. (*h*)

* It should be observed, that where trustees, clerks, or treasurers, &c. sue or are sued in their official characters by virtue of an act of parliament, the cause of action should, in the pleadings, be stated to have accrued to or against the *principals or company of individuals* whom they for this purpose represent. (*i*) If, however, the statute provide not only that these parties shall be the nominal plaintiffs, but also that the cause of action shall be vested in *them in trust*, they should then declare accordingly.

Where a party with whom a bond, simple contract, or other mere *personal* contract was made, has assigned his interest therein to a third person, the latter cannot, in general, sue in his own name, the interest in, and remedy upon *personal* contracts being *choses in action*, which are not, in general, assignable at law, so as to give the assignee a right of action in his own name, but he must proceed in that of the assignor, or, if he be dead, in the name of his personal representative. (*k*) Upon this

8dly. When the interest in the contract has been assigned.

ous mining and other local companies contain similar clauses. As to suits by banking societies or partnerships in *Ireland*, see 6 Geo. 4, c. 42, s. 10; and by joint stock societies in *Scotland*, 6 Geo. 4, c. 131.

(*h*) But having obtained a judgment against such nominal defendant, there is sometimes great delay and difficulty in obtaining satisfaction of such judgment by execution, since some statutes (and amongst them is the 7 & 8 Geo. 4, c. 46, s. 9) give no remedy against the property of the company on the judgment, and it is necessary to revive the judgment by *scire facias* before execution can be obtained against partners not parties to the record. *Cross v. Law*, 8 Dowl. 789; 6 M. & W. 217; *Ransford v. Bosanquet* 1 Ad. & El. N. S. 818; 3 P. & D. 298; as the *West Cork Mining Company*, 4 & 5 W. 4, c. 69, give no right to sue out execution against the nominal defendant, notwithstanding the company possesses property. *Harrison v. Pimmins*, 7 Dowl. 28. The 1 & 2 Vict. c. 96, s. 1 (made perpetual by 5 & 6 Vict. c. 85), reciting the above 9th section of the 7 & 8 Geo. 4, c. 46, gives power to any person being a member of such copartnership, either alone or jointly with any other person, to sue the public officer in respect of any demand upon such copartnership; and on the other hand enables such public officer to sue a member of the copartnership, either alone or jointly with any other person, for any demand by the copartnership, as effectually in either case, and with the same legal consequences as if such person was not a member of the copartnership, and provides that all such actions and

suits shall be conducted and have effect as if the same had been between strangers. See the form of declaration by a public officer of a banking company, *post*, vol. ii., and the form of a *scire facias*, *post*, vol. iii., and the notes to such forms. The 7 W. 4 and 1 Vict. c. 73, respecting trading and other companies (referred to in the preceding note (*g*)), s. 24, and the language of which differs somewhat from that of the statutes, the foundations of the above decisions enacts that the judgments, &c. obtained against the company shall have the same effect against the property and effects of such company, and also against the persons, property, and effects of the individual existing or former members thereof respectively, as if such judgments, &c. had been obtained against such company or body in suits or proceedings to which all the persons liable as existing or former members of such company or body had been parties, and that *execution or diligences shall be issued thereon accordingly*. It is to be observed that by this act the individual liability of the members may by the letters patent be limited to a particular sum. § 4.

(*i*) See a form, *post*, vol. ii.

(*k*) *Splidt v. Bowles*, 10 East, 281; *Master v. Miller*, 4 T. R. 340; *Johnson v. Collings*, 1 East, 104; *Bally v. Wells*, 3 Wils. 27; 1 Saund. 153, 154, 210; *Canham v. Rust*, 2 Moore, 164; *Seddon v. Senate*, 13 East, 73; *Wake v. Tinkler*, 16 East, 36; *Fairlie v. Denton*, 8 B. & C. 395. [The assignment authorizes the assignee to use the assignor's name in all necessary legal proceedings. *Moore v. Coughlin*, 4 Allen, 335;

principle it was held, that although the Scotch bankrupt act (*l*) vests in the trustee for behoof of the creditors the estate and effects of the bankrupt, so far as may be consistent with the laws of other countries, when the effects are out of Scotland, yet the trustee cannot sue in his own name for a *chose in action* which was vested in the bankrupt, the statute containing no words giving to the plaintiff a right of suit. (*m*) And in the common case of a composition deed,

Clark v. Swift, 3 Met. 392; Skinner v. Somes, 14 Mass. 107; Mosher v. Allen, 16 Mass. 451; Cushing J. in Pitts v. Holmes, 10 Cush. 96; Amherst Academy v. Cowles, 6 Pick. 427; Winchester v. Hackley, 2 Cranch, 342; Mulford v. French, 2 Penn. 463; Grover v. Grover, 24 Pick. 261; Dawes v. Boylston, 9 Mass. 337; Cutts v. Perkins, 12 Mass. 206; Eastman v. Wright, 6 Pick. 322; Norris v. Douglass, 2 South. 817; Jessel v. Williamsburg Ins. Co. 3 Hill, 88; M'Kinney v. Alvis, 14 Ill. 33; Powles v. Innes, 11 M. & W. 10; Lyon v. Summers, 7 Conn. 399; Usher v. D'Wolfe, 13 Mass. 290; Coolidge v. Ruggles, 15 Mass. 387; Brigham v. Clark, 20 Pick. 43; Halloran v. Whitcomb, 43 Vt. 306. The defendant cannot defeat the suit by showing a want of interest in the nominal plaintiff. Alsop v. Caines, 10 John. 400; Raymond v. Johnson, 10 John. 488. By the statutes or local usages of several of the American states, assignees are authorized to sue in their own names on assigned bonds or other contracts. Smith v. Schibel, 19 Missou. 140; Long v. Constant, 19 Missou. 320; Worthington v. Curd, 15 Ark. 491; Cox v. Sprigg, 6 Md. 274; Dickinson v. Burr, 15 Ark. 372; Prioleau v. S. Western R. R. Bank, 16 Geo. 582. In New York, actions must be prosecuted in the name of the real party in interest. Code, § 111. So in Iowa, Laws of Iowa, Revis. of 1860, p. 481, §§ 2757. So in Maryland, Kent v. Somerville, 7 H. & Gill, 265. Pennsylvania, Act 28th May, 1715. See Aldricks v. Higgins, 16 Serg. & R. 212; Smith v. Lyons, Harper (S. Car.), 334; Boggs v. Ingraham, 3 Dall. 505. Under the general statutory provision in Missouri, that "every action must be prosecuted in the name of the real party in interest," the assignee of a *chose in action* must bring suit in his own name, even though such *chose in action* is not assignable at common law. Long v. Heinrich, 46 Missou. 608. Under the laws of Nebraska, a *chose in action* is assignable so as to vest in the assignee a right to maintain an action therefor in his own name. Mills v. Murry, 1 Neb. 327. By statute in New Jersey, the assignee of a *chose in action* may sue thereon in his own name after the death of the assignor; but it is made an essential condition of such right of action that the assignment shall have been made for a valuable consideration, and that must be averred in the pleadings and proved on trial. Andrews v. Rne, 34 N. J. (Law) 402. "A succession in the right of action, not existing by the

common law, cannot be prescribed by the laws of one state to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the *lex fori*, and not by the *lex loci contractus*, a matter not of right but of remedy. McRae v. Mattoon, 10 Pick. 49; Warren v. Copelin, 4 Met. 594; Foss v. Nutting, 14 Gray, 484, and cases cited;" Hoar J. in Richardson v. New York Central R. R. Co. 98 Mass. 85, 92; Lodge v. Phelps, 1 John. Cas. 139; Tully v. Herrin, 44 Miss. 626. The assignee of a *chose in action* takes it subject to all the equities existing between the assignor and the debtor, at the time the latter has notice of the assignment, and, in an action upon it in the name of the assignor, the debtor may avail himself of all matters in defence and set-off, which he could have urged against the assignor if the debt had not been assigned. Shepley J. in Bartlett v. Pearson, 29 Maine, 9, 15; 2 Chit. Contr. (11th Am. ed.) 1366, 1367. But the debtor can impose no other burdens, nor claim any other deductions; he cannot diminish the amount equitably and justly due at the time of such notice by any matter of claim subsequently accruing, or by any subsequent payment to the assignor, nor can he avail himself, for that purpose, of any subsequent acts or admissions of the assignor, nor of any release or discharge by him, given after such notice to the debtor. 2 Chitty Contr. (11th Am. ed.) 1367, 1368, and notes and cases cited; Halloran v. Whitcomb, 43 Vt. 306, 313; Upton v. Wallace, 44 Vt. 552; Schenck v. Warner, 37 Barb. 258, 263; Bush v. Lathrop, 22 N. Y. 535; Western Bank v. Sherwood, 29 Barb. 383; Ainalie v. Boynton, 2 Barb. 258; Solomon v. Holt, 3 E. D. Smith, 139; Roberts v. Carter, 38 N. Y. 107; Commercial Bank of Rochester v. Colt, 15 Barb. 506; Baron v. Porter, 44 Vt. 587.] But a revived corporation may sue on a bond given to the old corporation. The Mayor, &c. of Colchester v. Seaber, 3 Burr. 1872, 1873; The Mayor, &c. of Scarborough v. Butler, 3 Lev. 237. As to a churchwarden suing, see Turner v. Baynes, 2 H. Bl. 559; Astle v. Thomas, 2 B. & C. 271; 3 D. & R. 492, S. C. A *chose in action* may be assigned by parol. Howell v. M'Ivers, 4 T. R. 690; Heath v. Hall, 4 Taunt. 326.

(*l*) 54 Geo. 3, c. 137.

(*m*) Jeffrey v. M'Taggart, 6 M. & Sel. 126; Sidaway v. Hay, 4 D. & R. 669.

the trustees can only sue in the name of the original creditor in whom the legal interest in the contract still remains. Where the assignor of the *chose in action* has become bankrupt, the action must be in his name, and not in that of the assignee of such bankrupt, because the assignee of a bankrupt can only sue upon contracts in which the bankrupt was beneficially interested; (n) and if after a charter-party the owner assigns, and then become bankrupt, he should sue. (o) If, * however, an express promise or contract to pay the debt, or perform the contract, be made to the assignee of the *chose in action*, in consideration of forbearance, or in respect of any other *new* consideration, such assignee may proceed in his own name, declaring upon such promise and new consideration. (p)

There are many instances, in which, by express legislative provision, the assignee of a *chose in action* may sue in his own name to enforce the recovery of the demand. The operation of the bankrupt and insolvent acts is to this effect; (q) and by various statutes the assignee of a bail bond, (r) replevin bond, (s) an India bond, (t) or a judgment by confession in Ireland, (u) or a promissory note, (x) may sue in his own name; and the avowant may join with a party making cognizance in an action on the replevin bond. (y) The acts for the encouragement and protection of friendly societies

(n) *Carpenter v. Marnell*, 3 B. & P. 40; *Winch v. Keeley*, 1 T. R. 619; *Chambers v. Page*, 3 B. & Ald. 697. The executor of the assignor must sue if the assignor be dead. *Brandt v. Heatig*, 2 Moore, 184.

(o) *Splidt v. Bowles*, 10 East, 279; *Morrison v. Parsons*, 2 Taunt. 407.

(p) 1 Saund. 210, note (1); *Innes v. Dunlop*, 3 T. R. 595; *Price v. Seaman*, 4 B. & C. 525. [If the debtor has assented to the assignment, and expressly promised to pay the assignee, the action may be brought in the name of the assignee. *Lang v. Fiske*, 2 Fairf. 385; *Smith v. Berry*, 18 Maine, 122; *Barger v. Collins*, 7 Harr. & J. 213; *Crocker v. Whitney*, 10 Mass. 316, 319; *Richardson C. J. in Wiggin v. Damrell*, 4 N. H. 69; *Currier v. Hodgdon*, 3 N. H. 82; *Warren v. Wheeler*, 21 Maine, 484; *Mowry v. Todd*, 12 Mass. 281; *Morton J. in Parkhurst v. Dickenson*, 21 Pick. 307, 309, 310; *Bucklin v. Ward*, 7 Vt. 195; *Moar v. Wright*, 1 Vt. 57; *Stiles v. Farrar*, 18 Vt. 444; *Thompson v. Emery*, 27 N. H. 269; *Clark v. Thompson*, 2 R. I. 146; *Hodges v. Eastman*, 12 Vt. 353; *Shaw C. J. in Derby v. Sandford*, 9 Cush. 264; *Bourne v. Cabot*, 3 Met. 305; *Meed v. Jewett*, 2 Met. 608; *Tibbetts v. Gerrish*, 25 N. H. 41, 48; *Edson v. Fuller*, 22 N. H. 191; *Jessel v. Williamsburg Ins. Co.* 3 Hill, 88. It makes no difference whether the *chose in action* assigned was a written or parol contract, or consisted of an express or implied promise. *Clark v. Thompson*, 2 R. I. 146, 149; *Currier v. Hodgdon*, 3 N. H. 82. The promise of the

debtor to pay the assignee in such cases may be inferred from the acts of the parties. *Barger v. Collins*, 7 Harr. & J. 213; *Crocker v. Whitney*, 10 Mass. 281; *Doty v. Wilson*, 14 John. 378; *Hawes v. Saunders*, Cowp. 290. The equitable interest obtained by the assignment is said to be a sufficient consideration to sustain the express promise. See *Thompson v. Emery*, 27 N. H. 273; *Currier v. Hodgdon*, 3 N. H. 82; *Edson v. Fuller*, 23 N. H. 191; *Crocker v. Whitney*, 10 Mass. 316, 319; *Doty v. Wilson*, 14 John. 378; *Wiggin v. Damrell*, 4 N. H. 75. But see, upon this point, *Crocker v. Whitney*, 10 Mass. 322, Rand's note; 1 Wms. Saund. 210, note (1); *Tibbetts v. George*, 5 Ad. & El. 115; 21 Amer. Jur. 284. The obligor in a bond may be sued in assumpsit on a promise to perform made by him to an assignee thereof; and the assignee may bring the action in his own name. *Warren v. Wheeler*, 21 Maine, 484.]

(q) *Post*, 25, 30.

(r) 4 Ann. c. 16, s. 20.

(s) 11 Geo. 2, c. 19, s. 23; *Page v. Ramer*, 1 B. & P. 381, note (a); *Phillips v. Price*, 3 M. & Sel. 180.

(t) 51 Geo. 3, c. 64, s. 4. See *Glyn v. Baker*, 13 East, 509. But not the assignee of an Indian certificate. *Williamson v. Thomson*, 16 Ves. 443.

(u) *O'Callaghan v. Thomond*, 3 Taunt. 82.

(x) 3 & 4 Ann. c. 9, s. 1.

(y) *Ante*, 10, note (g).

enable them to sue in the names of their "treasurers or trustees for the time being;" and as the right or cause of action is vested by the statutes in such treasurers or trustees (for the use and benefit of the society), they must necessarily be the plaintiffs. (z)

By the custom of merchants, the assignee or transferee of a bill of exchange, or check on a banker, may sue thereon in his own name. (a)

An exception to the rule, that a debt or *chose in action* cannot be assigned at law, arises in the following case, put by Buller J. in *Tatlock v. Harris*: (b) "Suppose A. owes B. 100l., and B. owes C. 100l., and the three meet, and it is agreed between them that A. shall pay C. the 100l., B.'s debt is extinguished, and C. may recover that sum against A." In such case an express agreement between all the parties that A. should become C.'s debtor instead of B. must be proved; (c) and it must appear that A.'s debt to B. was ascertained and fixed. (d)

The common law confers on the *grantee* of the *reversion* of an estate an action in his own name upon such *implied covenants*, or *covenants in law*, as are annexed to, and which run with, the ^{Real prop-}erty. *reversion*: as upon the *reddendum*, or word "demise," contained in

(z) 10 Geo. 4, c. 56, s. 21; see note (g), ante, 16. If persons, not being incorporated, enter into a contract as a corporation, they cannot sue in such corporate capacity; and in the late case of *Gooch v. Goodman*, 2 Q. & D. 159, where three persons professed to enter into a contract as masters and governors of a hospital, to which contract a common seal was affixed, it was held that such a contract could not be considered as the contract of the three as individuals, the seal professing to be the seal of a corporation, and that they could not sue on such contract in a corporate capacity, without being in law a corporation. See, also, *Graves v. Colby*, 9 Ad. & El. 356; 1 P. & D. 235.

(a) [Possession of a note, transferable by delivery only, or indorsed in blank, is *prima facie* evidence of title. *Bayley v. Taber*, 6 Mass. 451; *Northampton Bank v. Pepoon*, 11 Mass. 288; *Pitts v. Keyser*, 1 Stewart, 154; *Johnson v. English*, 1 Stewart, 169; *Smith v. Hawthorn*, 3 Rawle, 355; *Dean v. Hewit*, 5 Wend. 257; *Jackson v. Heath*, 1 Bailey, 355. The holder, even if not the owner, of a promissory note payable to bearer, may, with the owner's consent, maintain an action thereon in his own name against the maker. *Wheeler v. Johnson*, 97 Mass. 39; *Ogilby v. Wallace*, 3 Hall, 553. A person to whom a negotiable note indorsed in blank was delivered for collection, may maintain an action on it. *Little v. O'Brien*, 9 Mass. 423. See *Sherwood v. Roys*, 14 Pick. 172. But the mere depositary of a note, payable to bearer, cannot sustain an action on it. *Sherwood v. Roys*, 14 Pick.

172; *Olcott v. Rathbone*, 5 Wend. 490. But a person holding such note as a trustee may sustain an action on it in his own name. *Sherwood v. Roys*, 14 Pick. 172.] Where the third indorsee of a bill of exchange, being advised through his agent abroad of the non-payment by the drawee, receives the amount of the bill from the second indorsee, who is in turn repaid by the first indorsee, but before this payment the third indorsee also receives by his agent the amount from the drawee, it seems doubtful whether an action for money had and received against the third indorsee should be brought by the first or second indorsee. *Rotton v. Inglis*, 2 G. & D. 259.

(b) 3 T. R. 180; *Iraael v. Douglas*, 1 H. Bl. 239. See, also, *Hodgson v. Anderson*, 3 B. & C. 855; *Wharton v. Walker*, 4 B. & C. 166; *Fairlie v. Denton*, 8 B. & C. 395; but see *Chitty jr. on Cont.* 3d ed. 614; *Crowfoot v. Gurney*, 9 Bing. 372; *Belcher v. Oldfield*, 6 Bing. N. C. 101; *Tibbitts v. George*, 5 Ad. & El. 101; *Smith v. Smith*, 2 Cr. & M. 231.

(c) *Wharton v. Walker*, 4 B. & C. 163; *Fairlie v. Denton*, 8 B. & C. 402.

(d) *Fairlie v. Denton*, 8 B. & C. 395. [For the law and authorities upon this point see 2 *Chitty Contr.* (11th Am. ed.) 912, 1371, et seq. *Tit. Novation, and notes*; *Griswold v. Griswold*, 7 Lansing, 72; *Helms v. Kearns*, 40 Ind. 124; *Cochrane v. Green*, 9 C. B. N. S. 448; *Heaton v. Angier*, 7 N. H. 397; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 15 N. H. 129; *Fiske v. McGregory*, 34 N. H. 414.]

the lease. (e) But at common law none but parties or privies to *express* covenants, as the parties or their heirs or devisees, (f) could sue thereon, the privity of contract being in such case wanting; and the grantee of the reversion being therefore considered as a mere stranger. (g) This defect was remedied by the statute 32 Hen. 8, c. 34, s. 1, which transfers the remedy and right of action to the grantee against the lessee or his assigns, although the grantee be not named in the lease. (h) The statute extends to the grantee or surrenderee of the reversion of a copyhold tenement; (i) and to the grantee of the reversion of part of the premises, as well as to the grantee of part of the estate of the reversion. (k) And it applies to the grantee of a reversion of a lease for life as well as for years; (l) and where a tenant for life makes a lease in pursuance of a leasing power, the remainderman is considered to be an assignee of the reversion within the statute. (m) But it does not relate to covenants entered into in a conveyance in fee or gift in tail; (n) and where J. B. being seised in fee conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain, to be issuing out of the premises, and subject to the said rent to the use of the defendant, his heirs and assigns; and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build a house to secure it; and J. B. demised the rent to the plaintiff for a long term; it was held that the latter could not sue upon the covenants; for they were *personal to J. B., and the rent was reserved out of the original estate, and there was neither privity of contract nor privity of estate. (o) In general, in order to enable a person to sue as *an assignee*, he ought to come in of *the same estate* as that in respect of which the covenant was made, and not by title paramount. (p) And if a per-

(e) *Harper v. Burgh*, 2 Lev. 206; *Vyvyan v. Arthur*, 1 B. & C. 410; 2 D. & R. 670, S. C. [The rules respecting covenants annexed to estates in land are fully stated in 2 Chitty Contr. (11th Am. ed.) 1382 *et seq.* and notes; *Bronson v. Coffin*, 108 Mass. 175; 2 Sugden V. & P. (8th Am. ed.) 576 *et seq.* and notes.]
(f) As to actions by *heirs* and *devisees*, *post*, 22-25.

(g) See *Webb v. Russell*, 3 T. R. 401; *Platt on Covenants*, 527, 531; *Bac. Ab. Covenant, E., Debt, C.*; *Com. Dig. Covenant, B. 3.*

(h) *Kitchin v. Buckley*, Sir T. Raym. 80; *Platt on Cov.* 534. Where there is a further reversion, the second reversioner may also sue for the diminution in the value of his interest which may arise from the breach of covenant. See *Jefferson v. Jefferson*, 3 Lev. 130; *Beddingfield v. Onslow*, Ib. 209; *Jesser v. Gifford*, 4 Burr. 2141; *Platt on Cov.* 537. Each reversioner will recover damages commensurate with his particular interest. *Evelyn v. Raddish*, Holt's Ni. Pri. Rep. 543;

Attersoll v. Stevens, 1 Taunt. 194. But the grantee of the reversion of part of the premises cannot maintain *ejectment* upon a condition broken. 5 Co. 55 b; *Twynam v. Pickard*, 2 B. & Ald. 109. The reason is that a condition is entire and indivisible. As to the right of the assignee of a reversion to maintain debt against the lessee for use and occupation previous to the assignment, see *Mortimer v. Freedy*, 3 M. & W. 602.

(i) *Glover v. Cope*, 3 Lev. 326; *Carth. 205*; *Isherwood v. Oldknow*, 3 M. & Sel. 386; 1 Saund. 241, note (a); *Platt on Cov.* 537.

(k) *Twynam v. Pickard*, 2 B. & Ald. 105; *Henniker v. Turner*, 4 B. & C. 157, 158.

(l) Co. Litt. 215; *Platt*, 535.

(m) *Isherwood v. Oldknow*, 3 M. & Sel. 382.

(n) Co. Litt. 215; *Lewis v. Ridge*, Cro. Eliz. 863; *Platt*, 515.

(o) *Milnes v. Branch*, 5 M. & Sel. 411.

(p) See *Webb v. Russell*, 3 T. R. 393; *Platt on Cov.* 341; Co. Litt. 215; [*Morse v.*

son, having only the equitable fee in freehold or copyhold, grant a lease and then devise the equitable fee to A., and A., after the death of testator, acquire the legal estate from the person in whom it was vested at the time of the lease and devise, and then sell and convey the legal estate to B., the latter could not sue the lessee or his assignees, because he takes not any legal estate from the lessor. (q)

It is to be remembered that the statute has no effect on covenants which are *collateral* to and do not *run with the land*. Upon such covenants the grantee of the reversion cannot maintain an action in his own name. (r)

After the grant of the reversion, the grantor cannot sue for breaches of covenant subsequently committed by the lessee or his assigns, (s) but his remedy for prior breaches is not (like the remedy by *distress*) destroyed. (t) And as a *chose in action* is not transferable at law, the remedy for breaches of covenant, which occurred before the grant of the reversion, must necessarily be *enforced* in the name of the grantor. (u) And rent accrued due before a conveyance of the reversion will not pass to the grantee, but is at law as well as in equity severed from the inheritance. (x)

The statute 32 Hen. 8 refers only to the remedies for and against the assignees and grantees of *reversions*. The *common law* gives a remedy by action upon a covenant real annexed to the estate, and running with it, to the assignee of the assignee of such estate, against

Aldrich, 19 Pick. 449, 453; Ross v. Turner, 2 Eng. 132; Hurd v. Curtis, 19 Pick. 463; Plymouth v. Carver, 16 Pick. 183; 4 Kent, 472, 473; Demarest v. Willard, 8 Cowen, 206; Taylor v. Owen, 2 Blackf. 301; Brewer v. Marshall, 3 C. C. Green (N. J.), 337. Where a covenant running with land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to separate persons, the covenant will attach upon each parcel *pro tanto*. Astor v. Miller, 2 Paige, 68; Hills v. Miller, 3 Paige, 254; Van Horne v. Craine, 1 Paige, 455.]

(q) Seymour v. Franco, 7 L. J. R. K. B. 18; Whitton v. Peacock, 2 Bing. N. C. 411.

(r) 5 Co. 17, Spencer's case; Co. Litt. 215 b; 1 Saund. 241 a, note (9), 5th ed.; Vyvyan v. Arthur, 1 B. & C. 417; 2 D. & R. 670, S. C. The assignee of a mere rent charge is not within the statute. Milnes v. Branch, 5 M. & Sel. 411. A covenant to insure a house within the weekly bills of mortality runs with the land. Vernon v. Smith, 5 B. & Ald. 1. See the judgment of the court in that case, as to what covenants run with the land. Vyvyan v. Arthur, 1 B. & C. 410; Sampson v. Easterby, 9 Ib. 505; 1 Cr. & J. 105. See, also, the notes to Spencer's case, in Smith's Leading Cases, where all the important decisions on the subject are collected; [2 Chitty Contr. (11th Am. ed.) 1382 *et seq.*; Bronson v. Coffin, 108 Mass. 175.]

(s) Beeby v. Parry, 3 Lev. 154; Webb v. Russell, 3 T. R. 394, *arg.*; [Wheeler v. Sohier, 3 Cush. 219.]

(t) Anonymous, Skin. 367; Midgley v. Gilbert, Carth. 289; Midgley v. Lovelace, 12 Mod. 45; Ashurst v. Mingay, 2 Show. 133.

(u) Lewis v. Ridge, Cro. Eliz. 863; Kingdon v. Nottle, 4 M. & Sel. 56; Canham v. Rust, 8 Taunt. 227; 2 Moore, 164, S. C.; [Greenby v. Willocks, 2 John. 1; Bickford v. Page, 2 Mass. 455; Marston v. Hobbs, 2 Mass. 439; Chapman v. Holmes, 5 Halst. 20; Clark v. Swift, 3 Met. 390; Garrison v. Sandford, 7 Halst. 261; Demarest v. Willard, 8 Cowen, 206; Backus v. M'Coy, 3 Ham. 218; Innes v. Agnew, 1 Ham. 386; Williams v. Wetherbee, 1 Aik. 233; Sprague v. Baker, 17 Mass. 588; Mitchell v. Warner, 5 Conn. 497; Davis v. Lyman, 6 Conn. 249; Stewart v. Drake, 4 Halst. 139; Bartholomew v. Candee, 14 Pick. 171; Wheelock v. Thayer, 16 Pick. 68; Thayer v. Clemence, 22 Pick. 493; Hacker v. Storer, 8 Greenl. 228; Pierce v. Johnson, 4 Vt. 325; Richardson v. Dorr, 5 Vt. 21; Tapley v. Labeaume, 1 Missou. 552.] But for as much of the breach as continues after the assignment, the grantee may sue. Mascall's case, 1 Moore, 242; 1 Leon. 62, S. C.

(x) Flight v. Bentley, 7 Sim. 149; Johnson v. St. Peter's, Hereford, 4 Ad. & El. 520.

the original assignor, who conveyed his whole interest in the property. (x¹) As if a party grant an estate in fee with a covenant for further assurance, and his grantee grant it over to A., the latter may maintain covenant against the original grantor, on the ground that a privity of estate subsists between them. (y) So the assignee of the original * grantee may sue the original assignor upon his covenant for quiet enjoyment, whether the interest assigned be an estate of inheritance or a chattel real only; and whether any estate remain in the covenantor or not. (z) And if A. demise to B. rendering rent, and then A. assign the rent, the counterpart of the lease, and the benefit of the covenant to C. for the remainder of the term, the latter may maintain debt for the rent against B. (a)

(x¹) [The transfer of covenants real, which run with the land, forms an exception to the general rule of the common law, that contracts and covenants, being *choses in action*, cannot be assigned. The ordinary covenants for title in a conveyance of real estate will run with the land, so that the benefit of them passes to successive owners of the estate. So the ordinary covenants in a lease for quiet enjoyment, and for further assurance, will run with the land and with the reversion. So, the warranty or covenants implied in words of demise; which implied covenants, however, extend no further than the estate of the lessor. 2 Chitty Contr. (11th Am. ed.) 1382 *et seq.*, 1388, 1389. Where land, conveyed with covenants of warranty, has passed by subsequent conveyances, with like covenants of warranty, through the hands of various covenantees, the last covenantor or assignee, in whose possession the land was when the covenant was broken, can alone sue for the breach, and he has a right of action against any or all of the prior warrantors. No intermediate covenantee can sue his covenantor, until he himself has been compelled to pay damages on his own covenant, and until such damage has been paid by him, he cannot release such covenantor from his liability to the subsequent covenantees. Chase v. Weston, 12 N. H. 413; Williams v. Beeman, 2 Dev. 483; Suydam v. Jones, 10 Wend. 180; Griffin v. Fairbrother, 1 Fairf. 91; Kane v. Sanger, 14 John. 89; Brown v. Staples, 28 Maine, 497; Thompson v. Shattuck, 2 Met. 615; Claunch v. Allen, 12 Ala. 159; Crooker v. Jewell, 29 Maine, 527; Kingdon v. Nottle, 1 M. & Sel. 353; S. C. 4 M. & Sel. 53; Wyman v. Ballard, 12 Mass. 306; Withy v. Mumford, 5 Cowen, 137; Slater v. Rawson, 6 Met. 439; King v. Kerr, 5 Ham. 156; Thomas v. Von Kapff, 6 Gill & J. 352; Booth v. Starr, 1 Conn. 244; Markland v. Crump, 1 Dev. & Bat. (Law) 94; Shelby v. Hearne, 6 Yerger, 512; Pike v. Galvin, 29 Maine, 183; Norman v. Wells, 17 Wend. 136; Ross v. Turner, 2 Eng. 182; Dailey v. Peck, 6 Penn. L. J. 383; Atkins v. Chilson, 7 Met. 398; Allen v. Culver, 3 Denio, 284; Trull v. Eastman, 3 Met. 124. A cov-

enant cannot be annexed to goods, so as to be assignable with the property in the goods. 2 Chitty Contr. (11th Am. ed.) 1393, 1394.]

(y) Middlemore v. Goodale, Cro. Car. 503; Campbell v. Lewis, 3 B. & Ald. 396; [Redwine v. Brown, 10 Geo. 311; Clark v. Swift, 3 Met. 390; Beddoe v. Wadsworth, 21 Wend. 120; Andrews v. Wolcott, 16 Barb. 21; Lewis v. Cook, 13 Ired. (Law) 193; Hopkins v. Lane, 9 Yerger, 79; Smith v. Perry, 26 Vt. 279. But not for a breach occurring before the assignment to himself, or after an assignment by himself. Wheeler v. Sohler, 3 Cush. 219; Shelton v. Codman, 3 Cush. 318. The covenantee in possession at the time of eviction may maintain a separate action against every intermediate warrantor, but he can have only one satisfaction. King v. Kerr, 5 Ohio, 156. But except in case of covenant real the action must be in the name of the covenantee. Clark v. Swift, 3 Met. 390; Whitney v. Dinsmore, 6 Cush. 124. In some states by statute the assignee of the grantee may maintain an action against the grantor for a breach of the covenants of seisin and those against incumbrances, although they do not run with the land. Allen v. Little, 36 Maine, 170; Van Doren v. Relfe, 20 Masson. 455. Where the title assured by a covenant of warranty became divided into life estate and remainder, the covenant being single, all those entitled to the remedy must join in an action for a breach of it. McClure v. Gamble, 27 Penn. St. 288.]

(z) Middlemore v. Goodale, Cro. Car. 503; Campbell v. Lewis, 3 B. & Ald. 396; Noke v. Awder, Cro. Eliz. 373; Lewis v. Campbell, 8 Taunt. 715; 3 Moore, 35, S. C.; affirmed in error, 3 B. & Ald. 392. See, further, Platt on Cov. 522 *et subs.*; [Wall v. Hinds, 4 Gray, 266.]

(a) Allen v. Bryan, 5 B. & C. 512. ["When rent is assigned without the reversion, the assignee may sue the lessee for rent accruing after the assignment; because the privity of contract is transferred. Kendall v. Garland, 5 Cush. 74; Patten v. Deshon, 1 Gray, 327; Demarest v. Willard, 8 Cowen, 206; Willard v. Tillman, 2 Hill (N. Y.), 274; Childs

Attornment by the tenant to the grantee of the reversion is not necessary in any of these cases to perfect the remedy of the latter, but the tenant shall not be prejudiced by any payment of rent to the grantor before he had notice of the grantee's title. (b)

In the case of a lunatic, the action upon a contract made with *him* should be brought in his name, not in the name of his committee. (c)

When one or more of several obligees, covenantees, partners, or others, having a *joint legal* interest in the contract, dies, the action must be brought in the name of the survivor, (c¹) and the executor or administrator of the deceased must not be joined, (c²) nor can he sue separately, though the deceased alone might be entitled to the *beneficial* interest in the contract; and the executor must resort to a court of equity to obtain from the survivor the testator's share of the sum recovered; (d) but if the interest of the covenantees were *several*, the executor of one of them may sue, though the other be living. (e) In an action at the suit of a surviving partner, he may include a debt due to him in his own separate right. (f) In the case of a deed, we have seen that it is necessary to declare as surviving obligee, &c.; (g) and in other actions on contracts, it is necessary to declare as surviving partner, noticing the deceased and his death. (h) However, in the case of a bill of exchange indorsed in

v. Clark, 3 Barb. Ch. 52; Moffat v. Smith, 4 Comst. 126; Ryerson v. Quackenbush, 2 Dutcher, 236." Metcalf J. in Hunt v. Thompson, 2 Allen, 341. An assignment, not under seal, of a lease which is under seal, does not give to the assignee the right to maintain an action in his own name for subsequently accruing rent. Bridgham v. Tilton, 5 Allen, 371.]

(b) 4 & 5 Ann. c. 16, s. 9, 10; Lumley v. Hodgson, 16 East, 99.

(c) Thorn v. Coward, 2 Sid. 124, 125; [Hamilton v. Colwell, 10 R. L. 39.] Ejectment must be brought in the name of the lunatic, for his committee is but a bailiff, and has no interest. Adams Eject. 2d ed. 81, cites Hutton, 16; Hob. 215; 2 Wils. 130. But the committee may, by order of the court of chancery, grant leases (see 43 Geo. 3, c. 75, s. 14); and in such case the remedy would be by the committee. See, further, 6 Geo. 4, c. 74; 9 Geo. 4 c. 78.

(c¹) [See Bernard v. Wilcox, 2 John. Cas. 374; Jones v. Yates, 9 B. & C. 532, 538; Rolls v. Yate, Yelv. 177; 2 Chitty Contr. (11th Am. ed.) 1351; Collyer Partn. § 129, and note (2); Murray v. Mumford, 6 Cowen, 441; Kinsler v. McCants, 4 Rich. 46; Burnside v. Merrick, 4 Met. 540; Crocker v. Beal, 1 Lowell, 416. Upon the death of the last survivor, in whom solely the right became vested, his executor or administrator becomes entitled. 2 Chitty Contr. (11th Am. ed.) 1411.]

(c²) [Smith v. Franklin, 1 Mass. 480;

Walker v. Maxwell, 1 Mass. 104; Morrison v. Winn, Hardin, 480; Bebee v. Miller, Minor, 364; Brown v. King, 1 Bibb, 462; Clark v. Parish, 1 Bibb, 547; S. C. 3 Bibb, 261; Murphy v. Branch Bank, 5 Ala. 421; Peters v. Davis, 7 Mass. 257.]

(d) Anderson v. Martindale, 1 East, 497; Martin v. Crump, Salk. 444; Lord Raym. 340; Com. Dig. Merchants, D.; Vin. Ab. Partner, D.; The King v. Collector of Customs, 2 M. & Sel. 225.

(e) 1 Saund. 153, note (1); Engs v. Don-nithorne, 2 Burr. 1197; Shaw v. Sherwood, Cro. Eliz. 729.

(f) Hancock v. Haywood, 3 T. R. 433; Slipper v. Stidstone, 5 T. R. 493; French v. Andrade, 6 T. R. 582; Jell v. Douglas, 4 B. & Ald. 374.

(g) Scott v. Godwin, 1 B. & P. 74.

(h) Jell v. Douglas, 4 B. & Ald. 374; Israel v. Simmons, 2 Stark. 356; 2 Saund. 121, note (1); vide Ditchburn v. Spracklin, 5 Esp. 32; Smith v. Barrow, 2 T. R. 477; Vin. Ab. Partners, D. See Undershell v. Fuller, 1 Cr., M. & R. 900; 5 Tyr. 392; 3 Dowl. 549, S. C.; [Callison v. Little, 2 Porter, 89; Baldwin v. Stebbins, Minor, 180; Patterson v. Chalmers, 7 B. Mon. 595; Hubbell v. Skiles, 16 Ind. 138. In Vandenhoevel v. Storrs, 3 Conn. 203, it was held that the survivor of several, having a joint interest, may sue in an action on simple contract, without describing himself as survivor. In such case, however, the cause of action must be correctly set forth, that the

4thly. When one of several obligees, &c. is dead.

blank, and not specially, to a firm, it is competent to the surviving members to sue, without noticing the death of a partner, who was in the firm when the bill was received, (i)

* In the case of a mere *personal* contract, or of a *covenant not running with the land*, if it were made only with *one* person, and he be dead, the action for the breach of it must be brought in the name of his executor or administrator, in whom the legal interest in such contract is vested. (k) But on a covenant relating to the *realty*, as for good title, on a deed of conveyance, an *executor* cannot sue even for a breach in the lifetime of his testator, without showing some special damage to the *personal estate of the latter*, but the action must be brought in the name of the *heir or devisee*. (l) But the executors and not the *heir* of a purchaser must sue for breach of contract on sale of an estate in fee-simple, and the consequent loss of interest and expense. (m) For the breach of the implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue, without stating that the testator sustained some actual damage; (n) and an executor cannot sue for the breach of a promise which impliedly occasions only a personal suffering to the testator, and is not shown to have occasioned a special damage to his estate; as a breach of promise of marriage. (o) And the 3 & 4 W. 4, c. 42, s. 2, which only enables an

defendant may know what he is called to answer. See *Holmes v. D'Camp*, 1 John. 34; *Moore v. Fenwick*, Gilmer, 214; *Pickens v. Garnett*, 2 Bay, 543; *Mott v. Petrie*, 15 Wend. 319.]

(i) *Attwood v. Rattenbury*, 6 Moore, 579. As to the effect of the death of one of the plaintiffs during the suit, see 8 & 9 W. 3, c. 11, s. 7; *Tidd*, 9th ed. 934.

(k) *Brandon v. Pate*, 2 H. Bl. 310; *Webb v. Russell*, 3 T. R. 393, 401; *Com. Dig. Covenant*, 1. And it is not necessary, in order to transmit to the executor or administrator a right of enforcing a contract, that he should be named in the terms of it. *Com. Dig. Administration*, B. 13. So if money be payable to A. or *his assigns*, his executor shall take it; for he is assignee in law; *Pease v. Mead*, Hob. 9; *Went. Off. Ex.* 215, 14th ed.; *Iremonger v. Newsam*, Latch, 261; 1 Roll. Abr. 915, *Executors*, X. pl. 1; *Williams's Executors*, 3d ed. 625.

(l) *Lucy v. Levington*, 2 Lev. 29; 1 Vent. 176, S. C.; *Kingdon v. Nottle*, 1 M. & Sel. 355; 4 Ib. 53; *King v. Jones*, 1 Marsh. 107; 5 Taunt. 418, S. C.; *Jones v. King*, 4 M. & Sel. 188. [See *South v. Hoy*, 3 Mon. 94; *Rice v. Spotswood*, 6 Mon. 40; *Brown v. Wilson*, 12 B. Mon. 100; *Grist v. Hodges*, 3 Dev. (Law) 200; *Van Rensselaer v. Platner*, 2 John. Cas. 17; *Cox v. Grant*, 6 J. J. Marsh. 201; *Paul v. Witman*, 3 Watts & S. 407; 2 Chitty Contr.

11th (Am. ed.) 1408, 1409; 2 Sugden V. & P. (8th Am. ed.) 577, note (g). Covenants for land, broken in the covenantor's lifetime, go to the executor; where broken after his death, to the heir. *South v. Hoy*, 3 Mon. 94; *Rice v. Spotswood*, 6 Mon. 40; *Grist v. Hodges*, 3 Dev. 203; *Abney v. Brownlee*, 2 Bibb, 170; *Van Rensselaer v. Platner*, 2 John. Cas. 17; 2 Sugden V. & P. (8th Am. ed.) 577, note (g); *Clark v. Swift*, 3 Met. 390, 393; *Mitchell v. Warner*, 5 Conn. 497; 4 Kent, 472.]

(m) *Orme v. Broughton*, 10 Bing. 533; 4 M. & Scott, 417, S. C.

(n) *Knights v. Quarles*, 4 Moore, 532; 2 B. & B. 102, S. C. *Sed quare*, whether damage, viz. deterioration in value of salable interest, would not be inferred. See, also, *Williams's Executors*, 3d ed. 631, 632; and *Raymond v. Fitch*, 3 Cr., M. & R. 588; S. C. Tyrw. 985.

(o) *Chamberlain v. Williamson*, 2 M. & Sel. 408. [See *Lattimore v. Simons*, 13 Serg. & R. 183; *Stebbins v. Palmer*, 1 Pick. 71. An action for breach of promise of marriage does not survive the plaintiff's death, unless, perhaps, where some special damage to property, such as would of itself sustain an action, is alleged. *Hovey v. Page*, 55 Maine, 142; *Smith v. Sherman*, 4 Cush. 408, 413.] So with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskilfulness of medical practi-

executor or administrator to sue for a *tort* affecting the *personal* or *real estate* of the deceased, does not appear to alter the law in that respect. Where a personal contract was made jointly with *several* persons, then during the life of the survivor of them the action must be brought in his name, (*p*) and upon his death *his* executor or administrator alone can sue, and the personal representatives of the partner who first died cannot be joined. (*q*) If there be *several* executors or administrators, they ought all to join, though some be under the age of seventeen years, or *have not proved the will*; (*r*) for the grant of a probate to *one inures to the benefit of all. (*s*) And it seems, that even the refusal of one of the executors before the ordinary to accept the trust does not render it unnecessary to join him as a plaintiff. (*t*) But his formal disclaimer and renunciation in the ecclesiastical court, on citation, would probably entitle the other executors to sue without him. (*u*)

If, however, only one of several executors or administrators bring an action either of debt or assumpsit, or in tort, it is settled that the defendant can only take advantage of the non-joinder of the co-executor or co-administrator, by pleading in abatement, after *oyer* of the probate or letters of administration, that the other executor or administrator therein mentioned is alive and not joined in the action. (*x*) This, it is observable, is a material distinction between the effect of the non-joinder of a party when he sues in *autre droit*, and when in his own right; in the latter case we have seen that the omission would be a ground of nonsuit. (*y*) An executor may sue as such upon a contract made with him in that character, as for goods sold by him *as* executor, or for money lent as such, and in other cases when the sum to

owers; the imprisonment of the party, brought on by the negligence of his attorney; generally speaking, no action can be sustained by the executor or administrator on a breach of the implied promise by the person employed, to exhibit a proper portion of skill and attention: such cases being, in substance, actions for injuries to the person. 2 M. & Sel. 415, 416. See, also, 8 M. & W. 854. As to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see Raymond v. Fitch, 2 Cr., M. & R. 588; S. C. 5 Tyrw. 985, and the cases there cited.

(*p*) *Ante*, 21.

(*q*) *Ante*, 21.

(*r*) Bro. Executors, 83; Smith v. Smith, 1elv. 130; Brookes v. Stroud, 1 Salk. 3; 1 Saund. 291 *h*, note (4); Munt v. Stokes, 4 T. R. 545; Brassington v. Ault, 2 Bing. 178; Laking v. Watson, 2 Dowl. 633; 4 Tyr. 889, S. C.; Kilby v. Stanton, 2 Y. & Jer. 75; Creswick v. Woodhead, 12 L. J. R. N. S. C. P. 111. In Davies v. Williams, 1 Simons Rep. 5, it was said that the rule at law as well as in equity was, if only one executor has

proved, he may sue alone, though the others have not renounced. See, further, as to the joinder of executors, Williams's Executors, 3d ed. 1466, 1467.

(*s*) Per Bayley J. Webster v. Spencer, 3 B. & Ald. 363.

(*t*) 9 Rep. 37 *a*; 1 Saund. 291 *h*, note (4); Kilby v. Stanton, 2 Y. & J. 75; Creswick v. Woodhead, *ante*, note (*r*).

(*u*) Munt v. Stokes, 4 T. R. 565, per Buller J.; [Bodle v. Hulse, 5 Wend. 313;] but *quere* see 2 Williams's Executors, 1467; and Creswick v. Woodhead, *ante*, note (*r*). If a debtor make his creditor and another his executors, and the creditor neither prove the will nor act as executor, he may sue the other for the debt, although he has not renounced. Rawlinson v. Woodhouse, 3 T. R. 557.

(*x*) 1 Saund. 291 *i*, *k*; [Packer v. Willson, 15 Wend. 343; Gordon v. Goodwin, 2 Nott & McC. 70; Bodle v. Hulse, 5 Wend. 313; Brinckerhoff v. Wemple, 1 Wend. 470.] *Aliter*, in the case of assignees of a bankrupt, *post*, 26.

(*y*) *Ante*, 15.

be recovered would be assets; (z) and in these cases the cause of action should be stated to have accrued, and the promise to have been made to them "*as executors.*" (a) And a party may sue as executor for money had and received to his use in that character, although he was guilty of a *devastavit*, in paying the money sued for to the defendant. (b) But executors who contract for the sale of their testator's effects, or make any other agreement in their representative character, are not bound to declare in that capacity, but may sue in their individual right; and in such case it is sufficient to join as plaintiffs such only of the executors as interfered, and were actual parties to the contract with the defendant. (c) An executor cannot sue as such upon a penal statute. (d) In the case of an aggregate corporation the successors may sue on a contract with or cause of action vested in their predecessors. (e)

* Before the 3 & 4 W. 4, c. 42, s. 31, executors and administrators, who sued at law unsuccessfully for the breach of a supposed contract with the deceased, were *not liable to pay costs, de bonis propriis*, which immunity encouraged many indiscreet and hasty actions; but now executors and administrators are as much liable to pay costs as other unsuccessful plaintiffs, unless the judge who tries the cause certifies so as to *protect them from costs*. So that now a personal representative must fully inquire into the sustainability of an action before it is commenced. (f)

The right of the *grantee* of a reversion to sue upon a *covenant relating to and running with the estate*, has been already noticed. (g) In the case of the death of the covenantee seised in fee, the executor may sue at common law upon such covenants, though they affected the realty, as were broken in the *testator's lifetime* and actually diminished his personal estate. (h) But it is only by virtue of the statute 32 Hen. 8, c. 32, that an executor can sue for arrears of rent which accrued to his testator, who was seised in fee or for life. (i) With regard to such breaches of real covenants as occurred in the lifetime

(z) *Cowell v. Watts*, 6 East, 405; *Webster v. Spencer*, 3 B. & Ald. 360; 2 Chit. Rep. 325; *Powley v. Newton*, 6 Taunt. 453; *Werner v. Humphreys*, 3 Scott N. S.; 2 M. & Gr. 853; *Marshall v. Broadhurst*, 1 Cr. & J. 403; 1 Tyr. 348.

(a) *Ib.*

(b) *Clark v. Hingham*, 2 B. & C. 149.

(c) *Brassington v. Ault*, 2 Bing. 177; 9 Moore, 340, S. C.; *Grissell v. Robinson*, 3 Bing. N. C. 10.

(d) *Com. Dig. Administration*, B. 15; *Branden v. Pate*, 2 H. Bl. 311.

(e) *Com. Dig. Biens*, C.; *Bac. Ab. Corporations*, F. 4; 2 Bl. Com. 430; *The Mayor, &c. of Colchester v. Seaber*, 3 Burr. 1866.

(f) *Lysons v. Barrow*, 10 Bing. 563; 2 Dowl. 807, S. C.; *Ashton v. Poynter*, 1 Cr. M. & R. 738; 3 Dowl. 465; 1 Gale, 57.

(g) *Ante*, 19.

(h) *Ante*, 22. Except in the case of joint tenancy of the testator with a person who survives. *Bac. Ab. Debt*, C., *Heir*, E.; *Vin. Ab. Covenant*, K. 2, pl. 5.

(i) [See *Van Rensselaer v. Platner*, 3 John. Cas. 17; *Hamilton v. Wilson*, 4 John. 72.] The 11 Geo. 2, c. 19, s. 15, gives an executor of a tenant for life the right to sue for a proportion of the rent to the death of the testator, where he dies before the rent was actually due; and by 4 & 5 W. 4, c. 22, this statute is extended to rents reserved on leases determining on the death of the person making them, or on the death of the tenant *pur autre vie* (s. 1), and all rents, annuities, and other payments coming due at fixed periods are made apportionable by the same statute. Sect. 2.

of the ancestor, but occasioned him no actual damage, or after his death, the action should be brought in the name of his *heir*, or his *devisee*, who, in this respect, is invested with the same rights as would have devolved on the heir. (*k*) The heir or devisee need not be expressly named in the covenant in order to entitle him to sue: the slightest indication of an intention that the covenant should not determine with the death of the testator would leave the remedy to the representative of his realty. (*l*) The executor of a termor (although he has demised for a longer term than his own) may support an action on the covenant for the stipulated rent, due since the death of his testator, on the *privity of contract*, though not on any supposed privity of *estate*. (*m*)

If an executrix or administratrix marry, she and her husband should join for the breach of any *personal* contract made with the *deceased; (*n*) but if she sue alone, the defendant cannot avail himself of the non-joinder except by a plea in abatement; (*o*) and when a bond or other contract is made to husband and wife as executrix, he may sue alone. (*p*)

When an executor dies after he has proved the will, his executor, or the executor of such executor, is the party to sue on the contract made with the original testator, provided the money to be recovered would be the assets of the representatives of the original testator himself. (*q*) If the money to be recovered would be assets of the original testator, then, in case of the death of his first representative, administration *de bonis non* must be obtained, and the defendant sued accordingly; and, therefore, where A. died intestate, and B. took out administration, and died before the effects were fully administered, and C. took out administration *de bonis non*, and sued D. as acceptor of the bill of exchange indorsed to the administratrix in payment of a debt due to the

(*k*) *Kingdon v. Nottle*, 1 M. & Sel. 355; 4 M. & Sel. 53, S. C.; *Jones v. King*, 5 Taunt. 418; 4 M. & Sel. 188, S. C.; *Vyvyan v. Arthur*, 1 B. & C. 410; *Roe v. Hayley*, 12 East, 464; *Platt on Cov.* 513, 519. [See, however, 2 *Sugden V. & P.* (8th Am. ed.) 577, note (*g*); *Clark v. Swift*, 3 Met. 390, 393; *Mitchell v. Warner*, 5 Conn. 497; 4 Kent, 472; *Watson v. Blaine*, 12 Serg. & R. 131.] But for breaches of contract *not under seal*, relating to land, and committed in the lifetime of the testator, the executor, and not the heir or devisee, is the proper party to sue. See *Orme v. Broughton*, 10 Bing. 533; 8 C. 4 M. & Sc. 417.

(*l*) *Lougher v. Williams*, 2 Lev. 92; 2 Saund. 367 a, 371; *Platt on Cov.* 517, 518. It is well observed by Mr. Platt, that perhaps the best way of putting it is, that the covenant will in all these cases run with the land in favor of the heir, unless an evident intention be manifested to confine it to the covenantee. As to warranty, see *Co. Litt.* 264 a.

(*m*) *Baker v. Gosling*, 1 Bing. N. C. 19; *Mackay v. Mackreth*, 2 Chit. Rep. 461; 2 Chit. Pl. 565 a, 5th ed.

(*n*) *Com. Dig. Baron & Feme, V.*

(*o*) *Milner v. Milnes*, 3 T. R. 631; 1 Saund. 291 g.

(*p*) *Ankerstein v. Clarke*, 4 T. R. 616; *Yard v. Ellard*, 1 Salk. 117.

(*q*) See *Williams's Executors*, 3d ed. 183. The executor of an executor is the representative of the first testator, but if the first executor die intestate his administrator is not the representative of the testator, but an administrator *de bonis non* of such testator must be appointed, who will be the personal representative of the testator. What are such assets, and when representatives of first representatives should sue, *Yates v. Gough*, 1 Vern. 473; *Yelv.* 33; *Cro. Jac.* 4; *Moore*, 680, S. C.; *Elliott v. Kemp*, 7 M. & W. 306; *Williams's Executors*, 3d ed. 1298-1319.

intestate; it was held that the action was well brought by the administrator *de bonis non*. (r) And if a promise be made to the personal representative of an intestate, the administrator *de bonis non* may sue on it in his character of administrator, and may join such a cause of action with counts upon promises made to the intestate. (s) Where an infant is a sole executor, probate is not to be granted to him till he attain the age of twenty-one years, and in the interim administration with the will annexed is to be granted to another person. (t)

In the case of bankruptcy the *legal* rights of the bankrupt arising from contracts made with him, and in the performance whereof the bankrupt is beneficially interested, are, by the express provisions of the bankrupt act, transferred to and vested in his assignees. The 6 Geo. 4, c. 16, directed the assignment of all debts due to the bankrupt, and enacted that such assignment should vest the property, right, and interest in such debts in such assignees as fully as if the assurance whereby they were secured had been made to such assignees; and that after such assignment, neither the bankrupt, nor any person claiming through or under him, should have power to recover the same, nor to make any release or discharge thereof, neither should *the same be attached as the debt of the bankrupt by any person, according to the custom of the city of London or otherwise, but such assignees should have like remedy to recover the same *in their own names*, as the bankrupt himself might have had, if he had not been adjudged bankrupt. (u)

There are cases, however, in which the bankrupt may sue as trustee for his creditors. (x) The assignment is no longer necessary in order to vest the estate of the bankrupt in the assignees; since the 1 & 2 W. 4, c. 56, s. 25, enacts, "that when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws then in force might be assigned by commis-

(r) *Catherwood v. Chabaud*, 1 B. & C. 150; 2 D. & R. 271; *Tingrey v. Brown*, 1 B. & P. 310; *Williams's Executors*, 3d ed. 183.

(s) *Hirst v. Smith*, 7 T. R. 182.

(t) 38 Geo. 3, c. 87; *Williams's Executors*, 3d ed. 165; *Wood's Inst.* 14; *Zouch v. Parsons*, 3 Burr. 1802.

(u) 6 Geo. 4, c. 16, s. 63. The consent of the creditors to the assignees suing at law is not necessary, *vide* s. 88, same stat.; *Bozon v. Williams*, 2 Y. & J. 475. As to right of assignees to sue for unliquidated damages, see *Wright v. Fairfield*, 2 B. & Ad. 727; *Porter v. Varley*, 9 Bing. 93; and for injury to bankrupt's personal property, *Hancock v. Caffyn*, 8 Bing. 358. The right of action for the seduction of a servant does not pass to the master's assignees on his bankruptcy. *Howard v. Crowther*, 8

M. & W. 601. Nor does money lent by a woman whilst sole, and before her marriage settled in the names of trustees for her benefit. See *Panham v. Hurst*, 8 M. & W. 743. So where a contract relates to the personal skill of the bankrupt, and the damages for the breach are compounded partly of the personal inconvenience to the bankrupt and partly of the consequential loss to his personal estate, the right of action for the breach of such contract does not pass to the assignees. *Beckham v. Drake*, 8 M. & W. 846. As to the right of the assignees to affirm a contract made by the bankrupt after his bankruptcy or to sue in tort, see *King v. Leith*, 2 T. R. 141; *Clark v. Gilbert*, 2 Bing. N. S. 343; *Gye v. Hitchcock*, 4 Ad. & El. 84.

(x) *Guinness v. Carroll*, 1 B. & Ad. 459.

sioners acting in the execution of a commission against such bankrupt shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment without any deed of assignment for that purpose, as fully to all intents as if such estate and effects were assigned by deed to such assignees and the survivor of them; and as often as any such assignees shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose." (x¹)

The right of action is vested in *all* the assignees jointly, and the non-joinder of one of them as a plaintiff in an action was considered a ground of nonsuit. (y) But in the case deciding that point, the contract declared on was exclusively made with the *assignees*, and therefore they did not altogether sue in *autre droit*; and, in general, when assignees sue on a contract with the bankrupt, there seems no reason why, if two out of three be plaintiffs, the defendant should * not be required (if he will set up the objection) to plead the non-joinder of the third in abatement. (z)

Where an action has been commenced by the bankrupt before the bankruptcy, the defendant may defeat the action by specially pleading the bankruptcy and assignment, and the assignees will be compelled to proceed *de novo* in their own names. (a)

Under the 6 Geo. 4, c. 16, where one of several assignees had been removed by order of the chancellor, such order, unless it had been followed up by a reassignment or release from the removed assignee

(x¹) [See the bankrupt law consolidation act, 12 & 13 Vict. c. 160, s. 141 (following 6 Geo. 4, c. 16, s. 63; and 1 & 2 W. 4, c. 56, s. 25) which assigns to the assignees all the personal estate of the bankrupt. 2 Chitty Contr. (11th Am. ed.) 1413 *et seq.* By the English bankrupt act, 1869 (32 & 33 Vict. c. 71, s. 17), the property of the bankrupt is, immediately upon the adjudication, to vest in the registrar, and is, on the appointment of a trustee, forthwith to pass to and vest in the trustee. 1 Dan. Ch. Pr. (4th Am. ed.) 58, note (4). As to the rights of action of the bankrupt which pass to the assignee or trustee, 2 Chitty Contr. (11th Am. ed.) 1414 *et seq.* As to the right to sue, of assignees appointed under the law of a foreign country, Bird v. Caritat, 2 John. 342; Raymond v. Johnson, 11 John. 48.]

(y) Saelgrove v. Hunt, 2 Stark. Rep. 434; 1 Chit. R. 71; but the contract declared on was made exclusively with the *assignees*, and therefore they did not sue merely in a representative character; see observations in Alivon v. Furnival, 1 Cr., M. & R. 285, 296. In the case of Holland v.

Phillips, 2 P. & D. 336; 10 Ad. & El. 149, the plaintiffs, who had been chosen assignees of a bankrupt, issued a *scire facias* to revive a judgment obtained by him before bankruptcy against the defendant, but omitted to make the official assignee a co-plaintiff, and the court, after plea pleaded and issue joined, allowed the proceedings to be amended by joining the official assignee, the defendant being allowed to plead *de novo*.

(z) *Quære*, if it ought not to be pleaded in abatement, as in case of non-joinder of a co-executor; see argument and judgment in Alivon v. Furnival, 1 Cr., M. & R. 290, 296.

(a) Kinnear v. Tarrant, 15 East, 622, Biggs v. Cox, 4 B. & C. 920. That this defence, if it arise after the commencement of the action, must be specially pleaded, and cannot be given in evidence under the general issue, see Page v. Bauer, 4 B. & Ald. 345; Lee v. Levy, 4 B. & C. 390. Where the bankruptcy of the plaintiff occurs after judgment, the action does not abate, and the assignees may proceed therewith to execution, &c.

to the remaining assignees, or by a new assignment by the commissioners, did not operate to divest the legal interest of the removed assignee, and he was therefore still a necessary party to an action; but this is no longer the case under the above section of the 1 & 2 W. 4, c. 56. (b) A new assignee may sue upon a judgment recovered by a former assignee where such judgment was recovered, as well for damages sustained by reason of injuries committed by the defendant against the bankrupt before his bankruptcy, as against the assignee *as such* after the bankruptcy. (c) By the 67th section of the 6 Geo. 4, c. 16, it is provided that "whenever an assignee shall die, or a new assignee or assignees shall be chosen, no action at law or suit in equity shall be thereby abated; but the court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." And under the 67th section of the same statute, it has been decided, that a second assignee, who continues by suggestion on the record a suit commenced by his predecessor, may recover a *penalty* as well as his assignee. (d)

Before the creditors' assignees are appointed, the official assignee is (unless otherwise ordered by the lord chancellor) entitled to the estate and effects of the bankrupt, and may sue for any debt due to the bankrupt before his bankruptcy. (e) When under the 6 Geo. 4, c. 16, *assumpsit* was brought in the name of the provisional assignee, it was held, that the fact of the bankrupt's estate having been assigned by the provisional assignee to the new assignees, between the time of issuing the *latitat* and the delivery of the declaration, was no ground of nonsuit upon a plea of *non assumpsit*. (f)

* When one of several partners becomes bankrupt, the action must be in the name of the solvent partner and the assignees of the bankrupt; (g) but the late bankrupt act (h) provides that the court, authorized by that statute to act in the prosecution of the fiat upon his or their application, may authorize the assignee or assignees to use the name of the solvent partner without his consent, provided that such partner shall have notice of such application, and if no benefit

(b) *Bloxam v. Hubbard*, 5 East, 407; *Snellgrove v. Hunt*, 1 Chit. Rep. 71; [*Van Valkenburgh v. Elmendorf*, 13 John. 314.]

(c) *De Cosson v. Vaughan*, 10 East, 61.

(d) *Bates v. Sturges*, 7 Bing. 583.

(e) 1 & 2 W. 4, c. 56, s. 22; 5 & 6 Vict. c. 122, s. 48, 51.

(f) *Page v. Bauer*, 4 B. & Ald. 345. *Quere*, if it had been specially pleaded. It has been doubted whether under the same statute assignees could have sued for a tort

committed against the estate of a provisional assignee. *Freen v. Cooper*, 6 Taunt. 358; *Eden*, 2d ed. 337.

(g) *Thomason v. Frere*, 10 East, 418; *Eckhardt v. Wilson*, 8 T. R. 140; *Anonymous*, 12 Mod. 446; *Carvalho v. Burn*, 4 B. & Ad. 382; S. C. 1 Nev. & Man. 700; *Lewis v. Edwards*, 7 M. & W. 300; [*Murray v. Murray*, 5 John. Ch. 703; *Willink v. Renwick*, 23 Wend. 63.]

(h) 5 & 6 Vict. c. 122, s. 31.

be claimed by him by virtue of the proceedings, he shall be indemnified against costs, and upon his application the court may direct that he shall receive a share of the proceeds of the action.

The assignees of two partners, under *separate* fiats against each, may jointly sue for and recover a debt which was due to both the partners; but they cannot recover in the same action a joint debt due to both, and separate debts due to each of the partners. (i) When there are several sets of assignees under separate fiats against partners, they may join in suing for a debt due to all the partners, but in such case the declaration should state what the several titles and interests of the plaintiffs are; and if they sue, describing themselves generally as assignees of the bankrupts, it will be a fatal variance; (k) but where the plaintiffs sued "as assignees of A. and B., and also as assignees of C.," for a joint demand due to the three bankrupts, the declaration was held sufficient, on a motion in arrest of judgment after verdict, since there was nothing upon the record to show that the plaintiffs did not claim under a joint commission against all, or under separate commissions against each of the bankrupts, in either of which cases the action is maintainable. (l)

Where there is a *joint* fiat against two partners, the assignees may recover in the same action debts due to the partners jointly, and also debts due to them separately; (m) but when the plaintiffs sued as assignees under a joint commission against two partners, and it appeared that only one had in fact committed an act of bankruptcy, it was held, the plaintiffs were not entitled to recover in respect of the interest of the partner who had become a bankrupt. (n) The assignees under a joint fiat against two partners in an action brought to recover a debt due to one of them, may, and indeed ought, to describe themselves in the declaration as assignees of such partner alone. (o)

When a contract is made with the assignees after the bankruptcy, *it is *not necessary* that they should sue thereon in the character of assignees; (p) though where the sum to be recovered would belong to the estate, they *may* sue as assignees, as where they have lent or paid money in that character; (q) but they cannot proceed in the same action both in their own right and as assignees. (r)

There are some cases in which, notwithstanding the bankruptcy, an action may be brought in the name of the *bankrupt* himself. Thus, where the bankrupt, prior to his bankruptcy, has assigned over the

(i) Hancock v. Haywood, 3 T. R. 433. Stonehouse v. De Silva, 3 Campb. 399;
 (k) Ray v. Davies, 8 Taunt. 134; 2 Moore, Scott v. Franklin, 15 East, 435.
 3, S. C. (p) Evans v. Mann, Cowp. 569.
 (l) Streatfield v. Halliday, 3 T. R. 779. (q) Richardson v. Griffin, 5 M. & Sel.
 (m) Graham v. Malcaster, 4 Bing. 115. 294; 2 Chit. Rep. 325. So as to executor,
 (n) Hogg v. Bridges, 8 Taunt. 200; 2 Webster v. Spencer, 3 B. & Ald. 360.
 Moore, 123, S. C. (r) Richardson v. Griffin, 5 M. & Sel.
 (o) Harvey v. Morgan, 2 Stark. R. 17; 297.

beneficial interest in a *chose in action* to a third person, the action must be brought in the name of the bankrupt, and not of the assignees; (s) for mere trust estates and interests do not pass by the appointment, but only property in which the bankrupt has an equitable or beneficial as well as legal title, and which may be made available towards the payment of his debts; (t) but if the bankrupt retained *any* beneficial interest, though he had parted with the rest, it seems the assignees should sue. (u)

The bankrupt is also, in several instances, allowed to sue in his own name in respect of property acquired and contracts made by him after the bankruptcy and before he has obtained his certificate; for although the appointment of the assignees vests in them all property which may accrue in any way to the bankrupt before he obtains his certificate, (x) it has been determined in many cases, that such property does not vest *absolutely* in the assignees, although they have a right to claim it; but if they forbear from making any claim, the bankrupt has a right against all other persons, and may maintain actions accordingly. (y) It has also been held, that where a third person has held out the bankrupt to the world as a party capable of doing a particular act which would confer a right of action upon another, as where he has made a promissory note payable to the bankrupt or his order after the bankruptcy, he will be estopped from setting up the bankruptcy as an answer to an action brought by a party claiming under the bankrupt. (z) But it appears to be fully settled, that an uncertificated bankrupt is incapable of retaining property against his assignees; (a) and that, when the dispute is between the bankrupt and a third party, their intervention will at once annihilate all right on the part of the former, such right being entirely * conditional upon the non-interference of the assignees. (b) It has even been held, (c) that if the assignees enter into an express contract with the bankrupt to remunerate him for his work and labor performed in their behalf, he may maintain an action against them upon such contract, but the soundness of this doctrine may reasonably be doubted. (d)

When all the creditors of the bankrupt, who have proved under the

(s) *Winch v. Keeley*, 1 T. R. 619; *Carpenter v. Marnell*, 3 B. & P. 40; *Chalmers v. Page*, 3 B. & Ald. 697.

(t) *Ib.*; and see *Eden's B. L.* 244, 2d ed.; *Kitchen v. Bartsch*, 7 East, 53.

(u) *Ib.*

(x) 1 & 2 W. 4, c. 56, s. 22.

(y) *Drayton v. Dale*, 2 B. & C. 293; *Ashley v. Kell*, 2 Strange, 1207; *Webb v. Fox*, 7 T. R. 391. *Semble*, the interference and claim of the assignees *after* action brought by the bankrupt would be sufficient to afford a defence. See *Hull v. Pickersgill*, 3 Moore, 612; and it seems the bankrupt cannot sue

as to property acquired *before* the bankruptcy, though the assignees do not interfere. *Lea v. Telfer*, 1 C. & P. 147.

(z) *Drayton v. Dale*, 2 B. & C. 293.

(a) *Evans v. Mann*, Cowp. 570; *Nias v. Adamson*, 3 B. & Ald. 225; *Heese v. Stevenson*, 3 B. & P. 565.

(b) *Kitchen v. Bartsch*, 7 East, 53; *Hall v. Pickersgill*, 1 B. & B. 282.

(c) *Coles v. Barrow*, 4 Taunt. 754.

(d) See *Nias v. Adamson*, 3 B. & Ald. 232; and note to *Coles v. Barrow*, 4 Taunt. 760.

commission, have been paid in full, the bankrupt is entitled to sue for and recover the remainder of the debts due to him. (e)

The principal statutes now in force respecting insolvent debtors are 1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 116. The first act is in many of its provisions a reënactment of the 7 Geo. 4, c. 57, and applies to proceedings where the party is in custody for debt. The 5 & 6 Vict. c. 116, enables persons not in custody to take the benefit of the insolvent laws; and as the provisions of these two statutes respecting the vesting of the insolvent's effects are dissimilar, it will be necessary to notice them separately.

7thly. In the case of an insolvent debtor.

The 1 & 2 Vict. c. 110, directs that upon the filing of the petition by the prisoner or the creditor, as the case may be, the court shall order that all the real and personal estate and effects of such prisoner, except as therein mentioned, and all his future estate, right, title, interest, and trust in or to any real or personal estate and effects shall vest in the provisional assignee of the court. (f) And it is enacted, (g) "That it shall be lawful for the provisional assignee to sue in his own name, (g¹) if the court shall so order, for the recovering, obtaining, and enforcing, of any estate, debts, effects, or rights of any such prisoner: and that all and every the real and personal estate, money and effects vested in or possessed by such provisional assignee, by virtue of such order, shall not remain in him, if he shall resign or be removed from his office, nor in his heirs, executors, or administrators, in case of his death, but shall go to and be vested in his successor in office." It was held, on the provisions of former insolvent acts, the enactments of which were in this respect of nearly a similar description to those above noticed, that the provisional assignee might proceed in ejectment for the recovery of property assigned to him, without applying for the leave of the insolvent debtors' court; that it was not necessary to prove upon the trial that such court had authorized the proceedings; (h) and that the court in which the action was brought would not, at the instance of a *defendant*, interfere to stay the *proceedings in such an action, on the ground of no such authority having been obtained. (i)

By a subsequent section, (k) the insolvent court is empowered at any time, after the making of the vesting order, to appoint assignees for the purposes of the act, and, immediately upon such assignee accepting the office, the estate and effects of the prisoner vested in the provisional assignee is immediately, by virtue of such appointment

(e) 6 Geo. 4, c. 16, s. 132.

(f) 1 & 2 Vict. c. 110, s. 37.

(g) *Ib.* s. 42.

(g¹) [See *Cooper v. Henderson*, 6 Binn. 188; *Kennedy v. Ferris*, 5 Serg. & R. 394; *Stoecker v. Stoecker*, 9 Serg. & R. 434.]

(h) *Doe dem. Clark v. Spencer*, 3 Bing. 203.

(i) *Doe dem. Spencer v. Clark*, 3 Bing. 370; *Casborne v. Barsham*, in vice chancelor's court, 2d July, 1835.

(k) Sect. 45.

and without any conveyance or assignment, vested in the assignees so appointed. And it is afterwards enacted, (l) "That it shall be lawful for the assignee or assignees of such prisoner, and such assignee or assignees is and are thereby empowered, to sue from time to time, as there may be occasion, in his or their own name or names, for the recovering, obtaining, and enforcing of any estate, effects, or rights of such prisoner." It is also provided, (m) that upon the death or removal of assignees, or the appointment of new assignees, no action or suit shall be thereby abated, but that the court in which such action or suit is depending, may, upon the suggestion of such death or removal and new appointment, allow the names of the new assignees to be substituted in the place of the former; and that such action or suit shall be prosecuted in the names of the surviving or new assignees in the same manner as if it had been originally commenced by them. There is no clause rendering it necessary for the assignees to apply to the creditors, or to the insolvent court, for authority to commence an action at law.

The 5 & 6 Vict. c. 116, enacts that upon the presentation of the petition by the insolvent as therein mentioned, all the estate and effects of the petitioner shall forthwith become vested in the official assignee nominated by the commissioners acting in the matter of the said petition, (n) and that from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to her majesty, as in the United Kingdom of Great Britain and Ireland, and all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee and assignee chosen by the creditors without any deed or conveyance, which assignee shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under his fiat, and shall sue and be sued as if they had been assignees under such fiat; and as often as any such assignees shall die or be lawfully removed, and a new assignee duly appointed, all estate real and personal, and such effects and credits as were or remained vested in such deceased or removed assignee, shall vest in the new assignee either alone or jointly with the existing * assignees, as the case may require, without any deed or conveyance for that purpose. (o)

From the above provisions it will be seen, that many of the decisions relative to actions by the assignees of a bankrupt, (p) will be applicable to the case of actions by the assignees of an insolvent debtor, under the 1 & 2 Vict. c. 110, as well as under the 5 & 6 Vict. c. 116.

(l) Sect. 51.

(m) Sect. 53.

(n) Sect. 1 & 7.

(o) Sect. 7.

(p) See *ante*, 25-30.

It was determined, upon the 11th and 19th sections of the 7 Geo. 4, c. 57, which correspond with the 37th and 45th sections of the 1 & 2 Vict. c. 110, that the death of an insolvent, after the assignment to the provisional assignee, but before the assignment to the assignee in chief, did not affect the validity of the latter assignment, but that all the rights of the provisional assignee passed to the assignee in chief. (q)

When an action was brought by a person who had assigned his property under an insolvent act, for a debt due to him before his assignment, the assignee refusing to sue, the court refused to interfere in a summary manner to stay the proceedings. (r) And it appears to be considered that an insolvent debtor, in the absence of any claim by his assignees, possesses a similar right to that possessed by a bankrupt against third persons, in respect to property and contracts which his assignees might claim the benefit of, if they chose to interfere. (s)

The assignees of a person discharged under the *lords' act* are also authorized to sue for the recovery of the estate and effects of the party discharged. (t)

The effect of *marriage*, at least in courts of *law*, is to deprive the wife of all separate legal existence, her husband and her herself being in law but one person, (u) though in the ecclesiastical courts a wife may sue alone for a legacy, &c. (v) It is therefore a general rule, that she cannot, during the marriage, maintain an action without her husband, (v¹) either upon contracts made

Stily. In
the case of
marriage.

(q) *Willes v. Elliott*, 4 Bing. 392.

(r) *Snow v. Townsend*, 6 Taunt. 223; 1 Marsh. 477, S. C.

(s) *Taylor v. Buchanan*, 4 B. & C. 419; *Lea v. Telfer*, 1 Car. & P. 146, 147. To a plea alleging that the plaintiff had taken the benefit of the insolvent debtors' act since the commencement of the action, a replication that the action is carried on for the benefit of his assignees is bad. *Swann v. Sutton*, 2 P. & D. 533.

(t) 32 Geo. 2, c. 28, s. 12, 17, and other statutes. See *Tidd*, 9th ed. 375.

(u) Litt. sect. 28; Bac. Abr. Baron & Feme, M.

(v) *Norris v. Hemingway*, 1 Hagg. R. 4; *Suter v. Christie*, 2 Add. R. 151; *Capel v. Roberts*, 3 Hagg. R. 161, in note; 2 Chitty's Gen. Prac. 467.

(v¹) [But by a late statute in England (33 & 34 Vict. c. 93, § 11) a married woman is empowered to maintain an action in her own name, for the recovery of any wages, earnings, money, or property by that act declared to be her separate property (1 Chitty Contr. (11th Am. ed.) 229, 230); or for any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong

to her after marriage as her separate property. 1 Chitty Contr. (11th Am. ed.) 256. And by statute in Massachusetts (Genl. Stat. c. 108, § 3) a married woman may sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole. So she may sue and be sued on contracts made by her for necessities to be furnished to herself and family. *St. Mass.* 1869, c. 304. See *Gordon v. Dix*, 106 Mass. 305; *Labaree v. Colby*, 99 Mass. 559; *Fiske v. McIntosh*, 101 Mass. 66; *Estabrook v. Earle*, 97 Mass. 302; *Burke v. Cole*, 97 Mass. 113. When a suit is brought by or against a married woman, for a cause of action to which she is entitled, or for which she is liable, it is not necessary, under the statutes of Massachusetts, to allege in the writ her marriage and that the subject-matter of the suit was her sole and separate property or services. It is sufficient, if the facts disclosed at the trial establish her right to recover, or her liability on account of her separate property. *Foster J.* in *Hubert v. Fera*, 99 Mass. 198; *Van Buren v. Swan*, 4 Allen, 380; *Robbins v. Potter*, 11 Allen, 588; S. C. 98 Mass. 532. See *Sigel v. Johns*, 58 Barb. 620. In an action against her on a promis-

by her before or after the marriage, (*w*) although they may be living apart under the provisions of a formal deed of separation; (*x*) or by virtue of a divorce *à mensâ et thoro*, (*x*¹) for adultery; (*y*) or he may have left the country and deserted her. (*z*) * The exceptions are in

sory note given by her while living with her husband, the burden of proof is on the plaintiff to show the facts necessary to render her liable thereon. *Tracy v. Keith*, 11 Allen, 214. In New Hampshire, it has been recently decided, that a defendant, sued by a married woman, who declares as if she were a *feme sole* but does not show that she has a right thus to sue, may take advantage of the defect by a plea in abatement, and the plaintiff must reply the facts which enable her to sue alone. *Dutton v. Rice*, 53 N. H. 496. In this case, the court say that the rule of pleading, by which the burden of allegation of facts enabling a *feme covert* to sue alone is thus cast upon her, seems, in the present condition of statutory law in New Hampshire, to be more convenient and reasonable than a rule which should impose upon the defendant, in pleading, a denial of all the possible conditions in which the suit might be maintained, notwithstanding the coverture. See, also, *Jordan v. Cummings*, 43 N. H. 134; *Wellcome v. Riley*, 63 N. H. 139; *Arnold v. Bernard*, 8 Abb. Pr. N. S. 116; *Lewis v. Moore*, 25 Ark. 63. As to the right and liability of a married woman to sue and be sued in Georgia, see *Meriwether v. Smith*, 44 Geo. 541. In Illinois, *Peru v. French*, 55 Ill. 317; *Mix v. King*, 55 Ill. 434; *Beach v. Miller*, 51 Ill. 206. In Iowa, *Pancoast v. Burnell*, 32 Iowa, 394. New York, *Rawson v. Pennsylvania R. R. Co.* 48 N. Y. 212; *Rowe v. Smith*, 45 N. Y. 230; *Sigel v. Johns*, 58 Barb. 620. (In New York, by statute, as a general rule, when a married woman is a party, her husband must be joined with her; one exception, however, is that when the action concerns her separate property, she may sue alone. Code, § 114. Hence it has been decided, that in all actions concerning the separate property of the wife, the husband is not a proper party. The wife must sue alone. *Draper v. Stouvenel*, 35 N. Y. 507; *Palmer v. Davis*, 28 N. Y. 242.) In New Hampshire, *Bailey v. Pearson*, 29 N. H. 77; *Shannon v. Canney*, 44 N. H. 592. Missouri, *Boal v. Morgner*, 46 Missou. 38; *Lackland v. Mittalberger*, 50 Missou. 183. Maryland, *Barton v. Barton*, 32 Md. 214. New Jersey, *Van Kirk v. Skillman*, 34 N. J. (Law) 109; *Eckert v. Reuter*, 33 N. J. (Law) 266. Mississippi, *Bacon v. Bevan*, 44 Miss. 293. Maine, *Tunks v. Grover*, 57 Maine, 586. Texas, *Houston v. Schrimpf*, 31 Texas, 667. Kansas, *Deering v. Boyles*, 8 Kan. 525. The right of a married woman to maintain an action in her own name is governed by the law of the state in which the action is brought. *Stoneman v. Erie Railway Co.* 52 N. Y. 429.]

(*w*) *Supra*, note (*u*); *Candell v. Shaw*, 4 T. R. 361; *Beard v. Webb*, in error, 2 B.

& P. 93. [It is provided by statute in Massachusetts (Genl. Sta. c. 127, § 22), that if an unmarried woman, who is a party to a suit either alone or with others, marries before final judgment, she may continue to prosecute or defend the suit in like manner as if she were sole, and her husband need not be admitted as a party thereto.]

(*x*) *Marshall v. Rutton*, 8 T. R. 545; *Nurse v. Craig*, 2 New Rep. 148. A deed providing for future separation was considered void. *Hindley v. The Marquis of Westmeath*, 6 B. & C. 200; but see 3 Chit. Gen. Prac. 329.

(*x*¹) [See *Dean v. Richmond*, 5 Pick. 461; *Pierce v. Burnham*, 4 Met. 303.]

(*y*) *Lewis v. Lee*, 3 B. & C. 291.

(*z*) *Boggett v. Frier*, 11 East, 301; [but see *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89; 1 Chitty Contr. (11th Am. ed.) 253, 254, and notes. In *Bean v. Morgan*, 4 McCord, 148; S. C. 1 Hill (S. Car.), 8, it was held, that if the husband leave the state, without the intention of returning, the wife is competent to contract, to sue and be sued, as if she were a *feme sole*. See *Valentine v. Ford*, 2 Browne, 193; *Robinson v. Reynolds*, 1 Aik. 174; *Troughton v. Hill*, 2 Hayw. 406; *Rhea v. Renner*, 1 Peters (U. S.), 105; *Edwards v. Davies*, 16 John. 286; *Wright v. Wright*, 2 Desaus. 244; *James v. Stewart*, 9 Ala. 855; *Chateau v. Merry*, 3 Missou. 254. It was held, in New York, that when a husband abandons his wife and family, ceases to provide for them, removes permanently from the state, and renounces, so far as he can, his marital relations, his acts amount to an abjuring of the realm at common law, and his wife may sue and be sued in her own name. *Osborn v. Nelson*, 59 Barb. 375. In *Gregory v. Pierce*, 4 Met. 478, it was said by Shaw C. J.: "The principle is now considered as established in this state [Massachusetts], as a necessary exception to the rule of the common law placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. In *Abbot v. Bayley*, 6 Pick. 89, it was held that, in this respect, the residence of the husband in another state of these United States, was equivalent to a residence in a foreign state; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts."]

the instances of a divorce *à vinculo matrimonii*, (a) or where the husband is dead in law by reason of his transportation under a judicial sentence. (b) Where the husband has been abroad, and not heard of for seven years, his death will be presumed. (c)

All *chattels* personal of the wife, in possession, are by marriage absolutely given to the husband, and for the recovery of them he may sue alone; (d) and in a case, where a bill of exchange was payable to a *feme sole*, who intermarried *before the same was due*, it was held, that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill, such a bill or note not being a mere *chose in action*. (e) And it is a general principle, "that that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this he may sue without his wife." (f)

As mere *choses in action* of the wife do not by the marriage vest absolutely in the husband until he reduce them into possession, (f¹) and if not reduced into possession, she would take them by survivorship, in general he cannot sue alone, (f²) but must join his wife in all actions upon bonds, and other personal contracts, made with the wife *before* the marriage, whether the breach were before or during the coverture; and also for rent or any other cause of action accruing before the marriage, in respect of the real estate of the wife. (g) There are, indeed, decisions and opinions which appear to militate against this rule; (h) but the current of authorities seems fully to establish it, and it is observable that it prevails also in equity and in cases of bankruptcy; (i) and that the rule is the same when the action

(a) *Lewis v. Lee*, 3 B. & C. 297. [See *Wintercast v. Smith*, 4 Rawle, 177.]

(b) *Sparrow v. Carruthers*, cited in *Lean v. Schurz*, 3 Bl. Rep. 1197, and in *Corbett v. Poelnitz*, 1 T. R. 7; *Marsh v. Hutchinson*, 2 B. & P. 231; *Carrol v. Blencow*, 4 Esp. Rep. 27; *Lewis v. Lee*, 3 B. & C. 297. [See *Deming's case*, 10 John. 232; *Platner v. Sherwood*, 6 John. Ch. 118; *Wright v. Wright*, 2 Deane's. 244; *Cornwall v. Hoyt*, 7 Conn. 420; *Troughton v. Hill*, 2 Hayw. 496; *Robinson v. Reynolds*, 1 Aik. 174; 2 Kent, 154; *Foster v. Everard*, *Craw. & Dix*, 135.]

(c) *Hopewell v. De Pinna*, 2 Campb. 113; *Lambert v. Atkins*, 2 Campb. 272; 1 Jac. c. 11, s. 2; *Row v. Hasland*, 1 Bl. Rep. 404; *Doe v. Jemou*, 6 East, 80.

(d) *Kenyon C. J.* in *Milner v. Milnes*, 3 T. R. 631; *Co. Litt.* 351 b; *Com. Dig.* Baron & Feme, E. 3; [Commonwealth v. Manley, 12 Pick. 173.]

(e) *M'Neillage v. Holloway*, 1 B. & Ald. 218. He alone might have petitioned for a commission of bankruptcy upon a note given to his wife *dum sola*. *Ex parte Barber*, 1 Gill & J. 1; [Commonwealth v. Manley, 12 Pick. 173.]

(f) *Per Dodderidge J.* in *Brett v. Cum-*

berland, 3 Bulst. 164, recognized in *M'Neillage v. Holloway*, 1 B. & Ald. 224.

(f¹) [1 *Chitty Contr.* (11th Am. ed.), 223 *et seq.* and notes.]

(f²) [See *Clapp v. Stoughton*, 10 Pick. 463; *Morse v. Earle*, 13 Wend. 271.]

(g) *Kenyon C. J.* in *Milner v. Milnes*, 3 T. R. 631; *Rumsey v. George*, 1 M. & Sel. 180, 181; *Com. Dig.* Baron & Feme, V.; *Bac. Abr.* Baron & Feme, K.; 1 *Roll. Abr.* 347, R. pl. 3; *Wright v. Rutter*, 2 Ves. 676, 677; *Bul. N. P.* 179; *Carr v. Taylor*, 10 Ves. 578; *Obrian v. Ram*, 3 Mod. 186; *Weller v. Baker*, 2 Wils. 423; *Rose v. Bowler*, 1 H. Bl. 109; *M'Neillage v. Holloway*, 1 B. & Ald. 222, 223; [Clapp v. Stoughton, 10 Pick. 470; *Hay v. Rogers*, 4 Monr. 225; *McGruder v. Stewart*, 4 How. (Miss.) 204; *Prescott v. Brown*, 23 Maine, 305, 306; *Decker v. Livingston*, 15 John. 479; *Morse v. Earle*, 13 Wend. 271.]

(h) *Howell v. Maine*, 3 Lev. 403; *Selw. N. P.* 285, 5th ed.; *Co. Litt.* 351 a, 396, note (2); cases cited in *Mitchinson v. Hewson*, 7 T. R. 349; *Oglander v. Baston*, 1 Vern. 396.

(i) *Rumsey v. George*, 1 M. & Sel. 176; *Clarke v. Ld. Ainger*, 2 Freem. 160; *Bac. Ab.* Baron & Feme, K.; 15 Ves. 495.

is brought on a contract made by a feme whilst sole, in which case the husband cannot be sued alone. (*k*) And when the wife is executrix or administratrix, as her interest is in *autre droit*, (*k*¹) they must in general join in the action. (*l*) But if in respect of a contract made to the wife whilst sole, the party thereto, after the marriage, give a bond to the *husband and wife, or in respect of some new consideration, as forbearance, &c. make a written or parol promise to the husband and wife, they may join, or the husband may sue alone upon such new contract. (*m*) If such bond or fresh promise were made to the husband alone, he alone can sue thereon, the wife not being privy to the new contract; (*n*) but they may jointly sue on the original contract in cases where it is not merged by a higher security. If a bond be given to a husband and wife administratrix, he may declare on it as a bond made to himself. (*o*)

In general, the wife cannot join in any action upon a contract made *during* the marriage, as for her work and labor, goods sold, or money lent by her during that time; (*p*) for the husband is entitled to her earnings, and they shall not survive to her, but go to the personal representatives of the husband, and she could have no property in the money lent or the goods sold. (*q*) But when the wife can be considered as the *meritorious* cause of action, (*q*¹) as if a bond or other contract under seal, or a promissory note, be made to her separately, or with the husband, (*r*) or if she bestow her personal labor and skill in curing a wound, &c. (*s*) she may join with the husband, or he may sue alone.

Where the wife is joined in the action, in these cases the declaration must distinctly disclose her interest, and show in what respect

(*k*) *Mitchinson v. Hewson*, 7 T. R. 348.

(*k*¹) [So, where a wife is guardian in socage. *Byrne v. Van Hoesen*, 5 John. 66.]

(*l*) Vin. Abr. Baron & Feme, Q. 22; Com. Dig. Baron & Feme, V.

(*m*) *Rumsey v. George*, 1 M. & Sel. 180; *Ankerstein v. Clarke*, 4 T. R. 616; *Yard v. Ellard*, 1 Salk. 117; 1 Ld. Raym. 368.

(*n*) See *Ib.*; *Lee v. Mynne*, Cro. Jac. 110; *Higgins v. Butcher*, Yelv. 89; 1 Saund. 210.

(*o*) *Ankerstein v. Clarke*, 4 T. R. 616.

(*p*) *Bidgood v. Way*, 2 Bl. Rep. 1239; *Buckley v. Collier*, 1 Salk. 114; Com. Dig. Baron & Feme, W.; *Weller v. Baker*, 2 Wils. 424; *Chambers v. Donaldson*, 9 East, 472; [*Cooper v. Alger*, 51 N. H. 174; *Hoyt v. White*, 46 N. H. 45; *Reilly v. United States*, 7 Ct. of Cl. 504. But under the provision of the Genl. Sta. (N. Hamp.) c. 164, s. 1, married women *shall* hold all property at any time earned by them, to their sole use; and it has been decided that, in a suit to recover for such earnings of the wife, it will be sufficient ground for nonsuit, if the husband joins as plaintiff. *Cooper v. Alger*, 51 N. H. 172.] Where the wife is

separated from her husband, she may in some cases, without his concurrence, sue in his name. *Chambers v. Donaldson*, 9 East, 471.

(*q*) *Ib.* *Ibid.*; *Abbott v. Blofield*, Cro. Jac. 644; *Weller v. Baker*, 2 Wils. 424; *Bidgood v. Way*, 2 Bl. Rep. 1237; *Buckley v. Collier*, Carth. 251. *Semble*, that although by the laws of a foreign country, husband and wife, natives of that country and resident there, may be partners in trade, they cannot jointly sue here for a debt due to the firm. *Cosio v. De Bernales*, R. & M. Rep. 102.

(*q*¹) [See *Prescott v. Brown*, 23 Maine 305; 1 Chitty Contr. (11th Am. ed.) 257.]

(*r*) *Howell v. Maine*, 3 Lev. 403; *Aleberry v. Walby*, Stra. 230; *Ankerstein v. Clarke*, 4 T. R. 616; *Co. Litt.* 351 a, note (1), 304; *Philliskirk v. Pluckwell*, 2 M. & Sel. 393, 395.

(*s*) *Fountain v. Smith*, 2 Sid. 128; *Brashford v. Buckingham*, Cro. Jac. 77; *Weller v. Baker*, 2 Wils. 424. See Bac. Ab. Baron & Feme, K. [See the remarks of Sargent J. upon this suggestion in *Cooper v. Alger*, 51 N. H. 174.]

she is the meritorious cause of action, and there is no intendment to this effect; (t) In the case of a bond or note payable to her or to her husband and herself, it would sufficiently appear from the instrument itself, as set out in the declaration, without further averment, that she had a peculiar interest, justifying the use of her name as a plaintiff. (u) But care should be taken that the declaration does not embrace a cause of action which affords the husband only a right to *sue. Therefore where husband and wife declared for a debt due for a cure effected by the wife during their marriage, and the declaration also contained a charge for medicines supplied, "upon general demurrer it was objected that the wife could not join, for that she was not the sole cause of action, because the medicines were the husband's own property, and the damages could not be severed; and of that opinion was the court." (x)

A *feme covert executrix* must join in an action upon any implied promise in respect of the estate of the deceased; as if money, part of the assets of the testator, be received by a party after the coverture, the husband cannot, it seems, sue alone in assumpsit, as for money had and received to his use, but he and his wife should join, and declare in the character of executrix. (y)

For rent, or other cause of action accruing during the marriage, on a lease or demise, or other contract relating to the land or other real property of the wife, whether such contract were made before or during the coverture, the husband and wife *may join*, or *he may sue alone*. (z) When a lease for years has been granted to husband and wife, and the lessor evicts them, they may join, or the husband may sue alone; (a) and in all actions for a profit, &c. accruing *during coverture* in right of the *real estate* of the wife, they may join, or the husband may sue alone, as in debt, for not setting out tithes payable to the wife. (b)

(t) *Bidgood v. Way*, 2 Bl. Rep. 1236; *Philliskirk v. Pluckwell*, 2 M. & Sel. 396; *Hopkins v. Logan*, 7 Dowl. P. C. 360; [*Pickering v. De Rochemont*, 45 N. H. 67; *Dutton v. Rice*, 53 N. H. 496, 500.] In *replevin* by husband and wife for taking their goods, it may perhaps be presumed *after verdict*, though it would not be so on demurrer (3 New Rep. 405), that the taking was before coverture, and that they then were jointly possessed, or that she was entitled as executrix, &c., in either of which cases she might be joined. See *post*, 66, note (p).

(u) *Philliskirk v. Pluckwell*, 2 M. & Sel. 393, 396.

(z) *Holmes v. Wood*, cited in 2 Wils. 424.

(y) *Anonymous*, 1 Salk. 282; Com. Dig. Baron & Feme, V.

(a) *Alberry v. Walby*, 1 Stra. 229; *Dunstan v. Burwell*, 1 Wils. 224; Com. Dig. Baron & Feme, X. Y. [See *Smith v. Talcott*, 21 Wend. 202. In New York, an action

on a lease taken by a married woman in her own name, must be brought by her alone. *Draper v. Stouvenel*, 35 N. Y. 507.]

(a) Bro. Abr. Baron & Feme, pl. 25; *Beaver v. Lane*, 2 Mod. 217; *Bret v. Cumberland*, Cro. Jac. 399. A lease for years was granted to the plaintiff and *his wife*, the plaintiff underlet for part of the term: held that an action for injury to the reversionary interest was properly brought by the plaintiff alone. *Wallis v. Harrison*, 7 Dowl. 395.

(b) Com. Dig. Baron & Feme, X.; *Weller v. Baker*, 2 Wils. 423, 424; *Bret v. Cumberland*, Cro. Jac. 399; *Beadle v. Sherman*, Cro. Eliz. 608. Where a judgment has been obtained by the husband and wife, and to which the wife was a necessary party, the husband may bring an action on the judgment in his own name, or he may join his wife, as upon a judgment on a bond to the wife *dum sola*. *Wolverston v. Fynnimore*, T. 18 & 19 Geo. 2, C. B. 1 Selw. N. P. 10th

The effect of joining the wife in an action when the husband might sue alone is, that if the husband die whilst it is pending, or after judgment, and before it is satisfied, the interest in the cause of action will survive to the wife, and not to the executors of the husband, though if he sued alone she would have had no interest. (c) A *feme covert*, being a sole trader, according to the custom of London, can only sue and be sued in the city courts, and even there the husband must be joined for conformity. (d) If a right accrue or injury be committed to a *feme covert* whilst living separate from her husband, an indemnity should be tendered to the husband against costs, after which, even without his consent, an action may be brought in his name, * either separately or jointly with his wife, according to the then circumstances of the case; (e) but the indemnity should be previously tendered, or the court might stay proceedings. (f)

If the *husband survive*, (g) there is a material distinction between chattels real and *choses in action*. The husband is entitled to the chattel real by survivorship, and to all rent, &c. accruing during the coverture; he is also entitled to all chattels given to the wife during the coverture in her own right, (h) though not to her rights in *autre droit*. (i) But mere *choses in action*, or contracts made with the wife before coverture, do not survive to the husband, and he must, to recover the same, sue as administrator of his wife. (k) So, the adminis-

ed. 294. See, also, *Nurse v. Wills*, 4 B. & Ad. 744.

(c) Co. Litt. 351 a, note (1); *Brashford v. Buckingham*, Cro. Jac. 77, 205; *Bidgood v. Way*, 2 Bl. Rep. 1236.

(d) *Beard v. Webb*, in error, 2 B. & P. 98; *Candell v. Shaw*, 4 T. R. 361; [1 Chitty Cont. (11th Am. ed.) 255, and note (m).]

(e) *Chambers v. Donaldson*, 9 East, 471; *Innel v. Newman*, 4 B. & Ald. 419.

(f) *Morgan v. Thomas*, 2 Cr. & M. 388. Where a married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single, and having paid rent to A., of whom she took the premises, under a distress, she was distrained upon by B. claiming to be the landlord, for the same rent. She brought replevin, and the defendant pleaded that she was a married woman, and that the goods were her husband's. A judge at chambers made an order at the plaintiff's instance that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas and avow, in which case the plaintiff's coverture should not be set up. But it was held that such an order could not be made without the defendant's consent, though in a case of obvious oppression, and the order was set aside. *Eubanke v. Owen*, 5 Ad. & El. 298.

(g) As to the effect of survivorships in general between baron and feme, see Bac.

Abr. Executors and Administrators, H. 4; 2 Bl. Com. 433-436; Co. Litt. 351; note (1); Com. Dig. Baron & Feme, F. 1, E. 2, 3, Z. (2 A.); *Rumsey v. George*, 1 M. & Sel. 180.

(h) Com. Dig. Baron & Feme, E. 2, 3, Z.; 2 Bl. Com. 424; Co. Litt. 351 a, note (1).

(i) Ib. Ibid.; *Ankerstein v. Clarke*, 4 T. R. 616; 1 Roll. Abr. 889, pl. 10; *Dyer*, 331 a.

(k) Com. Dig. Baron & Feme, E. 3; 2 Bl. Com. 435; *Obrian v. Ram*, 3 Mod. 186; *Garforth v. Bradley*, 2 Ves. sen. 676; *Heard v. Stanford*, Rep. temp. Talb. 173; Co. Litt. 351, note; [Allen v. Wilkins, 3 Allen, 321; *Hart v. Stephens*, 9 Q. B. 937; *Sherrington v. Yates*, 12 M. & W. 355; *Jones v. Richardson*, 5 Met. 247, 249; *Stevens v. Beals*, 10 Cush. 291; *Bryan v. Rooks*, 25 Geo. 622; *Burleigh v. Coffin*, 22 N. H. 125; *Stewart v. Stewart*, 7 John. Ch. 229; *Lowry v. Houston*, 3 How. (Miss.) 394; *Scott v. James*, 3 How. (Miss.) 307; *Wade v. Grimes*, 7 How. (Miss.) 425; *Huson v. Wallace*, 1 Rich. Eq. 1; *Whitaker v. Whitaker*, 6 John. 112; 1 Chitty Contr. (11th Am. ed.) 224; *Cornwall v. Hoyt*, 7 Conn. 427; *Beach v. Norton*, 8 Conn. 71; *Griswold v. Penniman*, 2 Conn. 564; 1 Dan. Ch. Pr. (4th Am. ed.) 90, and notes, 116, and note (6); *Hayward v. Hayward*, 20 Pick. 517; but see *Goddard v. Johnson*, 14 Pick. 352; *Hapgood v. Houghton*, 22 Pick. 480; *Albee v. Carpenter*, 12 Cush. 382, 386.]

trator of a husband, who survived his wife, and died without taking out administration to her effects, cannot recover her *choses in action*, and for the latter purpose administration must be taken out to the wife. (*l*) And he may sue as administrator on a bond to his wife during coverture. (*m*) And if pending an action by husband and wife for such *chose in action*, the wife die, the suit abates; (*n*) but if they obtain judgment, he may, notwithstanding her subsequent death, issue execution, or support an action of debt on such judgment. (*o*) He is entitled to sue or distrain for arrears of rent which became due in the lifetime of his wife, from persons who were tenants of her freehold property. (*p*) But the husband cannot sue for arrears of rent accruing after the death of his wife, on a lease of her land by himself and wife under seal during coverture, in which the lessee covenanted with the husband and wife and the *heirs* of the wife. (*q*)

If the wife survive, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his lifetime, and to arrears of rent, &c. which became due during the coverture, * upon her antecedent demise, or upon their joint demise (*r*) during the coverture, to which she assents after his death, and to all arrears of rent and other *choses in action* to which she was entitled before the coverture, and which the husband did not reduce into actual possession. (*s*) She also takes by survivorship a debt due upon a judgment recovered by husband and wife, whether obtained for a debt due to the wife whilst sole, (*t*) or upon a contract made with the wife during coverture, where she is the meritorious cause of action; (*u*) and she is entitled to a bond given to her and her husband, (*x*) or to her alone; (*y*) she is also entitled to all rights of action in *autre droit* as executrix or administratrix. (*z*) And where, during coverture of an administratrix, her husband joined with two sureties in a note for money lent to the husband out of the estate vested in the wife as ad-

(*l*) *Betts v. Kempton*, 2 B. & Ad. 273; [1 Chisty Contr. (11th Am. ed. 224.)]

(*m*) *Philliskirk v. Pluckwell*, 2 M. & Sel. 396, 397.

(*n*) *Checchi v. Powell*, 6 B. & C. 253. [See *Famee v. Harrington*, 11 Pick. 221.]

(*o*) *Obrian v. Ram*, 3 Mod. 189, notes (*g*), (*h*).

(*p*) 32 Hen. 8, c. 37, s. 3.

(*q*) *Hill v. Saunders*, 2 Bing. 112; 4 B. & C. 529, 8. C. in error.

(*r*) Not if the husband demise alone. Dict. Sir J. Mansfield, in *Parry v. Hindle*, 2 Taunt. 181; 1 Roll. Abr. 350 d.

(*s*) 1 Roll. Abr. 350; Co. Litt. 351 a; Com. Dig. Baron & Feme, F. 1. A promissory note, payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone during coverture. *Mason v. Morgan*, 2 Ad. & El. 30.

(*t*) Com. Dig. Baron & Feme, F. 1; 2 Bl. Com. 434; *Garforth v. Bradley*, 2 Ves. sen.

676; *Oglander v. Baston*, 1 Vern. 396; [Gibson v. Todd, 1 Rawle, 452; *Hammick v. Bronson*, 5 Day, 290.]

(*u*) *Bidgood v. Way*, 2 Bl. Rep. 1239; *Brashford v. Buckingham*, Cro. Jac. 77, 205, 8. C. in error; Co. Litt. 351 a, note (1); *Oglander v. Baston*, 1 Vernon, 396.

(*x*) *Coppin v. —*, 2 P. Wms. 496; [*Draper v. Jackson*, 16 Mass. 480.]

(*y*) *Philliskirk v. Pluckwell*, 2 M. & Sel. 396, 397, note (*b*). When a chose in action, such as a bond or note, is given to a *feme covert*, the husband may elect to let his wife have the benefit of it; or, if he thinks proper, he may take it himself. If he do not act in his lifetime which amounts to an election to take it himself, and to an expression of dissent to his wife's having any interest in it, it survives to the wife. *Gaters v. Madeley*, 6 M. & W. 423.

(*z*) *Ankerstein v. Clarke*, 4 T. R. 616; Com. Dig. Baron & Feme, F. 1.

ministratrix, it was held, that *after the death of her husband* she might sue the other two parties to the note. (a) In all these cases where the wife is joined in the action, if the husband die pending the suit, it will not abate, and the wife may proceed to judgment and execution, the death of the husband being suggested upon the record. (b) And when a feme executrix marries a debtor to the testator, the right of action is only suspended during the coverture, and if she survive, she may, in her character of executrix, sue the executors of the husband. (c) But if the husband made a separate demise of the wife's land, his executor will be entitled to the rent which became due before his death, and not his surviving wife. (d)

The *consequences of a mistake* in the proper parties, in the case of baron and feme, are, that when a married woman might be joined in the action with her husband, but sues alone, the objection can only be pleaded in abatement, (d¹) and not in bar, though the husband might sustain a writ of error, (e) and if she marry after writ, and before plea, her coverture must be pleaded in abatement, and cannot be given in evidence under the general issue. (f) But when a feme improperly *sues alone, having no legal right of action, she will be nonsuited; (g) and if she improperly join in an action with her husband, who ought to sue alone, the defendant may demur, (h) or the judgment will be arrested, (i) or reversed on a writ of error. (k.) And if the husband sue alone, when the wife ought to be joined, either in her own right, or in *autre droit*, he will be nonsuited; (l) or if the objection appear on the record, it will be fatal in arrest of judgment or on error. (m)

(a) *Richards v. Richards*, 2 B. & Ad. 447.

(b) 8 & 9 W. 3, c. 11, s. 7; *Rep. temp. Hardw.* 397-399. [See *Schoonmaker v. Elmendorf*, 10 John. 49; *Vaughan v. Wilson*, 4 H. & Munf. 452.]

(c) *Crossman v. Reade*, Cro. Eliz. 114; 3 Atk. 726.

(d) *Farry v. Hindle*, 2 Taunt. 181.

(d¹) [1 Chitty Contr. (11th Am. ed.) 226, and note (n); *Newton v. Robinson*, Tayl. 72; *Chirac v. Reinicker*, 11 Wheat. 303; *Sheidle v. Weishlee*, 16 Penn. St. 134; *Surtell v. Brailsford*, 2 Bay, 333; *Dutton v. Rice*, 53 N. H. 496.]

(e) *Milner v. Milnes*, 3 T. R. 631. See *Wallis v. Harrison*, 7 Dowl. 396, *contra*.

(f) *Morgan v. Painter*, 6 T. R. 265; *Bac. Ab. Abatement, G.*; [*Wilson v. Hamilton*, 4 Serg. & R. 238.] It would be pleadable *puis darrein continuance* in abatement, if it occurred after the defendant had pleaded in chief of the declaration. See *Tidd's Prac.* 9th ed. 849.

(g) *Candell v. Shaw*, 4 T. R. 361

(h) *Buckley v. Collier*, 1 Salk. 114; *Rose v. Bawler*, 1 H. Bl. 108; *Weller v. Baker*, 2 Wils. 424; [*Carleton v. Haywood*, 49 N. H. 314.]

(i) *Abbot v. Blofield*, Cro. Jac. 644.

(k) *Bidgood v. Way*, 2 Bl. Rep. 1236. See under what circumstances a declaration alleging an agreement by plaintiffs, one of them a married woman, and promises to the plaintiffs will be cured after verdict. *Nurse v. Wills*, 4 B. & Ad. 739; *S. C.* in error, 1 Ad. & El. 65. See, also, *France v. White*, 1 Scott N. R. 604; 1 M. & G. 731.

(l) *Anonymous*, 1 Salk. 282; *Bac. Ab. Baron & Feme, K.*; *Rumsey v. George*, 1 M. & Sel. 180, 181. See *Wallis v. Harrison*, 7 Dowl. 396, *contra*.

(m) *Aleberry v. Walby*, 1 Stra. 229; *Abbot v. Blofield*, Cro. Jac. 644; *Wallis v. Harrison*, 7 Dowl. 396, *contra*.

2. Who to be Defendants.

The action upon an *express* contract, whether it be by deed, or merely in writing, or by parol, must in general be brought against the party who made it either in person or by agent. (n) And although in the case of a deed *inter partes*, an individual not named as a party cannot sue thereon, although it contain a covenant with him and for his benefit, (o) yet this rule does not protect from liability a party who executes such a deed containing a covenant by him, although he is not described as a party thereto. (p)

II. DEFENDANTS.
1st. As between the original parties, and with reference to the liability of the party.

And a party who expressly contracts, and permits credit to be given to him, is liable, although he were not the strict *legal owner* of the property in respect of which the contract is made, nor *beneficially* interested. Thus the owner of a ship is *primâ facie* liable for repairs necessarily done to it; (q) but where the legal title to a vessel remained for some time after the sale in the vendor, and during that time the captain, by the direction of the purchaser, ordered repairs, it was decided that the vendor was not liable for the amount. (r) So the

(n) *Young v. Brander*, 8 East, 12; *James v. Jones*, 3 Esp. R. 27; *Annett v. Carstairs*, 3 Campb. 354, 356.

(o) *Ante*, 8.

(p) *Salter v. Kidgley*, Carth. 76; *Platt on Cor.* 7, 8.

(q) *Webster v. Seekamp*, 4 B. & Ald. 352; *Stokes v. Carne*, 2 Campb. 339; *Frazer v. Marsh*, 1b. 517; *Rich v. Coe*, Cowp. 636; *Young v. Brander*, 8 East, 10; *Trewbeller v. Rowe*, 11 Ib. 435; *Frazer v. Marsh*, 13 Ib. 238; [3 Kent, 133]. The master of a ship has authority, by law, to pledge the credit of his owner resident in England for money advanced to the master in an English port, where the owner has no agent there or near, and the advance of money is necessary for the prosecution of the voyage. *Arthur v. Barton*, 6 M. & W. 138; and the master has also authority to obtain supplies of goods in a foreign port, for the necessary use of the ship, on the credit of the owner, independently of express stipulation in a charter-party. *Weston v. Wright*, 7 M. & W. 396; [The H. B. Foster, 3 Ware, 165; *Kensel v. Kirk*, 2 Abb. (N. Y.) 500.]

(r) *Young v. Brander*, 8 East, 10. See *Frazer v. Marsh*, 13 Ib. 238; 2 Campb. 517; *M'Ivor v. Humble*, 16 East, 169. [See *Dame v. Hadlock*, 4 Pick. 458; *Portland Bank v. Scabbs*, 6 Mass. 422; *Abbott Ship*. (11th Eng. ed.) 26, 27; *Jennings v. Griffiths*, 1 Ry. & M. 42; *Curling v. Robertson*, 8 Scott's N. R. 17; *Frost v. Oliver*, 2 El. & Bl. 320; 22 L. J. 353, Q. B.; *Mitcheson v. Oliver*, 5 El. & Bl. 419; *Myers v. Willis*, 18 C. B. 886; *Mackenzie v. Pooley*, 11 Exch. 638; *Wendover v. Hogeboom*, 7 John. 308; *Duff v. Bayard*, 4 Watts & S. 240; *Lincoln v.*

Wright, 23 Penn. St. 76; *Brodie v. Howard*, 17 C. B. 109; *Smith v. McGuire*, 3 H. & N. 554; *Hackwood v. Lyall*, 17 C. B. 124; *Alexander v. Dowie*, 1 H. & N. 152; *Brooks v. Bondsey*, 17 Pick. 441; *Leonard v. Huntington*, 15 John. 302; *Thorn v. Hicks*, 7 Cowen, 697; *James v. Bixby*, 11 Mass. 34; *Muldon v. Whitlock*, 1 Cowen, 290. A party who appears on the register to have the legal title, and whom it is sought to charge on that ground, is not estopped by the register from proving that the actual beneficial ownership is in a third party, although it might be *primâ facie* evidence against him. See cases above cited; *Jones v. Pitcher*, 3 Stew. & P. 135, 155; *Ring v. Franklin*, 2 Hall, 1; *Weston v. Penniman*, 1 Mason, 306; *Bixby v. Franklin Ins. Co.* 8 Pick. 86; *Colson v. Bonzey*, 6 Greenl. 474; *Lord v. Ferguson*, 9 N. H. 380; *Lincoln v. Wright*, 23 Penn. St. 76; *Howard v. Odell*, 1 Allen, 85. The question in such cases is one of principal and agent; and he only, whether owner, or charterer, or intended purchaser, by the authority of whom, as his agent, the master gave the orders, is liable upon them. *Mitcheson v. Oliver*, 5 El. & Bl. 419; *Myers v. Willis*, 18 C. B. 886; *Mackenzie v. Pooley*, 11 Exch. 638; *Brodie v. Howard*, 17 C. B. 109; *Smith v. McGuire*, 3 H. & N. 554; *Hackwood v. Lyall*, 17 C. B. 124; *Alexander v. Dowie*, 1 H. & N. 152; *Abbott Ship*. (11th Eng. ed.) 27, 28; *The Druid*, 1 Wm. Rob. 391, 399; *The Troubadour*, L. R. 1 Adm. & Ecc. 302; *The Halley*, L. R. 2 P. C. 193, 201; *Hacker v. Young*, 6 N. H. 95; *Hibbs v. Ross*, 1 Cal. 481. The liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship.

mortgagee of a ship is not liable for wages or repairs where the party * claiming the debt was employed by the mortgagor, (s) or expressly gave him credit. (t) So if an executor trustee carry on trade as trustee for the benefit of the children of the testator, he will be personally liable to pay the debts, and may even be made a bankrupt in respect of them. (u)

In the case of an *express* contract, the agreement itself will, therefore, in general, remove all difficulty with regard to the person who should be sued upon it.

But difficulties frequently occur in deciding who should be made the defendant in an action upon a promise created or *implied by law* from a particular state of facts. In this case it must be ascertained who is the party subject to the *legal liability*; for he is the person who should be sued. (x) A mere *equitable* or *moral* obligation to pay a demand is, in the absence of an express promise, insufficient to support an action. (y) And there are

In cases where a contract can only be implied.

To render the defendant liable the supplies must have been furnished as on a contract with the owner, on orders given by the master as for him. *Mitcheson v. Oliver*, 5 EL. & BL. 419, 443, 445; *Howard v. Odell*, 1 Allen, 85, 88; *Blanchard v. Fearing*, 4 Allen, 118; *Macy v. Wheeler*, 30 N. Y. 231; *Kenzel v. Kirk*, 32 How. Pr. 269; *Myers v. Willis*, *supra*, and other cases above cited.]

(s) *Annett v. Carstairs*, 3 Campb. 354.

(t) *Briggs v. Wilkinson*, 7 B. & C. 30; *Cox v. Reid*, Ry. & M. N. P. C. 199; *Harrington v. Fry*, 2 Bing. 179; *S. C.* 9 Moore, 344. [A mere mortgagee not in possession, though registered as owner, is not responsible for supplies and repairs furnished by order of the master, acting under the orders and authority of the mortgagor, though benefitted by them. *McIntyre v. Scott*, 8 John. 159; *Fisher v. Willing*, 8 Serg. & R. 118; *Philips v. Ledley*, 1 Wash. C. C. 226; *Champlin v. Butler*, 18 John. 169; *Duff v. Bayard*, 4 Watts & S. 240; *Lord v. Ferguson*, 9 N. H. 380; *Cordray v. Mordecai*, 2 Rich. 518; *Cutler v. Thurlo*, 20 Maine, 213; *Myers v. Willis*, 17 C. B. 77; *S. C.* 18 C. R. 886; *Hackwood v. Lyall*, 17 C. B. 124; *Howard v. Odell*, 1 Allen, 85; *Blanchard v. Fearing*, 4 Allen, 118; *Winslow v. Tarbox*, 18 Maine, 132; *Morgan v. Shenn*, 15 Wallace, 105; *Abbott Ship*. (11th Eng. ed.) 29 *et seq.*; *Ring v. Franklin*, 2 Hall, 1; *Birbeck v. Tucker*, 2 Hall, 121; 3 Kent, 134; *Macy v. Wheeler*, 30 N. Y. 231; *Weber v. Sampson*, 6 Duer, 358. But he may, of course, make himself so liable by acts which show that he has authorized the credit to be given to him personally. See *Fish v. Thomas*, 5 Gray, 45. The mortgagee, even if he takes possession, is not liable for necessities ordered by the master, if it is clear that the master did not order them as his agent. *The Troubadour*, L. R. 1 Adm. & Ecc. 302. See *Miln v. Spinola*, 4 Hill, 177; *Tucker v.*

Buffington, 15 Mass. 477; *Champlin v. Butler*, 18 John. 169. The same rule applies to persons who hold a ship as trustees. *Macy v. Wheeler*, 30 N. Y. 230. With regard to the liability for repairs and supplies, when the vessel is chartered, see *Perry v. Osborne*, 5 Pick. 423, where the court remarked that generally supplies for a ship are furnished on the credit of the master and owner; but where the ship is employed by a charterer, whether under an oral or written contract, he, and not the owner is held liable. See, also, to the same effect, *Cutler v. Winsor*, 6 Pick. 335; *Thompson v. Hamilton*, 12 Pick. 425; 3 Kent, 137-139; *Marcardier v. The Chesapeake Ins. Co.* 8 Cranch, 39; *Gracie v. Palmer*, 8 Wheat. 605; *Reed v. United States*, 11 Wallace, 591, 601; *Donahoe v. Kettell*, 1 Clifford, 135; *Eames v. Cavaroe*, Newb. 528; *Adams v. Homeyer*, 45 Missou. 545. When a master hires a vessel on shares, and has the control of her, he becomes owner *pro hac vice*. *Bonzey v. Hodgkins*, 55 Maine, 98; *Sproat v. Donnell*, 26 Maine, 185; *Webb v. Pierce*, 1 Curtis, 104; *Mayo v. Snow*, 2 Curtis, 102; *Baker v. Huckins*, 5 Gray, 596; *Tucker v. Stimson*, 12 Gray, 487; *Thomas v. Osborn*, 19 How. 22, 30; *The City of New York*, 3 Blatchf. 187; *Fox v. Holt*, 36 Conn. 558, 570; *The Monsoon*, 1 Sprague, 37.]

(u) *Viner v. Cadell*, 3 Esp. Rep. 88.

(x) *Kinder v. Paris*, 2 H. Bl. 563; *Jenkins v. Tucker*, 1 H. Bl. 93.

(y) See *Chit. jr. on Contracts*, 3d ed. 47, 50; *Selw. N. P.* 10th ed. 50. Mere moral consideration will not support an express promise. An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded

some instances in which even an express promise will give no additional force to mere equitable liability, as in the case of a promise, without any new consideration, to pay a legacy, (z) or the share of an intestate's effects to which the plaintiff is entitled under the statute of distributions. (a) In these cases the subject-matter is more peculiarly within the province of the courts of equity, and a court of common law cannot so effectually do justice between all parties, and therefore will not recognize even an express promise so as to allow an action to be brought thereon.

The general rule is, that a *cestui que trust* cannot sue his trustee at law. (b) But if a trustee state an account, and admit a balance due from him to the *cestui que trust*, he may be sued at law. (c) When or not
against a
trustee.

A contract made by an *agent*, as such, is in law that contract of the principal: *Qui facit per alium facit per se.* (c¹) The assent of the agent is the assent of the principal; the former is the mere conduit or medium by which the contract is effected, and is not clothed with any legal or beneficial interest in it which can render him responsible upon the agreement, (d) although in some instances he may sue thereon. (e) The general rule therefore is, that when a person has contracted, in the capacity of an *agent*, and that circumstance is known at the time to the person with whom he contracts, such

never could have been enforced at law, though not barred by any legal maxim or statute. *Eastwood v. Kenyon*, 3 P. & D. 276; [*Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. 207. The apparently undoubted rule of law at the present day is, that a mere moral consideration cannot support an assumpsit. 1 Chitty Contr. (11th Am. ed.) 52, 53, and note (k), 58, note (k); *Beaumont v. Reeve*, 8 Q. B. 483, 486, 487; *Parke B. in Jennings v. Brown*, 9 M. & W. 496, 501; *Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. 207; *Smith v. Ware*, 13 John. 257, 289; *Edwards v. Davis*, 16 John. 281, 283, note; *Loomis v. Newhall*, 15 Pick. 150; *Parker v. Carter*, 4 Munf. 273; *Hawley v. Farrar*, 1 Vt. 420; *Warren v. Whitney*, 24 Maine, 561; *Farnham v. O'Brien*, 22 Maine, 475; *Snevely v. Reed*, 9 Wata. 396; *Ehle v. Judson*, 25 Wend. 97; *Nash v. Russell*, 5 Barb. 556; *Dodge v. Adams*, 19 Pick. 429; *McPherson v. Rees*, 2 Penn. 521; *Watkins v. Halstead*, 2 Sandf. 311; *Whitaker v. Whitaker*, 52 N. Y. 368; *Phillips v. Frye*, 14 Allen, 36; *Stafford v. Bacon*, 25 Wend. 384; *S. C.* 2 Hill, 353; *Andrews v. Ives*, 3 Conn. 368.]

(z) *Deeks v. Struts*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 542.

(a) *Jones v. Tanner*, 7 B. & C. 542.

(b) *Allen v. Imlett*, 1 Holt N. P. C. 641; *Allen v. Impett*, 2 Moore, 240; 8 Taunt. 263, 8 C.; *Sand. on Uses*, 222; 2 Bro. C.

C. 265. See further, and qualification of that rule, 1 Chit. Gen. Pra. 6, 7, 8; *Mileham v. Eicke*, 3 M. & W. 407.

(c) *Rosser v. Holland*, 1 Harr. & Wol. 167. So, if he admits a balance, and afterwards appropriate it to his use. *Roper v. Holland*, 3 Ad. & El. 99.

(c¹) [See 1 Chitty Contr. (11th Am. ed.) 303.]

(d) 3 Chit. Com. Law, 194, 211; *Payley's Principal & Agent*, 251, who may be an agent; Co. Litt. 52 a. On sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchasers, and by the vendor's attorney subscribing himself as "agent for S. S." The sale going off through the vendor's default, and the deposit money not being returned, it was held that the purchaser could not bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent; and payment of the deposit to him was payment to the vendor. *Bamford v. Shuttleworth*, 11 Ad. & El. 926. As to the liability of one attorney to another, and which is an exemption to the general rule of the non-liability of an agent, where the name of the principal is disclosed, see *Serace v. Whittington*, 2 B. & C. 11; *Hall v. Ashurst*, 1 Cr. & M. 714.

(e) *Ante*, 7, 8.

agent is not liable to an action for the non-performance of the contract, (*f*) even for a deceitful warranty, (*g*) if he had authority, (*g*¹) from his principal to make the contract. (*h*) For the same reasons, if an attorney "for and on the behalf of his client, and as his agent," promise to pay money, he is not personally liable if he had authority from his client. (*i*) And where a trader, after an act of bankruptcy, employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant, it was decided that the assignees could not sue the latter for the money. (*j*) So where A., an auctioneer, being employed to sell an estate belonging to B., entered into and signed an agreement with C. for the purchase, in his own name, as agent of B., and B. shortly afterwards signed it, and added, "I hereby sanction this agreement, and approve of A.'s having signed the same on my behalf," it was held A. was not personally liable. (*k*)

But if an agent covenant under seal for the act of another, though he describe himself in the deed as contracting for and on the part and behalf of such other person; (*l*) or if he accept or draw a bill of exchange generally and not as agent, (*l*¹) he is personally liable, (*m*) unless in the case of an agent on behalf of government. (*n*) So where

(*f*) See the rule and principle, 12 Ves. 352; *Paterson v. Gandasequi*, 15 East, 62, 66; *Payley, Principal & Agent*, 246; *M'Brain v. Fortune*, 3 Campb. 317; *Hartop v. Jenkes*, 2 M. & Sel. 438; *Bowen v. Morris*, 2 Taunt. 387.

(*g*) *Johnson v. Ogilby*, 3 P. Wms. 278, 279; *Pochin v. Pawley*, 1 Bl. Rep. 670; *Pond v. Underwood*, 2 Ld. Raym. 1210; *Buller v. Harrison*, Cowp. 565; *Sadler v. Evans*, Burr. 1986; *Macbeath v. Haldimand*, 1 T. R. 181; *Unwin v. Wolseley*, 1 T. R. 674; *Greenway v. Hurd*, 4 T. R. 553; *Hanson v. Robondeau*, Peake C. N. P. 130; *Bac. Abr. Action on the Case, B.*; *Abbott*, 1st ed. 229; *Ward v. Felton*, 1 East, 507.

(*g*¹) [*Hopkins v. Mehaffy*, 11 Serg. & R. 128; *Carew v. Otis*, 1 John. 418; *Passmore v. Mott*, 2 Binn. 201; *Bethune v. Neilson*, 2 Caines, 139; *Mann v. Chandler*, 9 Mass. 335; *Dusenbury v. Ellis*, 3 John. Cas. 70.]

(*h*) *Johnson v. Ogilby*, 3 P. Wms. 279; [*1 Chitty Contr.* (11th Am. ed.) 308, and note (*e*); *Shaw C. J.* in *Simonds v. Heard*, 23 Pick. 124.]

(*i*) *Ib.*; *Hartop v. Jenkes*, 2 M. & Sel. 438. [An attorney is personally liable to a sheriff, and so, it would seem, to any other officer of the court, for his fees, as it is to be presumed that the credit was given to the attorney. *Adams v. Hopkins*, 5 John. 252; *Ousterhout v. Day*, 9 John. 114; *Tarbell v. Dickinson*, 3 Cush. 345.]

(*j*) *Coles v. Wright*, 4 Taunt. 198; *Coles v. Robins*, 3 Campb. 183; *White v. Bartlett*, 9 Bing. 378. But see *Stephens v. Elwall*, 4 M. & Sel. 259.

(*k*) *Spittle v. Lavender*, 2 B. & B. 452; 5 Moore, 270, S. C.; and see *Bowen v. Morris*, 2 Taunt. 374, 387; but see *Burrell v. Jones*,

3 B. & A. 47; and *Leadbitter v. Farrow*, 5 M. & Sel. 345. See *ante*, note (*d*).

(*l*) *Appleton v. Binks*, 5 East, 148; *Hunter v. Parker*, 7 M. & W. 344; [*White v. Skinner*, 13 John. 307; *Tippets v. Walker*, 4 Mass. 595; *Sumner v. Williams*, 8 Mass. 362; *Cutter v. Whittemore*, 10 Mass. 447; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *New Eng. Mar. Ins. Co. v. De Wolf*, 8 Pick. 56; *Meyer v. Barker*, 6 Binn. 228; *Mitchell v. Hazen*, 4 Conn. 495; *Magill v. Hinsdale*, 6 Conn. 464; *Belden v. Seymour*, 8 Conn. 24; *Duval v. Craig*, 2 Wheat. 45; *Stone v. Wood*, 7 Cowen, 453; *Evans v. Wells*, 22 Wend. 234; *Key v. Parnham*, 6 Harr. & J. 418; *Stinchfield v. Little*, 1 Greenl. 231; *Abbey v. Chase*, 6 Cush. 54; *Hopkins v. Mehaffy*, 10 Serg. & R. 126.]

(*l*¹) [*See Mahew v. Prince*, 11 Mass. 54; *Thatcher v. Dinsmore*, 5 Mass. 299; *Foster v. Tuller*, 6 Mass. 58.]

(*m*) *Sowerby v. Butcher*, 2 Cr. & M. 368. (*n*) *Unwin v. Wolseley*, 1 T. R. 674; *Prosser v. Allen*, Gow's Cas. N. P. 117; *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275, 286; S. C. 7 Moore, 91, 110; [*Bainbridge v. Downie*, 6 Mass. 257; *Jones v. Le Tombe*, 3 Dall. 384; *Hodgson v. Dexter*, 1 Cranch, 345; *Hopkins v. Mehaffy*, 11 Serg. & R. 126; *Randall v. Van Vechten*, 19 John. 60; *Bernard v. Torrance*, 5 Gill & J. 383; *Tutt v. Hobbs*, 17 Missou. 486; *Ogden v. Raymond*, 23 Conn. 379; *Dwinelle v. Henriquez*, 1 Cal. 387; *Nicholls v. Moody*, 22 Barb. 611; *Parks v. Ross*, 11 How. (U. S.) 362; *Rathbon v. Budlong*, 15 John. 1; *Brownson v. Woolsey*, 17 John. 46; *Gill v. Brown*, 12 John. 385; *Osborne v. Kerr*, 12 Wend. 179; *Ghent v. Adams*, 2 Kelly, 214; *Copes v. Matthews*, 10 Sm. & M. 398; 1

the defendant by a written agreement, expressed to be made "by himself *on behalf of A. B. of the one part, and the plaintiff of the other part," stipulated that he the defendant would execute to the plaintiff a lease of certain premises, which, as it was proved, belonged to A. B., Best C. J. held, that the defendant was personally liable; and he added, that there was no distinction between deeds and parol agreements in this respect. (o) And where the solicitor of the assignees of a bankrupt, upon whose lands a distress had been made by the landlord, gave a written undertaking, stating that "they, as solicitors to the assignees, undertook to pay the rent, &c." they were held personally liable; (p) and in general, where an agent enters into a written agreement as if he were the principal, and the credit is given to him, he is personally liable; (q) but this liability must be collected from the instrument upon a reasonable exposition of the whole of its terms. (r) So, if a person being an agent act as a principal, and do not disclose his principal, or declare that he acts as agent at the time of making a verbal contract, and the credit be given expressly to him, he will be personally responsible. (s) The master of a ship

Chitty Contr. (11th Am. ed.) 386. But a public officer may render himself liable by his express promise. *Gill v. Brown*, 12 John. 385; *Sheffield v. Watson*, 3 Caines, 69; *Walker v. Swartwout*, 12 John. 444; *Swift v. Hopkins*, 13 John. 313; *Brown v. Rundlett*, 15 N. H. 360, 363, 364; *Rathbon v. Badlong*, 15 John. 1; *Gillaspie v. Wesson*, 7 Porter, 564; *Simonds v. Heard*, 23 Pick. 120.]

(o) *Norton v. Herron*, Ry. & Moo. 229. See *Spittle v. Lavender*, 5 Moore, 278. The following is an important case on this subject. The defendant, a merchant residing at St. Petersburg, carried on business in London, through H., who had himself no capital or credit, and was universally known to represent the defendant, though H.'s name was always used. The defendant gave notice to H. that he purposed to cease employing him; after which H. contracted with the plaintiff to sell him tallow, and H.'s name was used as before. H. intended to contract on his own account, but the plaintiff did not know this, and believed that H. represented the defendant as usual. The contract was made by a broker, W., acting for both parties. He signed bought-and-sold notes; the former beginning "Bought for T." (the plaintiff), and the latter, "Sold for H. to my principals," no buyer or seller being further named; and it was held that the defendant was liable for the non-delivery of the tallow. See *Truman v. Loder*, 11 A. & E. 589.

(p) *Burrell v. Jones*, 3 B. & Ald. 47; *Iverson v. Conington*, 1 B. & C. 160; S. C. 2 D. & R. 307; *Prosser v. Allen*, 1 Gow, 117; *Redhead v. Cator*, 1 Stark. 14.

(q) *Wilks v. Back*, 2 East, 142; *Unwin v. Wolseley*, 1 T. R. 674; *Paterson v. Gandasequi*, 15 East, 62; *Schmaling v. Thomlinson*, 6 Taunt. 147; 1 Marsh. 500; *Higgins*

v. Senior, 8 M. & W. 834; [*Mauri v. Hefernan*, 13 John. 68; *Jaques v. Todd*, 3 Wend. 83; *Lincoln v. Battelle*, 6 Wend. 475; *Pentz v. Stanton*, 10 Wend. 271; *Tradesman's Bank v. Astor*, 11 Wend. 87; *Jaffrey v. Bigelow*, 13 Wend. 518.] Thus where L. & Co., brokers, sold hemp by auction at their rooms, and gave an invoice describing the goods as "bought of L. & Co.," and received part of the price, but failed to deliver the goods; it was held that L. & Co., though they were mere agents, had made themselves responsible as sellers by the invoice. *Jones v. Littleedale*, 6 Ad. & El. 486. See, also, *Magee v. Atkinson*, 2 M. & W. 440.

(r) *Bowen v. Morris*, 2 Taunt. 374-387; *Spittle v. Lavender*, 5 Moore, 270.

(s) *M'Brain v. Fortune*, 3 Campb. 317; *Paterson v. Gandasequi*, 15 East, 63-66; 12 Ves. 252; *Payl. 246*; *Hanson v. Robendeau*, Peake's N. P. C. 120; *Macbeath v. Haldimand*, 1 T. R. 181; *George v. Clagett*, 7 T. R. 359; *Simon v. Motivos*, Burr. 1921. [Whenever an agent enters personally into a contract, or pledges his own credit, by concealing his principal or otherwise, this gives the other party a right of action against him. *Cabot Bank v. Morton*, 4 Gray, 156, 160; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Royce v. Allen*, 28 Vt. 234; *Merrill v. Wilson*, 6 Ind. 426; *Franklyn v. Lamond*, 4 C. B. 637; *Thomson v. Davenport*, 9 B. & C. 78; 1 *Chitty Contr.* (11th Am. ed.) 308, 309, and note (f), and cases cited; *Wilder v. Cowles*, 100 Mass. 487; *Allen v. Rostain*, 11 Serg. & R. 375. And it makes no difference that the party dealing with him had the means of finding out the principal. *Thomson v. Davenport*, *supra*; *Raymond v. Crown & Eagle Mills*, 2 Met. 319; *Tainter v. Prendergast*, 3 Hill (N.

is in general liable for necessities furnished abroad, (t) or in this country, unless they were furnished upon the credit of the owners; (u)

Y.), 72. If a person professing to act as agent enter into a contract, and there be not in fact any principal then in existence, the agent will be personally liable on such contract. *Kelner v. Baxter*, L. R. 2 C. P. 174. And where an agent enters in his own name into an agreement in writing, he cannot relieve himself from liability thereon, even by showing that, at the time such agreement was made and signed, the other contracting party knew that he was only an agent in the transaction. 1 *Chitty Contr.* (11th Am. ed.) 309, and note (h); *Higgins v. Senior*, 8 M. & W. 834; *Jones v. Littledale*, 6 Ad. & El. 486; *Magee v. Atkinson*, 2 M. & W. 440; *Brown v. Rundlett*, 15 N. H. 360; *Hovey v. Pitcher*, 13 Missou. 191; 2 Kent, 630; *Cooke v. Wilson*, 1 C. B. N. S. 153; *Simonds v. Heard*, 23 Pick. 120. So, there is no doubt that a person who enters into a contract, which is expressed to be made by him for and in behalf of another, may still contract thereby in such terms as to bind himself personally. And, accordingly, the question in such cases is whether, looking at the contract as a whole, it appears to have been intended that he should be personally liable thereon. See *Deslandes v. Gregory*, 2 E. & E. 602, 610; *Parker v. Winlow*, 7 El. & Bl. 942; *Reid v. Dreaper*, 6 H. & N. 813; *Tanner v. Christian*, 4 El. & Bl. 591; *Lennard v. Robinson*, 5 El. & Bl. 125; *Wilson v. Zelusta*, 14 Q. B. 405; *Paice v. Walker*, L. R. 5 Ex. 173; *Smith v. Watson*, 14 Vt. 332. So, if the instrument evince an intention that the agent should not be liable, he will be held not to be so, even although words are used which *per se* might render him so. *Rogers v. Marsh*, 33 Mass. 106; 1 *Chitty Contr.* (11th Am. ed.) 311, and note (m), 312. An agent is likewise personally liable to third parties, whenever, in dealing with them, he knowingly exceeds his authority, — provided, that is, his want of authority be not known to the person with whom he deals; *Jones v. Downman*, 4 Q. B. 235; *Harper v. Williams*, 4 Q. B. 219, 232; *Downman v. Williams*, 7 Q. B. 103; *Wilson v. Barthrop*, 2 M. & W. 863; *Beattie v. Lord Ebury*, L. R. 7 Ch. Ap. 777;

Meech v. Smith, 7 Wend. 315; *Cunningham v. Soules*, 7 Wend. 106; *Woodes v. Dennett*, 9 N. H. 55; *Savage v. Rix*, 9 N. H. 263; *Clarke v. Foster*, 8 Vt. 90; or fraudulently misrepresents the extent of his authority; see *Smout v. Ilberry*, 10 M. & W. 1, 9; or does an act which although he believes it to be within the scope of his authority, yet, in fact, it is not so, and, at the same time, omits to give such information to the other party as would enable him, equally with himself, to judge of the authority under which he proposed to act. *Smout v. Ilberry*, 10 M. & W. 10; *Jefts v. York*, 10 Cush. 392, 395; *Pow v. Davis*, 1 B. & S. 219; *Collen v. Wright*, 8 El. & Bl. 647, 664; *Beattie v. Lord Ebury*, L. R. 7 Ch. Ap. 777; *Royce v. Allen*, 28 Vt. 234; *Feeter v. Heath*, 11 Wend. 477; *Baltzen v. Nicolay*, 53 N. Y. 469; *Dung v. Parker*, 52 N. Y. 494; *White v. Madison*, 26 N. Y. 117; *Clark v. Foster*, 8 Vt. 98; *Roberts v. Button*, 14 Vt. 195. And in each of these cases an action will lie against the agent, on an implied contract by him, that he had the authority which he professed to have; per *Jervis C. J.* in *Randell v. Trimen*, 18 C. B. 786, 794; 1 *Chitty Contr.* (11th Am. ed.) 314; whilst, in the two former, he would also be liable in an action for the false representation. Per *Jervis C. J.* in *Randell v. Trimen*, 18 C. B. 786, 794; 1 *Chitty Contr.* (11th Am. ed.) 314. But it would appear that the fact of an agent entering into a contract without authority, will not, *per se*, render him liable to be sued on the contract itself. And accordingly it has been held, that where a party who has no authority to do so, executes a written instrument in the name of another, and adds his own name thereto only as agent for that other, he cannot be treated as a party to that instrument, and be sued upon it, unless it be shown that he was the real principal. *Jenkins v. Hutchinson*, 13 Q. B. 744, 752; *Jefts v. York*, 4 Cush. 371; *S. C.* 10 Cush. 392; *Sherman v. Fitch*, 98 Mass. 63; *Kingman v. Kelsie*, 3 Cush. 339; *Harper v. Little*, 2 Greenl. 14; *Stetson v. Patton*, 2 Greenl. 358; *Ogden v. Raymond*, 22 Conn. 385; *McHenry v. Duffield*, 7

(t) *Rich v. Coe*, Cowp. 639; *Westerdell v. Dale*, 7 T. R. 312. See *ante*, 38, note (g).

(u) *Abbott on Shipping*, 1st ed. 95. [Unless there is some special contract, the master is in every case personally responsible upon all the contracts, which he makes, in reference to the employment, repairs, supplies, and navigation of the ship. See *Watkins v. Laughton*, 8 John. 164; *Elliott v. Russell*, 10 John. 1; *Abbott Ship.* (11th Eng. ed.) 107. Whether at home or abroad. *James v. Bixby*, 11 Mass. 34; *Marquand v. Webb*, 16 John. 89; *Leonard v. Huntington*, 15 John. 298. If there is a special promise of the master, taken and relied upon, the

owner is not liable; and, on the other hand, if there is a special promise of the owners, the master is not liable. *Hussey v. Allen*, 6 Mass. 163; *Chapman v. Durant*, 10 Mass. 47; *James v. Bixby*, 11 Mass. 34; *Wainwright v. Crawford*, 3 Yeates, 131; *Farrel v. M'Clea*, 1 Dall. 302; *Schermerhorn v. Loines*, 7 John. 311; *Marquand v. Webb*, 16 John. 89; *Muldon v. Whitlock*, 1 Cowen, 290; *Thorn v. Hicks*, 7 Cowen, 597; *Nickerson v. Monsoon*, 5 Law Rep. 416. The master and owners of a whaling ship are not liable to be sued jointly by a seaman, for his lay or share. *Matern v. Gibbs*, 1 Sprague, 658.]

and he or the owners may be sued upon the bill of lading, or generally, for the loss of goods, unless there has been an express contract with the owners; (x) and it seems that a policy broker alone can be sued for the premiums of insurance. (y)

Where an agent does not pursue in any degree the principal's authority; (z) or so far exceeds it as to discharge the principal from responsibility for his acts; (a) or where he acts under an authority, which he knows the principal has no right to give, as an agent selling property under a notice that it does not belong to his principal; he is personally responsible. (b)

There is a material distinction between an action against an agent for the recovery of damages for the non-performance of the contract, and an action to recover back a specific sum of money received by him; for when a contract has been rescinded, or a person has received money as agent of another who had no right thereto, and has not paid it over, an action may be sustained against the agent to recover the money, (b¹) and the mere passing of such money in account with his principal, or making a rest, without any new credit given to him, fresh bills accepted, or further sums advanced to the principal in consequence of it, is not equivalent to a payment of the money to the principal. (c) But, in general, if the money be paid over before notice to retain it, the agent is not liable, (d) unless

Blackf. 41; 1 Chitty Contr. (11th Am. ed.) 314, and note (d), and cases cited. But see *Dusenbury v. Ellis*, 3 John. Cas. 70, 71; *Walker v. Bank of State of New York*, 13 Barb. 639; *Bay v. Cook*, 2 N. J. 343, and other cases cited in 1 Chitty Contr. (11th Am. ed.) 314, note (d), which support the doctrine that the agent is liable on the contract. Where, however, the agent fails to execute his authority in such manner as to charge his principal, or undertakes to make a contract as agent without authority, yet if, rejecting what the agent was not authorized to put into the contract, it still contains apt words to charge himself; it has been held, in some cases, that he is personally liable on the promise. 1 Chitty Contr. (11th Am. ed.) 314, note (d), and cases cited to this point. If a man makes a contract as agent—he does promise that he is what he represents himself to be, and he must answer for any damages which directly result from confidence given to the representation. *Wightman J. in Collen v. Wright*, 7 El. & Bl. 318. In this same case Lord Campbell C. J. said: "I always thought the notion, of suing the agent as principal, absurd; the illustration which Mr. O'Malley suggested of a promise, that an alleged principal should marry, shows this." An agent is not responsible on contracts entered into by him in behalf of a foreign principal, if it appears that in point of fact exclusive credit was given to his principal. *Bray v. Kettell*, 1 Allen, 80; *Barry v. Page*, 10 Gray, 398; *Oelricks v.*

Ford, 23 How. (U. S.) 49; *Green v. Kopke*, 18 C. B. 549; *Mahoney v. Kekulé*, 14 C. B. 390; *Lennard v. Robinson*, 5 El. & Bl. 125; 1 Chitty Contr. (11th Am. ed.) 315, and note (f), and cases there cited.]

(x) *Boson v. Sandford*, Carth. 58; *Bac. Ab. Actions*, B.

(y) 1 Marsh. on Insurance, 204.

(z) 1 Eq. Ab. 308.

(a) *Fenn v. Harrison*, 3 T. R. 761; *Mertens v. Winnington*, 1 Esp. N. P. C. 112; *Johnson v. Ogilby*, 3 P. Wms. 279; *Eaton v. Bell*, 5 B. & Ald. 34; *Bowen v. Morris*, 2 Taunt. 386; *Ex parte Bennett*, 10 Ves. 400.

(b) *Buller v. Harrison*, Cowp. 565, 566; *Sadler v. Evans*, 4 Burr. 1984; *Bul. N. P.* 133; *Pond v. Underwood*, Lord Raym. 1210; *Greenway v. Hurd*, 4 T. R. 558; *Cary v. Webster*, Stra. 480; *Snowden v. Davis*, 1 Taunt. 359; *Bowen v. Morris*, 2 Taunt. 386.

(b¹) [Hearsey v. Prunyn, 7 John. 179.]

(c) *Cox v. Prentice*, 3 M. & S. 344; *Buller v. Harrison*, Cowp. 565; *Cary v. Webster*, Stra. 480; *Edwards v. Hodding*, 5 Taunt. 815; [but see *Holland v. Russell*, 1 B. & S. 424; *S. C.* 4 B. & S. 14.]

(d) *Buller v. Harrison*, Cowp. 565; *Sadler v. Evans*, Burr. 1986; *Pond v. Underwood*, Ld. Raym. 1210; *Greenway v. Hurd*, 4 T. R. 553; *Cary v. Webster*, Stra. 480; *Bul. N. P.* 133; *Bishop v. Eagle*, 10 Mod. 23; *Jones v. Perchard*, 2 Esp. Rep. 507; *Whitehead v. Howard*, 5 Moore, 105; *Wells v. Girling*, 8 Taunt. 737; *Atlee v. Backhouse*, 3 M. & W. 633; [Carew v. Otis, 1 John. 418;

his receipt of the money was obviously illegal, or his authority was wholly void. (e)

Where persons received money for the express purpose of taking up a bill of exchange two days after it became due, and upon tendering it to the holders, and demanding the bill, find that they have sent it back, protested for non-acceptance, to the persons who indorsed it to them, it was held, that such persons, having received fresh orders not to pay the bill, were not liable to an action by the holders for money had and received, when, upon the bill being procured and tendered to them, they refused to pay the money. (f) A person, who, as a banker or agent, receives money from A. to be paid to B., and to other different persons, cannot in general be sued by B. for his share, unless he has expressly agreed to appropriate the money to the purpose for which it was sent. (g) - Nor can an action for money had and received be maintained against a mere bearer of money from one person to another; (h) or a mere collector or receiver who has *bond fide* paid it * over; (i) or against a churchwarden to recover back dues which, before the commencement of the action, had been paid over to the trustee of a chapel, for whom it was received; (k) or against an arbitrator to recover money deposited with him by a bankrupt, subject to an award, and which money the arbitrator *bond fide* paid over to the person whom he thought entitled to receive it, before the issuing of the commission, and without notice of an act of bankruptcy. (l) But auctioneers and stakeholders are considered in the light of trustees for both parties, and are bound to retain the money deposited with them, until it be ascertained which of the parties is entitled to receive it. (m)

The *agents of government* are not in general liable upon contracts

Jefts v. York, 10 Cush. 392, 396. And the same rule holds where, although the money has not been actually paid over by the agent, he has given credit in account to the principal for it, and the account has been stated and settled between them on that footing. *Holland v. Russell*, 1 B. & S. 424; S. C. 4 B. & S. 14; 2 Chitty Contr. (11th Am. ed.) 911.] (e) *Townson v. Wilson*, 1 Campb. 396; *Favence v. Hullet*, 1 Campb. 564; *Lovell v. Simpson*, 3 Esp. Rep. 153; *Cary v. Webster*, 1 Stra. 480; *Whithead v. Brooksbank*, Cowp. 69; *Snowden v. Davis*, 1 Taunt. 359. See *Rotton v. Inglis*, 2 G. & D. 259; [or the payment was compulsory, and not made expressly for the use of the principal; *Ripley v. Gelston*, 9 John. 201; *Mowatt v. McClellan*, 1 Wend. 173; *Mitchell v. Bristol*, 10 Wend. 492. When an agent acts in good faith under an authority which he supposes to be good, and omits to state nothing which tends to discredit his powers, he is not liable, though his authority may have terminated or have been void. *Smout v. Ilberry*, 10 M. & W. 1; *Jefts v. York*,

10 Cush. 392, 395, 396; *Pow v. Davis*, 1 B. & S. 220; *Collen v. Wright*, 8 El. & Bl. 647; *Taylor v. Shelton*, 30 Conn. 128; *Jenkins v. Hutchinson*, 13 Q. B. 744; 1 Chitty Contr. (11th Am. ed.) 313, and note (a), and cases cited; *ante*, 41, note (s).]

(f) *Stewart v. Fry*, 1 Moore, 74; *Williams v. Everett*, 14 East, 582, 590; *Gibson v. Minet*, 2 Bing. 7; 9 Moore, 31, S. C. See *Brind v. Hampshire*, 1 M. & W. 365.

(g) *Williams v. Everett*, 14 East, 582; *Steward v. Fry*, 7 Taunt. 339; *Gibson v. Minet*, 1 R. & M. 68; 3 Cr. & Jer. 83; *Pinto v. Santos*, 1 Marsh. Rep. 132.

(h) *Coles v. Wright*, 4 Taunt. 198.

(i) *Sadler v. Evans*, 4 Burr. 1985; *Greenway v. Hurd*, 4 T. R. 554, 555.

(k) *Horsfall v. Handley*, 8 Taunt. 136.

(l) *Tope v. Hockin*, 7 B. & C. 101.

(m) *Burrough v. Skinner*, 5 Burr. 2639; *Cowling v. Beachum*, 7 Moore, 465. As to deposits on legal or illegal wagers, see 1 Chit. Contr. (11th Am. ed.) 735; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221.

avowedly entered into by them in their official capacity. (*m*¹) Thus, neither the governor of a fort or colony, (*n*) nor a military commissary, (*o*) nor the captain of a regiment, (*p*) or ship, (*q*) is liable for goods ordered by him for the public service, in cases where he does not expressly pledge his individual credit and responsibility. Nor is the secretary at war liable to a retired clerk of the war office for his retired allowance, although such allowance was included in certain funds received by the defendant in his official character. (*r*) Nor are justices of the peace contracting on the behalf of the public for rebuilding a public bridge, under the provisions of an act of parliament, which provides a fund for the payment, liable to the contractor; (*s*) and it seems that where a servant of the crown expressly contracts on account of government, he is not responsible, although the agreement be under seal. (*t*)

In *Horsley v. Bell*, (*u*) a bill having been filed by the plaintiff, the undertaker of a navigation, against the commissioners named in the act for carrying it on, who had signed the several orders, it was contended, first, that the defendants were not personally liable, because they were exercising a public trust, and the credit was given to the undertaking itself, and not personally to them, and the remedy was therefore *in rem*; secondly, that those who had been present at the meetings, and had signed some, but not all the orders, were liable only to those which they had respectively signed. But Lord Chancellor *Thurlow, assisted by Ashhurst and Gould, Justices, held, first, that the commissioners were personally liable; and, secondly, they were all liable in respect of all the orders. Lord Thurlow said, "Who would make a contract on the credit of toll, which it is in the power of the commissioners to raise, or not, at their pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault if they enter into contracts when they have no money to answer them. They have made themselves liable by their own acts." And this doctrine was confirmed in the case of *Eaton v. Bell*. (*x*) It appeared that an inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing

(*m*¹) [See *ante*, 40, note (*n*).]

(*n*) *Macbeath v. Haldimand*, 1 T. R. 172; *Allen v. Waldegrave*, 2 Moore, 627.

(*o*) *Macbeath v. Haldimand*, 1 T. R. 180.

(*p*) *Myrtle v. Beaver*, 1 East, 135; *Rice v. Chute*, 1 East, 579.

(*q*) *Unwin v. Wolseley*, 1 T. R. 674.

(*r*) *Gidley v. Lord Palmerston*, 3 B. & B. 273; 7 Moore, 91, S. C. Where the plaintiff, a surveyor, employed by a colonial government, and who was entitled by the colonial law to be paid out of deposits received from land-owners by the district secretary, entered into a private arrangement with the

secretary for payment in another way, and the secretary afterwards became a bankrupt, it was held, that the plaintiff was precluded from making a claim upon the government, who were liable in the first instance. *Van Rooyen v. Vandereit*, 2 E. F. Moore's Privy Council Cases, 177.

(*s*) *Allen v. Waldegrave*, 2 Moore, 621.

(*t*) *Unwin v. Wolseley*, 1 T. R. 674; *Allen v. Waldegrave*, 2 Moore, 621.

(*u*) 1 Bro. C. C. 101; *Horsley v. Bell*, Ambl. 770; *Payley*, 251.

(*x*) *Eaton v. Bell*, 5 B. & Ald. 34.

money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses, the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums, by paying these drafts; and it was held, that the commissioners were personally responsible to the bankers for the drafts so made. And a churchwarden, who employs a person to make a plan of the church, in order that the plan may be laid before certain commissioners for building new churches, is personally liable to such person. (*y*) These cases appear to have been decided upon the ground that the several parties sued had within their reach the means of indemnifying themselves by making rates, or out of funds in their hands or power. (*z*) And it has been decided that vestrymen, who at a vestry meeting sign a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, are not liable to the attorney employed by the surveyor; because the conduct of the business relative to the road was more peculiarly the province of the surveyor, who could have afterwards charged the parish in his account, and been reimbursed by a regular parish rate. (*a*) The surveyor of a turnpike road employed and acting by order of commissioners, appears not to be liable to persons who perform work in repairing the road; for in such case the surveyor is to be viewed in the light of a mere servant of the commissioners. (*b*)

* Where the agent does not, at the time the contract is made, disclose that he is acting merely as an agent, and the principal is unknown, the latter may, when discovered, be sued upon the agreement. (*c*) And the principal is also responsible for the price of goods ordered by his agent, who disclosed that he was acting merely as such, but did not express who his principal was, although the

(*y*) *Brook v. Guest*, N. P. Stafford Summer Assizes, 1825, cited 3 Bing. 481.

(*z*) *Sprott v. Powell*, 3 Bing. 483.

(*a*) *Sprott v. Powell*, 3 Bing. 478.

(*b*) *Pochin v. Pawley*, 1 Bl. Rep. 670. As to the liability of trustees of a turnpike road, *Parrot v. Eyre*, 10 Bing. 283. The subscribers who attend a committee of a hospital are liable to the creditors of such hospital. *Burlis v. Smith*, 7 Bing. 705. As to the liability of members of a club for debts incurred by a committee of management, see *Fleming v. Hector*, *Adams v. O'Brien*, *Same v. Rippon*, 2 M. & W. 172; or for goods ordered by the house steward, *Todd v. Emly*, 7 M. & W. 427; 8 M. & W. 505. Shareholders in a mine carried on by directors are, where they interfere in the affairs of the company, liable for goods and implements necessary for work-

ing the mine, ordered by the purser of the company, and although the prospectus of the company and the scrip certificates state that no debts are to be incurred; but it would be otherwise if it were shown that in fact the agent had no authority from the defendant, and that the plaintiff had notice thereof. *Hawker v. Bourne*, 8 M. & W. 703. See, also, *Tredmen v. Bourne*, 6 M. & W. 461; *Bell v. Francis*, 9 C. & P. 66. But a member of a joint stock company is not liable for goods ordered before he became a member, although they were delivered after. *Whitehead v. Barron*, 2 Mood. & R. 248.

(*c*) *Paterson v. Gandasequi*, 15 East, 67; *Addison v. Gandasequi*, 4 Taunt. 576, note; per Lord Tenterden, *Thompson v. Davanport*, 9 B. & C. 86. See *ante*, 40, 41.

vendor had actually debited the agent without inquiring the name of his employer; for in such case the vendor cannot be considered to have had the means of electing finally to give credit to the agent only. (*d*)

But the principal is not liable upon the contract of his agent, if the other party to the agreement, with full knowledge of the facts, and the power and means of deciding to whom he will give credit, elect to give credit to the agent only, in his individual character. (*e*)

At law, one *partner* or *tenant in common* cannot in general sue his copartner (*e*¹) or cotenant, in any action in *form ex contractu*; (*f*) but must proceed by action of account, (*g*) or by bill in equity. (*g*¹) This rule is founded on the nature of the situation of the parties, the difficulty at law of adjusting complicated accounts between them, and the propriety, arising from the supposed confidence reposed by the parties in each other, of their being examined upon oath, which can only be effected in a court of equity. Therefore, in the case of a partnership, whether it be a general or particular partnership, one partner cannot at law recover his share of moneys received by the other on account of the firm, unless on a final balance of all accounts a particular sum be found due to one partner, which the other expressly promises to pay; (*h*) or unless there be an express covenant to account, &c. (*i*)

Partners,
tenants in
common;
&c. suing
each other.

(*d*) *Thompson v. Davenport*, 9 B. & C. 78.

(*e*) *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Thompson v. Davenport*, 9 B. & C. 89, 90; *Patapoco Ins. Co. v. Smith*, 6 Harr. & J. 171; *Westmoreland v. Davis*, 1 Ala. N. S. 299; *French v. Price*, 24 Pick. 13.]

(*e*¹) [Murray v. Bogert, 14 John. 318; *Beach v. Hotchkiss*, 2 Conn. 425; *Walker v. Long*, 2 P. A. Browne, 125; *Ozeas v. Johnson*, 4 Dall. 434; S. C. 1 Binn. 194; *Young v. Brick*, 2 Penn. 663; *Course v. Prince*, 1 Rep. Const. Ct. 413; *Kennedy v. M'Faddon*, 3 Harr. & J. 194.]

(*f*) *Foster v. Allanson*, 2 T. R. 478; *Mainwaring v. Newman*, 2 B. & P. 124; *Becketh v. Blanchard*, 4 East, 144; *Wilkinson v. Frasier*, 4 Esp. R. 182; 2 Marsh. 319, 324; *Holmes v. Higgins*, 1 B. & C. 74; *Teague v. Hubbard*, 8 B. & C. 345; *Jackson v. Stopherd*, 2 Cr. & M. 361; *Green v. Beesley*, 2 Bing. N. C. 108. But a partnership must have been actually formed. *Nockels v. Crosby*, 3 B. & C. 814; *Brown v. Tapscott*, 6 M. & W. 119. But if a contract be made by a person before he becomes a partner he may afterwards sue on it. Thus, where the plaintiff entered into

an express contract with a committee of individuals, associated together for the purpose of obtaining an act of parliament for making a turnpike road, to do certain work for a specified sum, and he afterwards caused his name to be inserted in the list of subscribers for two shares, it was held, that he was not thereby precluded from recovering upon such express contract. *Lucas v. Beach*, 1 M. & Gr. 417.

(*g*) *Bac. Ab. Account*; *Wheeler v. Herne*, Willes, 208.

(*g*¹) [See *Niven v. Spickerman*, 12 John. 401; *Ozeas v. Johnson*, 1 Binn. 191.]

(*h*) *Foster v. Allanson*, 2 T. R. 478; *Fromont v. Coupland*, 2 Bing. 170; *Coffee v. Brian*, 3 Bing. 55, 56; *Bovill v. Hammond*, 6 B. & C. 149; *Rackstraw v. Imber*, Holt's N. P. C. 368. [It is, however, said now to be the settled rule in England, that if partners finally balance all their accounts, and a certain sum be found to be due to one of them thereon, the partner against whom the balance is struck may be sued at law to recover the amount, without there having been any express promise on his part to pay the same. *Wray v. Milestone*, 5 M. & W. 21, 24, 25. So in Massachusetts there is no necessity for an express promise. *Jones v.*

(*i*) *Foster v. Allanson*, 2 T. R. 482; *Thimblethorp v. Hardesty*, 7 Mod. 116; *Venning v. Leckie*, 13 East, 8; *Ouston v. Ogil*, 13 East, 538; *Jackson v. Stopherd*,

2 Cr. & M. 361; *Bedford v. Brutton*, 1 Bing. N. C. 399; *Green v. Beesley*, 2 Bing. N. C. 108; [1 Chitty Contr. (11th Am. ed.) 341.]

* It has been held, that assumpsit for money had and received may be maintained against one who had been a member of a benefit club, for money intrusted to his keeping by the rest of the society, in the name of the officers properly appointed for managing their affairs, under the articles. (*k*) So one joint contractor who pays money for another, the whole of which, or a particular part of which, the latter had engaged to pay, may recover it from the other as money paid to his use; (*l*) and if one of two joint contractors refer the claim of a third person to damages upon the contract to arbitration, and he pay over the sum awarded to the claimant, he may sue his co-contractor for money paid. (*m*) In the case, however, of a general unsettled account between partners, one who has been compelled to pay the whole of a creditor's demand cannot sue his copartner at law. (*n*)

In the case of a personal chattel, or of trees severed from the land, if one of two or more joint tenants, or tenants in common, by the sale thereof, convert the thing into money, the joint interest is determined, and each hath a separate interest for a sum certain, and may support money had and received against the other; (*o*) and one partner may maintain an action for money had and received, against the other partner for money received to the separate use of the former, and

Harraden, 9 Mass. 540; Brigham v. Eveleth, 9 Mass. 538; Bond v. Hayes, 12 Mass. 34; Wilby v. Phinney, 15 Mass. 115; Fanning v. Chadwick, 3 Pick. 423; Williams v. Henshaw, 11 Pick. 82. In this last case, Morton J. said: "Assumpsit will lie to recover a final balance of a partnership account in all cases in which the rendition of the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them." See Brinley v. Kupfer, 6 Pick. 179. So in Pennsylvania, no express promise to pay the balance is required. Ozeas v. Johnson, 1 Binn. 191; S. C. 4 Dall. 434; Lamabere's case, 1 Wash. C. C. 435. In New York and South Carolina there must be an express promise to pay the balance. Casey v. Brush, 2 Caines, 293; Murray v. Bogert, 14 John. 318; Halsted v. Schmelsel, 17 John. 80; Westerlo v. Everton, 1 Wend. 532; Clark v. Dibble, 16 Wend. 603; Atwater v. Fowler, 1 Hall, 180; Course v. Prince, 1 Const. Ct. (S. Car.) 416. See Collyer Partn. § 281; 1 Chitty Contr. (11th Am. ed.) 342, note (*b*); Sally v. Capps, 1 Ala. N. S. 121; Bangor v. Collins, 7 Harr. & J. 213; Chase v. Garvin, 19 Maine, 211. Partners may separate any portion of the partnership affairs from the rest, and adjust that portion, and if upon an accounting and adjustment of such portion, a sum is found due from one to the other, a promise to pay that sum is binding, and an action may be sustained upon it, notwithstanding the balance so found is not the final balance upon a final settlement of the whole concerns of the partnership.

Gibson v. Moore, 6 N. H. 547; 1 Chitty Contr. (11th Am. ed.) 342, note (*z*). If one partner covenant to pay all debts due from the partnership, he is liable for a debt due from the partnership to one of the other copartners. Hobart v. Howard, 7 Mass. 304; Clough v. Hoffman, 5 Wend. 499.]

(*k*) Sharp v. Warren, 6 Price, 131.

(*l*) Hutton v. Eyre, 6 Taunt. 289; 1 Marsh. 603; Wright v. Hunter, 1 East, 29; Child v. Morley, 8 T. R. 614; Rol. Abr. Action sur le Case, 24, pl. 31; Hussey v. Crickitt, 3 Campb. 168; [Johnson v. Johnson, 11 Mass. 259; Bachelder v. Fiske, 17 Mass. 464; Keith v. Easton, 21 Pick. 261, 262; Wiggins v. Suffolk Ins. Co. 18 Pick. 145, 153; 2 Chitty Contr. (11th Am. ed.) 889 *et seq.* and notes and cases cited.]

(*m*) Burnell v. Minot, 4 Moore, 340.

(*n*) Robson v. Curtis, 1 Stark. 78, 79.

(*o*) Wheeler v. Horne, Willes, 209; Martyn v. Knowllys, 8 T. R. 146; [Selden v. Hickock, 2 Caines, 166; Gardiner Manuf. Co. v. Heald, 5 Greenl. 381; Coles v. Coles, 15 John. 159; Brinckerhoff v. Wemple, 1 Wend. 470; Jones v. Harraden, 9 Mass. 540; Brigham v. Eveleth, 9 Mass. 538; Shepard v. Richards, 2 Gray, 426. When a tenant in common has received more than his share of the rents of the common property, in money, or as bailiff of the other, the latter may maintain assumpsit or contract for his proportion. Sargent v. Parsons, 12 Mass. 148; Sturdivant v. Smith, 29 Maine, 387; Munroe v. Luke, 1 Met. 459; Stinton v. Richardson, 13 M. & W. 17; Buck v. Spofford, 31 Maine, 34.]

wrongfully carried to the partnership account; (*p*) and a partner may recover money paid to his copartner for the purpose of being paid over, as the plaintiff's liquidated share of a debt to their joint creditor, if it be not so applied, and the plaintiff be obliged to pay such joint creditor. (*q*) So, one of several co-sureties in a bond, &c. who has been obliged to pay more than his proportion, may recover against any one of the others his proportion of the money paid under the bond, &c. (*r*) And an action at law is sustainable to recover a contribution in the nature of general average by one shipper of goods against another. (*s*) And if there be not an actual partnership, one of several parties interested in profits may in general proceed at law against a person who has received his share; thus, if a sailor engage *on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold he may maintain an action for his wages against the captain, and shall not be considered as a partner. (*t*) And when the agreement between two does not constitute a partnership as between themselves, but only an agreement in favor of one, as a compensation for trouble and credit, he may sue the other, though, as between third persons, both might be liable as partners. (*u*)

It is an answer to an action that a party is *legally interested in each side of the question*. A party cannot be both plaintiff and defendant in an action. (*x*) If, therefore, one of the plaintiffs be also a mem-

(*p*) *Smith v. Barrow*, 2 T. R. 476; [1 Chitty Contr. (11 Am. ed.) 341.]

(*q*) *Wright v. Hunter*, 1 East, 20; *Venning v. Leckie*, 13 East, 7; *Hutton v. Eyre*, 6 Taunt. 289.

(*r*) *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Earl of Winchelsea*, 2 B. & P. 270; *Exall v. Partridge*, 8 T. R. 310; *Child v. Morley*, 8 T. R. 614; *Toussaint v. Martinant*, 2 T. R. 100; *Browne v. Lee*, 6 B. & C. 689; *Dunn v. Snee*, 1 Moore, 2; *Davies v. Humphreys*, 6 M. & W. 153. See the distinction in cases of tort, *Merryweather v. Nixan*, 8 T. R. 186; *Farebrother v. Aulseley*, 1 Campb. 343, 345; *Wilson v. Milner*, 2 Campb. 452; [2 Chitty Contr. (11th Am. ed.) 691 et seq. and notes; *Harris v. Ferguson*, 2 Bailey, 397; *Chaffee v. Jones*, 19 Pick. 260; *Norton v. Coons*, 3 Denio, 130, 132; *Davies v. Humphreys*, 6 M. & W. 153, 168; *Kemp v. Finden*, 12 M. & W. 421; *Fletcher v. Grover*, 11 N. H. 369; *Boardman v. Paige*, 11 N. H. 431; *Johnson v. Johnson*, 11 Mass. 356; *Crowder v. Shelby*, 6 J. J. Marsh. 62; *Odell v. Dana*, 33 Maine, 182; *Whipple v. Stevens*, 19 N. H. 150.] The rule that there is no joint contribution among joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. *Pearson v. Skel-*

ton, 1 M. & W. 504. But no part of the costs paid or incurred by one surety in an action against him on the bond, &c. given for the principal, is recoverable against the co-surety by way of contribution. *Knight v. Hughes*, 3 C. & P. 467.

(*s*) *Dobson v. Wilson*, 3 Campb. 480; *Birkley v. Freagrave*, 1 East, 220; *Price v. Noble*, 4 Taunt. 123.

(*t*) *Wilkinson v. Frasier*, 4 Esp. R. 182; *Nockels v. Crosby*, 3 B. & C. 814.

(*u*) *Hesketh v. Blanchard*, 4 East, 144.

(*x*) *Mainwaring v. Newman*, 2 B. & P. 124; *Moffatt v. Van Mullingen*, 2 Chit. Rep. 539; *Bosanquet v. Wray*, 2 Marsh. 319; *Bosanquet v. Wray*, 6 Taunt. 597; *Harvey v. Sir W. Hay*, 9 B. & C. 356; [*Eastman v. Wright*, 6 Pick. 316; *Westcott v. Price*, *Wright (Ohio)*, 220; *Warren v. Stearns*, 19 Pick. 73; *Graham v. Harris*, 5 Gill & J. 487; *Livingston v. Livingston*, 2 Mill (S. Car.) Const. 428; *Griffith v. Chew*, 8 Serg. & R. 20; *Portland Bank v. Hyde*, 2 Fairf. 196; *Burley v. Harris*, 8 N. H. 235; *Rogers v. Rogers*, 5 Ired. Eq. 31; *Denny v. Metcalf*, 28 Maine, 389; *Thayer v. Buffum*, 11 Met. 398; *Belknap v. Gibbens*, 13 Met. 471; *Cole v. Reynolds*, 18 N. Y. 74; *Pultney v. Stewart*, 27 Barb. 553; *Sherwood v. Barton*, 23 How. Pr. 535; *S. C. 36 Barb. 284*; *Pearson v. Nesbitt*, 1 Dev. 315.] This may be given in evidence under the general issue. *Hammond v. Teague*, 6 Bing. 197; *Goddard*

ber of the firm against which the action is brought, upon a contract entered into by the firm, the action shall fail, although the other partners only be sued. (*y*) And where the agent, employed in endeavoring to carry through parliament a bill for making a railway, sued the chairman of a committee of subscribers to the undertaking for his work and labor, and expenses incurred as such agent, and it appeared that he himself was a subscriber to the undertaking, it was held the action would not lie. (*z*) And in assumpsit by A., B. and C. against D. as one of the indorsers of a promissory note, drawn by E. in favor of himself and of the said C. and D. then in partnership, and by them indorsed to the plaintiffs, a plea in bar that C., one of the plaintiffs, is liable as an indorser, together with the defendant, was held good on special demurrer; (*a*) and in an action by several as executors, a plea in bar that the promises were made by the defendants jointly with one of the plaintiffs, is sufficient. (*b*) So if A., an attorney, and B. and C. were members of a trading company, and after the dissolution of that company, B. and C. be sued by creditors of the company, and retain A. to defend the action, the latter being, as a member of the company, jointly liable to contribute to the expense of defending those actions, cannot sue B. and C. for his bill of costs. (*c*)

A *lunatic* is liable for goods suitable to his rank supplied to him upon a contract, which a person, not aware of his infirmity, *bond fide* enters into with him. (*d*)

A contract, whether it be by specialty or not, is either joint, or it is *several; or parties may bind themselves jointly and severally. (*d*¹) It would be a pursuit foreign to the object of this treatise to detail the various instances in which contracts shall be considered to entail upon the parties a joint or separate responsibility. (*e*) The rule is, that several persons

2dly. With reference to the number of the defendants, and who must be sued.

v. Hodges, 1 Cr. & M. 33; *Warrell v. Grayson*, 1 M. & W. 166; *Pearson v. Skelton*, 1 M. & W. 505.

(*y*) *Ib.* But see *Bedford v. Bruton*, 1 Bing. N. C. 399.

(*z*) *Holmes v. Higgins*, 1 B. & C. 74; 2 D. & R. 196, S. C. See, however, *Lucas v. Beach*, 1 M. & Gr. 417.

(*a*) *Mainwaring v. Newman*, 2 B. & P. 120; 2 Marsh. 329; *Teague v. Hulband*, 8 B. & C. 345.

(*b*) *Mainwaring v. Newman*, 2 B. & P. 124, note (*c*); *Fitzgerald v. Boehm*, 6 Moore, 332; 1 Went. 17, 18.

(*c*) *Milburn v. Codd*, 7 B. & C. 149.

(*d*) *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170. [See *McCrillis v. Bartlett*, 8 N. H. 569; *Hallet v. Oakes*, 1 Cush. 296, 298; *Seaver v. Phelps*, 11 Pick. 304; *Fitzgerald v. Reed*, 9 Sm. & M. 94; *Sawyer v. Lufkin*, 56 Maine, 308; *Molton v. Camroux*, 2 Exch.

487; S. C. 4 Exch. 17; *Kendall v. May*, 10 Allen, 59.]

(*d*¹) [2 Chitty Contr. (11th Am. ed.) 1351.]

(*e*) See Bac. Ab. Obligation; *Collins v. Prosser*, 1 B. & C. 682; *Platt on Cov.* 115. Persons may be jointly liable as partners, either as having expressly contracted, or by holding themselves out to the world as such, or by a participation in the loss or profit. *M'Iver v. Humble*, 16 East, 174; *Hoare v. Dawes*, Doug. 356; *Waugh v. Carver*, 2 H. Bl. 246, 247. If several persons dine together at a tavern, they are *primâ facie* jointly liable for the whole bill, and not merely each for his own share, but each of the officers of a regimental mess is separately liable for his own share. 3 Campb. 51; *Hussey v. Crickett*, 3 Campb. 168. See *Wathen v. Sandys*, 2 Campb. 640, as to the liability of candidates at election for expense of husbands, &c. As to who are partners in gen-

contracting together with the same party, for one and the same act, shall be regarded as jointly and not individually or separately liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisors. (f) This rule is more particularly obvious in the case of promises implied by law. But in the case of parties demising or granting the separate interest of each in an estate, it seems that the covenant implied by law from the word "demise," or even an express covenant by the two, without express words of severalty, shall be considered co-extensive with the interest granted, and therefore shall be several where a several interest is granted, and joint, if a joint estate be granted. (g)

First. Where there are several parties, if their contract be *joint* they must all be made defendants; (h) although they subsequently arrange amongst themselves that one only of them shall perform the contract. (i) And a partner who retires from a firm is liable for the old debt, although the debt be carried by the consent of the creditor to the account of the remaining partners, and he take their bill of exchange, there being no actual satisfaction or release of the responsibility of the retiring partner. (k) When an insurance has been made for the benefit of several, a jury may infer a joint contract to pay the broker. (l) Where it appears from an instrument, that a promise by two contractors is intended to be *joint*, it may be treated as such, although the promise be in terms several only. (m)

A contract made by two partners to pay a sum of money to a third person equally, out of their own private funds, is a joint contract, and they should be jointly sued upon it; (n) but if A. lease for years to B.

eral, see Chitty's Com. Law, 231. As to the liability of shareholders in joint stock companies, see *Vice v. Lady Anson*, 7 B. & C. 409; 8 C. 1 Man. & R. 113; *Bourne v. Freeth*, 9 B. & C. 632; 8 C. 4 Man. & R. 412; *Dickenson v. Valpy*, 10 B. & C. 128; 8 C. 5 Man. & R. 126; *Pitchford v. Davis*, 5 M. & W. 2; *Hawker v. Bourne*, 8 M. & W. 703.

(f) *May v. Woodward*, Freem. 248; 7 Mod. 154; *Robinson v. Walker*, 1 Salk. 393. See *Platt on Cov.* 117, 118.

(g) See *Coleman v. Sherwyn*, 1 Show. 79; 8 C. in Carth. 97; 1 Salk. 137; *Comb.* 163; *Noy*, 86; *Adams v. Gibney*, 6 Bing. 636.

(h) 1 Saund. 153, note (1); 291 b, note (4); [M'Call v. Price, 1 McCord. 82.]

(i) *Lodge v. Dicus*, 3 B. & Ald. 611; *Byers v. Doby*, 1 H. Bl. 236; *Solly v. Forbes*, 2 B. & B. 38. See *Gibson v. Lupton*, 9 Bing. 297.

(k) *David v. Ellice*, 5 B. & C. 196.

(l) *Robinson v. Gleadow*, 2 Bing. N. C. 156. And as to where two overseers are jointly liable, *Eaden v. Titchmarsh*, 1 Ad. & El. 691.

(m) *Lee v. Nixon*, 3 Nev. & Man. 441.

[Where the debt is joint only, a judgment against one joint contractor would be a bar to an action against another, because the latter might plead that he made no promise except with the former. *King v. Houre*, 13 M. & W. 494; *Maule J. in Bell v. Bankes*, 2 M. & Gr. 267; *Bayley J. in Lechmere v. Fletcher*, 1 Cr. & M. 634; *Story J. in U. States v. Cushman*, 2 Sumner, 437-441; *Trafton v. U. States*, 3 Story, 646; *Pierce v. Kearney*, 5 Hill, 86; *Ward v. Johnson*, 13 Mass. 151, 152; *Robertson v. Smith*, 18 John. 459; *Moale v. Hollins*, 11 Gill & J. 11; *Ward v. Motter*, 2 Rob. (Va.) 559, 560; *Smith v. Black*, 9 Serg. & R. 142; *Anderson v. Levan*, 1 Watts & S. 334. But by statute in Tennessee, a creditor may sue any one or more joint obligors, or partners; and such suit is no bar to a suit subsequently brought against the remaining obligors or partners. *Lowry v. Hardwick*, 4 Humph. 88. In Mississippi the law allows an action of debt to be maintained against one of the parties to an obligation under the hands and seals of two persons. *Rogers v. Batchellor*, 12 Peters, 221.]

(n) *Byers v. Doby*, 1 H. Bl. 236. As to the effect of a contract signed by two out of

* and C., rendering rent, and C. assign his moiety to D., A. may sue B. and D. jointly or severally, at his election, for rent in arrear. (o) And where two several tenants of a farm agreed with a succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award, and the arbitrators awarded that each of the two should pay a certain sum of money to the third, it was decided that they were liable to be sued jointly for the sums awarded to be paid by each; because, by the terms of the agreement they had promised jointly as well as severally, which made each of them liable for the act of the other. (p) Parceners should, before partition, be jointly sued, though they be entitled to the estate by different descents. (q)

Before the 3 & 4 W. 4, c. 42, s. 9, joint contractors must all have been sued, although one had become bankrupt, and obtained his certificate, (r) but by this statute it is enacted, "that to any plea in abatement in any court of law of the non-joinder of another person the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors." In the case of a joint contract, if one of the parties cannot be served with process, and a plea in abatement be apprehended, the only safe course is to proceed to outlawry against him, (r¹) and even then, if after outlawry and interlocutory judgment against the defendant who was served with process, he die, no proceedings at law against his executors are sustainable, the debt still continuing to be joint. (s)

It seems that mere dormant partners, (t) and nominal partners

three partners, see *Latch v. Wedlake*, 11 Ad. & El. 959.

(o) *Waldron v. Vickers*, Palm. 283; 2 Vin. Abr. 66, 67; 2 Saund. 182, note (1); *The Bailiffs, &c. of Ipswich v. Martin*, Cro. Jac. 411.

(p) *Mansell v. Burreddge*, 7 T. R. 352; 2 Saund. 61 A, note (2).

(q) Vin. Ab. Actions, Joinder, D. d. Parceners; *Middleton v. Croft*, Rep. temp. Hardw. 398, 399.

(r) *Bovill v. Wood*, 2 M. & Sel. 23; *Moravia v. Glass*, 2 M. & Sel. 444; *Hawkins v. Ramsbottom*, 6 Taunt. 179; *Heath v. Hall*, 4 Taunt. 326.

(r¹) [The process of outlawry is generally unknown in the United States. 1 Dan. Ch. Pr. (4th Am. ed.) 45; 7 Dane Abr. 313.]

(s) *Fort v. Oliver*, 1 M. & Sel. 242; *see quere.*

(t) *Robinson v. Wilkinson*, 3 Price, 538; *Waland v. Elkins*, 1 Stark. R. 272; *Baldney v. Ritchie*, 1 Stark. R. 338; *Stansfield v. Levy*, 3 Stark. R. 8; *Mitchell v. Lasseage*, Holt N. P. C. 253; *Hudson v. Robinson*, 4 M. & Sel. 475; *Mullett v. Hook*, 1 M. & M. 88; *Dickenson v. Valpy*, 10 B. & C. 128; *Vere v. Ashby*, 10 B. & C. 288; *De Man-*

tort v. Saunders, 1 B. & Ad. 398, overrules *Dubois v. Ludert*, 5 Taunt. 609; [*The New York Dry Dock Co. v. Treadwell*, 19 Wend. 525; *Mitchell v. Dall*, 2 Harr. & J. 159.] As to a dormant partner suing, see *ante*, 13, and *Kell v. Nainby*, 10 B. & C. 20. By a contract between the plaintiff and A. and B., it was agreed that the plaintiff should serve A. and B. as foreman in their business for seven years, if A. and B., or either of them, should so long live. The plaintiff having subsequently discovered that at the time of making the contract, C. was a dormant partner with A. and B., declared upon the contract as an agreement to serve A., B. and C, or the survivors of them, for the period therein mentioned; but it was held that the contract was misdescribed, although it seems that, if the declaration had been differently framed, C. might have been made liable under the agreement. *Beckham v. Knight*, 1 M. & Gr. 738; 1 Scott N. R. 675; 9 M. & W. 79. One partner can bind his copartners only by express contract, or to the extent of the authority which is given to the partners generally to enable them to carry on the business of the partnership together; and, therefore, where two persons in partnership carried on business under the

having no interest, (u) need not necessarily be joined as defendants; *more especially if the right or interest of the plaintiff might otherwise be varied or affected. (u¹) And in the case of infants, or married women, (x) contracting jointly with other persons competent to enter into agreements, it is a ground of nonsuit to sue them with the persons who are legally responsible. Their names should be omitted, and if the defendant plead the non-joinder in abatement, the plaintiff may reply the infancy or coverture. (y) If one or more of several partners originally jointly liable has taken the case out of the statute of limitations as to himself only, by promising or acknowledging the debt, then the action should be only against *him*, and not against him and his copartner, who has been discharged from liability. (x)

In the case of *defendants*, if one of the parties originally bound be dead, it is not necessary to notice him in the declaration, and the survivors need not be declared against as such, but may be sued as if they alone were the parties primarily liable. (a)

Secondly, Where the covenant or promise is so framed that it does not confer upon the plaintiff a remedy against the contractors jointly, but each is only *separately* responsible for his own act, it is essential to sue them distinctly; but where it appears upon an instrument that a promise by two contractors was *intended* to be *joint*, it may be treated as such, although the promise be *in terms* several only. (b)

name of J. B. only, and one of the partners accepted bills in the name of J. B. & Co., the acceptance was holden not to bind the firm. *Kirt v. Blenton*, 12 L. J. R. N. S. Exch. 117.

(u) *Guidon v. Robson*, 2 Campb. 302; *Teed v. Elworthy*, 14 East, 210; *Glossop v. Colman*, 1 Stark. 25; *Dubois v. Ludert*, 1 Marsh. 246. See, as to plaintiffs, *Kell v. Nainby*, 10 B. & C. 30, and *ante*, 13.

(u¹) [But where there are dormant partners in a firm, and that fact being unknown to the plaintiff, he sues the ostensible partner or partners, upon a cause of action on which the whole firm are liable, and recovers a judgment, which is unsatisfied, this may be pleaded in bar to a subsequent suit upon the same cause of action, in which he joins the ostensible and dormant partners as defendants. *Robertson v. Smith*, 18 John. 459; *Ward v. Johnson*, 13 Mass. 148; *Smith v. Black*, 9 Serg. & R. 143; *Moale v. Hollins*, 11 Gill & J. 11; *King v. Hoare*, 13 M. & W. 494; *Collyer Partn. § 575*, in note; *Ward v. Motter*, 2 Rob. (Va.) 546.]

(x) *Chandler v. Parkes*, 3 Esp. Rep. 76; *Jaffay v. Frebain*, 5 Esp. Rep. 47; *Burgess v. Merrill*, 4 Taunt. 468; *Noke v. Chiswell*, 1 Wils. 89.

(y) *Chandler v. Parkes*, 3 Esp. Rep. 76; but see *Gibbs v. Merrill*, 3 Taunt. 307. [But a different rule prevails, in some at

least of the American states, where it is held, that if several are sued and one of them pleads infancy, the plaintiff may enter a *nolle prosequi* against the infant, and proceed to judgment against the other defendants. *Hartness v. Thompson*, 5 John. 160; *Woodward v. Newhall*, 1 Pick. 500; *Cutts v. Gordon*, 13 Maine, 474; *Tappan v. Abbott*, cited 1 Pick. 502; *Peebles v. Rand*, 43 N. H. 337, 339; *Niles v. Drake*, 17 Pick. 516. So also, the plaintiff may enter a *nolle prosequi* against one of several defendants who gives his infancy in evidence under the general issue, or if the defendant does not enter a *nolle prosequi*, the jury may find a verdict for the infant, and for the plaintiff against the other defendants. *Cutts v. Gordon*, 13 Maine, 574; *Hartness v. Thompson*, 5 John. 160; *Walmsley v. Lindenberger*, 2 Rand. 478; *Dacoeta v. Davis*, 4 Zabrisk. 419; *Allen v. Butler*, 9 Vt. 122. An adult cannot plead in abatement the infancy of a co-defendant. *Hallam v. Mumford*, 1 Root, 58.]

(z) See 9 Geo. 4, c. 14, s. 2.

(a) *Richards v. Heather*, 1 B. & Ald. 29; *Calder v. Rutherford*, 3 B. & B. 302; *Mott v. Petrie*, 15 Wend. 318; *Huckins v. Rockwell*, 2 Duer, 650.]

(b) *Lee v. Nixon*, 3 Nev. & Man. 441; *Kinsley v. Shenberger*, 7 Watts, 193. In Massachusetts, persons severally liable upon contracts in writing, including all parties

Thirdly, When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties jointly, or each separately, though their interest be joint. (c) But if there be more than two parties to a joint and several contract, as where three obligors are jointly and severally bound, the plaintiff must either sue them all jointly, or each of them separately; (d) though if two only be improperly sued, the objection should be taken by plea in abatement, or by writ of error if the defect appear on the record, and it is not a ground of nonsuit. (e) Where parties are sued separately, on a joint and several engagement to do a certain act, the breach may be assigned in both; (f) and a recovery, and execution against the body of one, producing no actual satisfaction, will be no bar to an action against the other. (g) And when the contract is joint and several, and the *debt or demand considerable, it is most advisable to proceed separately, for if all the parties be joined, and one of them die after judgment, and before execution, the remedy at law

Joint and several contract.

to bills of exchange and promissory notes, may all or any of them be joined in the same action. The declaration may include one count only, describing the several contracts of the defendants, when the same contract was made by each; or different counts, describing the different contracts of the defendants when, as in the case of maker and indorser, the same contract was not made by all. Genl. Sta. c. 129, § 4. See *Costigan v. Lunt*, 104 Mass. 217; *Wallis v. Carpenter*, 13 Allen, 19; *Wamesit Bank v. Buttrick*, 11 Gray, 387.]

(c) Bac. Ab. Obligation, D. 4; 1 Saund. 153, note (1); *Enys v. Donnithorne*, 2 Burr. 1190; *Constable v. Cloberry*, Poph. 161; [*Wright v. Hickson*, Brayt. 22; 2 Chitty Contr. (11th Am. ed.) 1355.] In what cases the court will restrain a party from proceeding in several actions on bail bond; *Key v. Hill*, 2 B. & Ald. 598; and as to the consolidation of actions, see *Tidd* (9th ed.), 614. *Seem*, that a creditor cannot sue jointly and separately at the same time. Ex parte *Brown*, 1 Ves. & B. 65. And where separate actions were brought against several persons for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the court stayed the proceedings in the others without costs. *Carne v. Legh*, 6 B. & C. 124.

(d) *Buller J. in Stratfield v. Halliday*, 3 T. R. 782; Bac. Ab. Obligation, D. 4; 1 Saund. 291 e; 2 Vin. Ab. 68; pl. 7; *Platt on Cov.* 134.

(e) 1 Saund. 291 e; *South v. Tanner*, 2 Taunt. 254; [*Bangor Bank v. Treat*, 6 Greenl. 207. "Each party to a joint contract is severally liable in one sense, i. e. if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the

same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect composes the joint bond of all and the several bonds of each of the obligees." *Parke B. in King v. Hoare*, 13 M. & W. 515.]

(f) *Lilley v. Hedges*, 1 Stra. 553; *Enys v. Donnithorne*, 2 Burr. 1197.

(g) *Brown v. Wootton*, Cro. Jac. 73; 5 Co. 86; *Claxton v. Swift*, 3 Mod. 87; 2 Show. 494; [*United States v. Cushman*, 2 Sumner, 310; *Trafton v. United States*, 3 Story, 646; *Simonds v. Center*, 6 Mass. 18; *Gatz v. Stump*, Cooke, 494; *M'Mahan v. Murphy*, 1 Bailey, 535; *King v. Hoare*, 13 M. & W. 494; *Lechmere v. Fletcher*, 1 Cr. & M. 623; *Higgins's case*, 6 Co. 44-46. "In such case," Mr. Justice Wilde said, in *Ward v. Johnson*, 13 Mass. 151, "the separate judgments amount in substance to the same as a joint judgment against all the promisors. In both cases, each defendant is liable for the whole debt, and payment by one will discharge the others." In *Trafton v. United States*, 3 Story, 646, Mr. Justice Story proceeded further, and held that, where the contract is both joint and several, a judgment against both contractors is not a bar to a several action against either one of them; and a several judgment against either is not a bar to a joint judgment against both. See also, to the same effect, *United States v. Cushman*, 2 Sumner, 426. But see Ex parte *Rowlandson*, 3 P. Wms. 405; *Cabell v. Vaughan*, 1 Saund. 291 f; *King v. Hobbs*, Yelv. 26, 27, and Mr. Metcalf's note (1). In some of the states all partnership contracts are joint and several by statute. *Coll-yer Partn.* § 757, note (4); *McLain v. Carson*, 4 Ark. 164; *Lyons v. Hamilton*, 1 How. (Miss.) 474; *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 597; *Lowry v. Hardwick*, 4 Humph. (Tenn.) 188.]

against the personal estate or assets of the deceased is determined ; (l) and in the case of the death of a surety, even a court of equity will not in all cases relieve ; (m) whereas, if the plaintiff proceed separately, the executor of the deceased, as well as the survivor, continue severally liable at law. (n) In general, where a contract is joint and several, if the debt be considerable, it is most advisable to proceed separately, so that the creditor may thereby retain his legal remedies against each in case of death of one or more of the parties.

Misjoinder. — It has been already observed, that at law as well as in equity the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, though standing in the same relative situations. (o) And, therefore, in an action *ex contractu* against several, it must appear on the face of the pleadings that their contract was joint, (o¹) and that fact must also be proved on the trial. If *too many* persons be made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error ; (p) and even if the objection do not appear upon the pleadings, the plaintiff may be nonsuited upon the trial, if he fail in proving a joint contract. (q) Although in actions for *torts* one defendant may be found guilty and the other acquitted, yet in actions for the breach of a *contract*, whether it be framed in *assumpsit*, *covenant*, *debt*, or *case*, a verdict or judgment cannot in general be given in a joint action against one defendant without the other. (r) In an action of *assumpsit* against three persons two only of whom were liable to be sued, the party not liable, together with one of those who was liable, suffered judgment by de-

(l) Com. Dig. Pleader, 3 L. 3, Action, K. 4; Bac. Abr. Obligation, D. 4, vol. v. and vol. vii., Obligation, B.; 2 Saund. 50 a, 51 (4); Tidd, 9th ed. 1121; [Commonwealth v. Miller, 8 Serg. & R. 452; Foster v. Hooper, 2 Mass. 572.]

(m) Thomas v. Frazer, 3 Ves. 399; Bishop v. Church, 2 Ves. sen. 106, 171.

(n) Enys v. Donnithorne, 2 Burr. 1190.

(o) Ante, 9-14; Kenyon C. J. in Birkley v. Presgrave, 1 East, 226, 227; Brookes v. Lord Whitworth, 1 Mnd. 88, 89; [1 Dan. Ch. Pr. (4th Am. ed.) 333 *et seq.*]

(o¹) [Walcott v. Canfield, 3 Conn. 198.]

(p) Mansell v. Burdette, 7 T. R. 352.

(q) Shirreff v. Wilks, 1 East, 52; Porter v. Harris, 1 Lev. 63; Jacques v. Whitcomb, 1 Esp. Rep. 363; Bul. N. P. 129; Coope v. Eyre, 1 H. Bl. 37; Powell v. Layton, 2 N. R. 365; Max v. Roberts, 2 N. R. 454; Ellemborough C. J. in Max v. Roberts, 12 East, 94; Neale v. King, 12 East, 454; Barton v. Hanson, 2 Taunt. 49; Siffkin v. Walker & Nowlstone, 2 Campb. 308; Cooper v. Whitehouse, 6 Car. & P. 545; [Whiting v. Cook, 8 Allen, 63.] And the court will not permit the striking out the names of one or more defendants to cure

the defect. *Ib.* The same rule prevails under a joint commission of bankruptcy. Cooke's Bank. Law, 57. [See Jackson v. Woods, 5 John. 280, 281; Manahan v. Gibbons, 19 John. 109; Tom v. Goodrich, 2 John. 213; Livingston v. Tremper, 11 John. 101; Burnham v. Webster, 5 Mass. 270; Elmendorph v. Tappen, 5 John. 176; Whiting v. Cook, 8 Allen, 63. Where a suit is brought against several joint debtors, a recovery must be had against all or none, unless one or more of the defendants interpose a personal defence, such as infancy, death, bankruptcy. Tuttle v. Cooper, 10 Pick. 281; Wolcott v. Canfield, 3 Cowen, 194; Peebles v. Rand, 43 N. H. 337, 339; Kimmel v. Shultz, Breese, 128; Browne v. Warner, 2 J. J. Marsh. 38; Blight v. Ashley, Peters C. C. 16; Erwin v. Divine, 2 Monroe, 124; Jenkins v. Hunt, 2 Rand. 446.]

(r) Porter v. Harris, 1 Lev. 63; Powell v. Layton, 2 New Rep. 365; Max v. Roberts, 2 New Rep. 454; Max v. Roberts, 12 East, 93; Neale v. King, 12 East, 454; *aliter*, in case one of the defendants has been sued and pleaded in abatement the non-joinder of another party. 3 & 4 W. 4, c. 42, s. 10. See *post*, p. 53, note (e), as to carriers.

fault, and the other party pleaded the general issue, and a verdict was found for the defendant who pleaded, on the ground that the plaintiff having declared as upon a promise by three defendants, to entitle himself to recover, he should have proved a promise, either * express or implied, binding upon all the three; (s) and where the plaintiff declared on a joint and several promissory note against all the makers jointly, and one of them by his plea admitted his handwriting to the note, but the other defendants pleaded *non assumpsit*, the plaintiff was nonsuited, for not proving the handwriting of the defendant, who by his plea had so admitted it. (t) And though a contract be proved to have been in *fact* made by all the defendants, yet if in point of *law* it was not obligatory on one of the defendants, either on the ground of infancy or coverture, at the time it was entered into, the plaintiff will be nonsuited, and in this instance he cannot avoid the objection by entering a *nolle prosequi* as to the infant or *feme covert*; (u) but must discontinue and commence a fresh action, omitting such parties; in which case, should the defendants plead the non-joinder of the infant or *feme covert* in abatement, the plaintiff may reply the infancy or coverture. (x) But when one of the defendants is discharged from liability by matter *subsequent* to the making of the contract, and which operates only to protect him individually, leaving the contract in other respects in full force, as by bankruptcy and certificate, or by the order of the insolvent court, the failure on the trial as to him on that ground does not preclude the plaintiff from recovering against the other parties, or a *nolle prosequi* as to him may be entered upon his plea of his personal discharge. (y) And by virtue of the stat. 9 Geo. 4, c. 14, s. 1, the success of one defendant upon the statute of limitations does not defeat the action against another defendant who has admitted the claim within six years. In debt on a penal statute at the suit of a common informer, or of the party aggrieved, for an offence which may be committed by several jointly, the plaintiff will succeed if he prove either of the defendants to be liable; for in this case the action, though in form *ex contractu*, is founded upon a *tort*. (z) So against executors, though the plaintiff may fail as to one, on the plea of *plene administravit*,

(s) *Shirreff v. Wilks*, 1 East, 52; *Hannay v. Smith*, 3 T. R. 662; *Porter v. Harris*, 1 Lev. 63; *Robeson v. Ganderton*, 9 C. & P. 476.

(t) *Gray v. Palmers*, 1 Esp. Rep. 135.

(u) *Ante*, 49, 50. But where in *assumpsit* for work and labor against several defendants, one the wife of another, the declaration alleged promises by the *defendants*, and the defendants pleaded in abatement the non-joinder of other parties, after verdict for the plaintiff, the court refused to arrest the judgment, as there was nothing on the record to show that the promise was not made before marriage. *France v. White*, 1 Scott

N. R. 604; 1 M. & G. 731. But the declaration would be bad on special demurrer. Per Maule J. *Ib.* See, also, *Nurse v. Wills*, 4 B. & Ad. 739; 1 Ad. & El. 65.

(x) *Burgess v. Merrill*, 4 Taunt. 468, 470; *Gibbs v. Merrill*, 3 Ib. 307; *Teed v. Elworthy*, 14 East, 214; *Chandler v. Parkes*, 3 Esp. Rep. 76; Vin. Ab. Actions, Joinder, D. pl. 8; *Jaffray v. Frebain*, 5 Esp. R. 47.

(y) *Noke v. Chiswell*, 1 Wils. 89; 1 Saund. 207 a, note (2); *Chandler v. Parkes*, 3 Esp. Rep. 77; *Bovill v. Wood*, 2 M. & Sel. 23; *Moravia v. Hunter*, *Ib.* 444.

(z) *Bastard v. Hancock*, Carth. 361; *Barnard v. Gostling*, 3 East, 569; 1 New Rep.

he may recover against the other, and the defendant who is acquitted is not even entitled to costs. (a)

As the consequence of the joinder of *too many* defendants, in an *action founded on a *contract*, (c) are in general so important, it is advisable, in cases where it is doubtful how many parties are liable, to proceed only against those defendants who are certainly liable, in which case we shall see the non-joinder can only be taken advantage of by a plea in abatement. (d)

Non-joinder. — With respect to the mode of taking advantage of the omission of a party who ought to be made a co-defendant, there is a material distinction between this case and that of co-plaintiffs. We have seen that if a person who ought to join as *plaintiff* be omitted, and the objection appear upon the pleadings, the defendant may demur, move in arrest of judgment, or bring a writ of error; or if the objection do not appear on the pleadings, the plaintiff, except in the case of co-executors or co-administrators, will be nonsuited. (e) But in the case of *defendants*, if a party be omitted, whether liable to be jointly sued upon a personal contract (e¹) or as prenor of the profits of a real estate, as in debt for a rent charge, (f) or as one of the assignees of a term, (g) the objection can only be taken by plea in abatement, (g¹) verified by affidavit; (h) and the statute 3 & 4 W. 4,

245; *Govett v. Radnidge*, 3 East, 62; [Whitbeck v. Cook, 15 John. 583; *Biedman v. Vanderslice*, 2 Rawle, 334.]

(a) *Tidd's Prac.* 9th ed. 986; 1 Saund. 207 a, b, note.

(c) According to the case of *Govett v. Radnidge*, 3 East, 62, when the plaintiff declares in case for a cause of action founded in contract or arising *quasi ex contractu*, the defendant cannot plead in abatement that another person was liable, nor is it a ground of nonsuit that *too many* defendants were joined in the action; but see *Powell v. Layton*, 2 New Rep. 365, which is at variance with *Govett v. Radnidge*; and the true doctrine was not decided in the late case of *Pozzi v. Shipton*, 8 Ad. & El. 963. In an action upon the case against public carriers for negligence, the non-joinder of a party cannot be pleaded in abatement. *Powell v. Layton*, 2 New Rep. 365, 454; *Max v. Roberts*, 12 East, 95; *Wall v. King*, 12 East, 454; *Bretherton v. Wood*, 3 B. & B. 54; 6 Moore, 141; *Leslie v. Wilson*, 3 B. & B. 171; *Ansell v. Waterhouse*, 3 Chit. Rep. 1. And if a declaration against carriers be couched in such language as to be consistent with the defendants being charged on the general custom as to carriers, some of the defendants may be found guilty and the others acquitted. *Pozzi v. Shipton*, 8 Ad. & El. 963.

(d) *Infra*. [See *Burnham v. Webster*, 5 Mass. 270.]

(e) *Ante*, 14, 15.

(e¹) [Murphy v. Cross, 2 Whart. 33.]

(f) 1 Saund. 234, note (4).

(g) *Merceron v. Dowson*, 5 B. & C. 479.

(g¹) [*Storey v. McNeill*, Harper, 173; *Horton v. Cook*, 2 Watts, 40; *Robinson v. Robinson*, 1 Fairf. 240; *Winslow v. Merrill*, 2 Fairf. 127; *Powers v. Spear*, 3 N. H. 35; *Williams v. Allen*, 7 Cowen, 316; *Barry v. Foyles*, 1 Peters, 317; *Mackall v. Roberts*, 3 Mon. 130; *M'Arthur v. Ladd*, 5 Ham. 517; *Conley v. Good*, 1 Breese, 96; *Allen v. Luckett*, 3 J. J. Marsh. 165; *Palmer v. Crosby*, 1 Blackf. 139; *Hicks v. Cram*, 17 Vt. 449; *Claremont Bank v. Wood*, 12 Vt. 252; *Nash v. Skinner*, 12 Vt. 219; *Ives v. Hulett*, 12 Vt. 314; *Lurton v. Gilliam*, 1 Scam. 577; *Burgess v. Abbott*, 6 Hill, 135; *Wilson v. Nevers*, 20 Pick. 22; *Tuttle v. Cooper*, 10 Pick. 283; *Elder v. Thompson*, 13 Gray, 91; *McGregor v. Balch*, 17 Vt. 562; *Nealy v. Moulton*, 12 N. H. 485; *Gove v. Lawrence*, 24 N. H. 128; *Potter v. McCoy*, 26 Penn. St. 458; *Exum v. Davis*, 10 Rich. (S. Car.) 357; *Merrick v. Trustees*, 8 Gill, 59; *Hamilton v. Buxton*, 6 Ark. 24; *Shelton v. Banks*, 10 Gray, 401; *Canfield v. Miller*, 13 Gray, 274; *Kendall v. Weaver*, 1 Allen, 277; *Bledsoe v. Irwin*, 35 Ind. 293.]

(h) *Whelpdale's case*, 5 Co. 119 a; *South v. Tanner*, 2 Taunt. 254; 1 Saund. 154, note (1); *Ib.* 291 b, note (4), &c.; *Mitchell v. Tarbutt*, 5 T. R. 651; *Wright v. Hunter*, 1 East, 20; *Saville v. Robertson*, 4 T. R. 725; *Abbott v. Smith*, 2 Bl. Rep. 947; *Forster v. Taylor*, 3 Campb. 50; [*Elder v. Thompson*, 13 Gray, 91; *Bledsoe v. Irwin*, 35 Ind. 293.]

c. 42, sect. 8, requires the affidavit to state the residence in England of the omitted defendant, and if this be omitted, the defendant will be chargeable with the whole debt, and it cannot be objected at the trial upon the general issue as a variance, that a bill or note stated in the declaration to have been made by the defendant, was in fact made by him and others. (i) If, however, it expressly appear on the face of the declaration, or some other pleading of the plaintiff, that the party omitted is *still living*, as well as that he jointly contracted; in that case the defendant may demur, or move in arrest of judgment, or sustain a writ of error. (k) There may, however, be this objection in * the case of a joint contract, to the non-joinder of one or more of the several parties liable, that if judgment be obtained against one, in a separate action against him on such contract, the plaintiff may have difficulty in afterwards proceeding against the parties omitted. (l) If the defendant plead in abatement the non-joinder of a party, and it turns out there are other joint contractors not named in the plea, the defendant will not succeed thereon. (m)

In general, in the case of a mere *personal* contract, the action for the breach of it cannot be brought against a person to whom the contracting party has assigned his interest, and the original party alone can be sued: thus if one demise cattle or goods, and the lessee covenant for himself and his assigns at the end of the term to deliver such cattle or goods, and the lessee assign the cattle, &c. this covenant will not bind the assignee, for it is merely a thing in action in the personalty, and wants such privity as exists between the lessor and lessee of *real* property in respect of the reversion; (n) and if two parties dissolve their partnership, and one of them covenant with the other that he will pay all the debts, a creditor must nevertheless sue both. (o)

(i) *Mountstephen v. Brooke*, 1 B. & Ald. 224; *Wilson v. Reddall*, Gow Rep. 161; [*Wooster v. Chamberlain*, 28 Barb. 602; *Wigand v. Sichel*, 3 Keyes, 120; *Fowler v. Kennedy*, 2 Abb. Pr. 347; *Taylor v. Richards*, 9 Bosw. 679.]

(k) 1 Saund. 291 b, &c. note (4); *Ib.* 154, note (1); *Scott v. Godwin*, 1 B. & P. 73; but see *Churchill v. Gardner*, 7 T. R. 596, 597; *South v. Tanner*, 2 Taunt. 254; [*Cook v. Berkley*, 3 Call, 378; *Merrick v. Trustees*, 8 Gill, 59; *Nealey v. Moulton*, 12 N. H. 458; *McGregor v. Balch*, 17 Vt. 562; *Harwood v. Roberts*, 5 Greenl. 441; *Rhodes v. Dymock*, 33 N. Y. 141; *Cunningham v. White*, 45 How. Pr. 486.] Suing only two of the inhabitants of the hundred under the Black Act was held fatal in arrest of judgment. *Jackson v. Pearson*, 2 D. & R. 439. In general a person is presumed to be living, until it be proved that he is dead, unless seven years have elapsed since he was heard of; *Wilson v. Hodges*, 2 East, 313; *Doe v. Jesson*, 6 East, 85; but this

seems an exception, *sed quare*. See *The King v. Young*, 2 Anstr. 448; *The King v. Chapman*, 3 Anstr. 811; from which it seems that if it appear in a declaration or in a *scire facias* at the suit of the queen on a bond, that there were other joint contractors, though it be not averred that they be living, the declaration and *scire facias* will be deemed insufficient.

(l) Com. Dig. Action, K. 4, L. 4; 6 Co. 45 a, 46 a; *Brown v. Wooton*, Cro. Jac. 73, 74; S. C. Yelv. 67.

(m) *Godson v. Good*, 6 Taunt. 587; 2 Marsh. 302; *Abbott v. Smith*, 2 Bl. Rep. 951. See, also, *Hill v. White*, 6 Bing. N. C. 23.

(n) *Bally v. Wells*, 3 Wils. 27; *Saville v. Robertson*, 4 T. R. 720, 726. *Chose* in action not assignable at law. See *ante*, 17. See *Humble v. Langston*, 7 M. & W. 530, as to the liability of parties for calls in a railway company after they have sold their shares.

(o) *Ante*, 13.

There may, however, in some case, be a *change of credit*, by agreement between the parties, so as to transfer the liability from the original contracting party to another, or to one only of the original parties; (*p*) thus where the plaintiffs were creditors of T. and the defendants were debtors to T., and by the express consent of all parties an arrangement was made, that the defendants should pay to plaintiffs the debt due from them to T.; it was held, that the plaintiffs were entitled to recover. (*q*) But unless it was agreed that T. should be discharged from all liability, it seems that no such action could be supported. (*r*) The general rule of the law is, that a debt cannot be assigned. The exception to that rule is, that where there is a defined and ascertained debt due from A. to B. and a debt to the same or a larger amount due from C. to A., and the three agree that C. shall be * B.'s debtor instead of A., and C. promises to pay B., the latter may maintain an action against C. But in such action it is incumbent on the plaintiff to show, that at the time when C. promised to pay B. there was an ascertained debt due from A. to B. (*s*) So in the case of a tenancy from year to year, if the landlord accept another person as tenant, in the room of the former tenant, without any surrender in writing, such acceptance will be a dispensation of any notice to quit, and the original tenant will be discharged. (*t*) So if one take the security of the agent of the principal, with whom he dealt, unknown to the principal, and give the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent on the faith of such receipt, the principal is discharged, although the security fail; but if the principal were not prejudiced, he would not be discharged. (*u*) When one of three joint covenantors gave a bill of exchange as a collateral security, not expressly accepted in satisfaction of the debt, the judgment recovered on

(*p*) *Anstey v. Marden*, 1 New Rep. 124, 131; *Evans v. Drummond*, 4 Esp. Rep. 91, 92; *Reed v. White*, 5 Esp. Rep. 122; *Tapley v. Martens*, 8 T. R. 451; *Wyatt v. The Marquis of Hertford*, 3 East, 147; *Barton v. Hanson*, 2 Campb. 99; *Gouthwaite v. Duckworth*, 12 East, 421; *Barton v. Hanson*, 2 Taunt. 49; *Venning v. Leckie*, 13 East, 7. See instances of a new firm adopting a debt of an old firm, and thereby becoming liable. 1 Mont. Bank. Law, 619, 620; *Weston v. Barton*, 4 Taunt. 673; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Simpson v. Ingham*, 2 B. & C. 72; *Hart v. Alexander*, 2 M. & W. 484.

(*q*) *Wilson v. Coupland*, 5 B. & Ald. 228.

(*r*) *Hodgson v. Anderson*, 3 B. & C. 855; *Wharton v. Walker*, 4 B. & C. 166; *Wilson v. Coupland*, 5 B. & Ald. 228; *Fairlie v. Denton*, 8 B. & C. 395, 396; [*Cochrane v. Green*, 9 C. B. N. 8. 448; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Batchelder*, 15 N. H. 129; 2 Chitty Contr. (11th Am. ed.) 1373, and note (*g*).]

(*s*) *Fairlie v. Denton*, 8 B. & C. 395; [*Butterfield v. Hartshorn*, 7 N. H. 345; *Heaton v. Angier*, 7 N. H. 397; *Hall v. Marston*, 17 Mass. 575; *Gill v. Brown*, 12 John. 385; *Holley v. Rathbone*, 8 John. 149; *Phalan v. Stiles*, 11 Vt. 82; *Tompkins v. Smith*, 3 Stew. & P. 54; 2 Chitty Contr. (11th Am. ed.) 1371 *et seq.* and notes, where this subject is fully considered and the authorities cited. *Griswold v. Griswold*, 7 Lansing, 72; *Helms v. Kearns*, 40 Ind. 124.]

(*t*) *Sparrow v. Hawkes*, 2 Esp. Rep. 505; *Thomas v. Cook*, 2 B. & Ald. 119; but see *Mollett v. Brayne*, 2 Campb. 103; *Whitehead v. Clifford*, 5 Taunt. 518. See cases as to this point, *Stone v. Whiting*, 2 Stark. Rep. 236; *Johnstone v. Hudlestone*, 4 B. & C. 922, 933; *Walls v. Atcheson*, 3 Bing. 462.

(*u*) *Wyatt v. The Marquis of Hertford*, 3 East, 147; *Tapley v. Martens*, 8 T. R. 451; *Robinson v. Read*, 9 B. & C. 449. See observations of Lord Hardwicke in *Tolson v. Hallett*, Amb. 271, 272.

the bill was decided to be no bar to an action of covenant against the three; (x) and the creditor of a firm does not discharge a retiring partner by agreeing to carry the debt to the account of the remaining partners, and by taking their bill, which is afterwards dishonored; (y) or unless it clearly appear that the creditor has accepted the substituted credit of a new partnership instead of the liability of the old firm, and not merely as a continuing or additional security. (z) But taking a new security from a continuing partner may discharge the retiring one if so agreed. (a) The consignor of goods may be primarily liable for the freight, but the consignee or purchaser, if he accept the goods in pursuance of the usual bill of lading, may be sued for the same, unless it be known to the master of the ship that he acted only as agent for the consignor. (b) And the indorsee of a bill of lading requiring the delivery to order, on payment of freight, is liable, though he only acted as broker for the consignee. (c) But where there is a charter-party under seal providing for payment of *freight by the freighter, and the goods are received under an indorsed bill of lading, by which they are deliverable to the freighter or order, he or they paying freight as per charter-party, there is no implied contract on the part of the indorsee of the bill of lading to pay freight to the owner of the ship. (d)

Upon a covenant running with the *land*, which must concern real property or the estate therein, (e) the assignee of the *lessee* is liable

(x) *Drake v. Mitchell*, 3 East, 251; *Tapley v. Martens*, 8 T. R. 451; *Bedford v. Deakin*, 2 B. & Ald. 210; *Lodge v. Dicas*, 3 B. & Ald. 611.

(y) *David v. Ellice*, 5 B. & C. 196; [*Smith v. Rogers*, 17 John. 340. But a bond or obligation under seal, of one of the partners, is an extinguishment of a simple contract debt from the partnership to the obligee. *Clement v. Brush*, 3 John. Cas. 180; *Tom v. Goodrich*, 2 John. 213. The principle of law is that a security of a higher nature extinguishes inferior securities, but not securities of an equal degree. *Andrews v. Smith*, 9 Wend. 53.]

(z) *Kirwan v. Kirwan*, 2 Cr. & M. 617, 627; 4 Tyr. 491, S. C.

(a) *Thompson v. Percival*, 3 Nev. & Man. 167, citing *Kirwan v. Kirwan*, *supra*.

(b) *Abbott Ship*. [(11th Eng. ed.) 375]; *Ward v. Felton*, 1 East, 507; *Pinder v. Wilks*, 1 Marsh. 248; *Cook v. Taylor*, 13 East, 399; *Wilson v. Kymer*, 1 M. & Sel. 157; *Moorsom v. Kymer*, 2 M. & Sel. 303, 320; [*Trask v. Duval*, 4 Wash. C. C. 181.] The consignee of goods, where there is no bill of lading, is not in general liable for the freight, but prior dealings with him and payments by him of the freight on former occasions of the same kind, are evidence to show that in the particular case he contracted on the receipt of the goods to pay the freight. *Coleman v. Lambert*, 5 M. & W. 503. As

to the duty of a master to forward goods by another conveyance where he is prevented completing his voyage by tempest, and as to the amount recoverable for freight in such a case, see *Shipton v. Thornton*, 9 Ad. & El. 314; 1 P. & D. 216.

(c) [*Abbott Ship*. (11th Eng. ed.) 375, 376;] *Bell v. Kymer*, 1 Marsh. 146; *Pinder v. Wilks*, 1 Marsh. 250; *Wilson v. Kymer*, 1 M. & Sel. 157.

(d) [*Abbott Ship*. (11th Eng. ed.) 374, 376;] *Moorsom v. Kymer*, 2 M. & Sel. 303; but see *Birley v. Gladstone*, 3 M. & Sel. 218; *Bell v. Kymer*, 3 Campb. 545; [*Barker v. Haven*, 17 John. 234. Although a bill of lading is an instrument having, by the custom of merchants, a virtue and efficacy peculiar to itself, and no other instrument can be indorsed with like effect, yet the indorsement only transfers the right of property, and not the contract itself, so as to enable the indorsee to sue upon it. *Thompson v. Dominy*, 14 M. & W. 403; *Sanders v. Vanzeller*, 2 Q. B. 260; *Jenkins v. Usborne*, 8 Scott N. R. 516; *Saltus v. Everett*, 20 Wend. 268, 272; *Rowley v. Bigelow*, 13 Pick. 307, 314; *Stanton v. Eager*, 16 Pick. 467, 474.]

(e) *Bally v. Wells*, 3 Wils. 29; *Tatem v. Chaplin*, 2 H. Bl. 133; *The Mayor of Conington v. Pattison*, 10 East, 138, 139; *Collison v. Lettsom*, 2 Marsh. 1, 4. As to what is a covenant running with the land, see

to an action for a breach of covenant after the assignment of the estate to him, (f) and although he afterwards reassign or assign to a third party, he continues liable for all breaches accruing whilst the term was legally vested in him, (g) and though he have not taken possession. (h) And executors or administrators of a lessee may be sued as assignees of the term if they accept the term, (h¹) though if one of two executors of a lessee enter, such entry does not inure as the entry of both, so as to make them jointly liable to an action for use and occupation. (i) But his liability ceases when he assigns his interest, though even purposely, to a married woman, or an insolvent person; (k) and although the lease

In case of covenants running with real property.

Vernon v. Smith, 5 B. & Ald. 1; Jourdain v. Wilson, 4 B. & Ald. 266; Vyvyan v. Arthur, 1 B. & C. 410; Lewis v. Campbell, 3 Moore, 45; Grey v. Cuthbertson, 2 Chit. Rep. 483; Bullock v. Dommitt, 2 Chit. Rep. 608; ante, 19; [Nesbit v. Nesbit, Cam. & N. 324; Norman v. Wells, 17 Wend. 136.]

(f) 32 H. 8, c. 34; Bac. Ab. Covenant, B. 34; Bally v. Wells, 3 Wils. 25; 2 Saund. 304, note (12); Platt on Cov. 489; [Pollard v. Shaffer, 1 Dall. 210.] As to the liability of the assignee of part of the premises, see Mercer v. Dowson, 5 B. & C. 479, 484; 8 D. & R. 264, S. C. The leading principle as to the construction of covenants of this description in which an assignee has or has not a right to sue, are laid down in Spencer's case, 5 Co. Rep. 16. An assignee of a lease under covenant to repair, without qualification, must repair the premises if destroyed by fire. Bullock v. Dommitt, 2 Chit. Rep. 608. The assignee of the lessee is bound to protect the latter from liability, although the assignment contain no covenant so to do. Burnett v. Lynch, 5 B. & C. 589; 8 D. & R. 368, S. C. And see Flight v. Glossop, 2 Bing. N. C. 125. The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable in the nature of a surety as between himself and the assignee for the performance of the same covenants during the continuance of his interest as assignee; the consequence is, that a duty is imposed on the assignee at common law to perform the covenants during that time for which an action on the case will lie. Burnett v. Lynch, 5 B. & C. 589; Humble v. Langston, 7 M. & W. 530. [A stipulation in a deed-poll that the grantee shall maintain a division fence between the land conveyed and other land of the grantor, has been held to be a covenant running with the land conveyed, and thence it has been held that such grantee would be liable on the covenants against incumbrances in his deed of conveyance to subsequent purchasers. Kellogg v. Robinson, 6 Vt. 276. This case is cited without disapproval in Blain v. Taylor, 19 Abb. Pr. 228; Berbank v. Pillsbury, 48 N. H. 475.

See Wooliscroft v. Norton, 15 Wisc. 198; Easter v. Little Miami R. R. 14 Ohio St. 48; Savage v. Mason, 3 Cush. 500; 4 Kent (12th ed.), 480, note (1); Wright v. Wright, 21 Conn. 329, 342; 2 Chitty Contr. (11th Am. ed.) 1399, note (f). But in Parish v. Whitney, 3 Gray, 516, the court, without much discussion of the subject, decided the contrary. See, also, Maule v. Weaver, 7 Barr, 122, where it was held that covenant will not lie against the grantee in a deed-poll, for the non-performance of any condition or thing therein stipulated to be done by him; the grantee, in such case, not having sealed the deed. In Brandon v. Coffin, 108 Mass. 186, Gray J. referring to Parish v. Whitney, *supra*, said: "If that decision can be supported, it must be as falling within the rules that no easement in or right affecting real estate can be created by contract of the party, except by deed, and that an agreement not sealed by the party who is to perform it, cannot create a covenant or run with the land."

(g) Harley v. King, 1 Gale R. 100; 2 Cr. M. & R. 18. [But only for those during his term; by assigning to another, he discharges himself from liability for subsequent breaches. Armstrong v. Wheeler, 9 Cowen, 88. And an assignee or grantee is not liable for breaches committed by those who preceded him in the enjoyment of the estate. Tillotson v. Boyd, 4 Sandf. 516.]

(h) Woodfall L. & T. 7th ed. 113; Westerdell v. Dale, 7 T. R. 312; 2 Saund. 182; Brewster v. Kitchell, 1 Salk. 198; Brewster v. Kitchin, 1 Lord Raym. 322; Williams v. Bosanquet, 1 B. & B. 238; 3 Moore, 500, S. C. acc.; Eaton v. Jaques, Doug. 438, *cont.* [Heirs, and also assigns by deed, are respectively jointly liable for breach of covenants real. Morse v. Aldrich, 1 Met. 544.]

(h¹) [The executor of the vendor of land is liable to an action, by the assignee of the vendee who is evicted, on the covenants of warranty of the vendor. Chapman v. Holmes, 10 N. J. (Law) 20.]

(i) Nation v. Tozer, 1 Cr. M. & R. 179.

(k) Taylor v. Shum, 1 B. & P. 21; Bac. Abr. Covenant, E. 4; Lekens v. Nash, 2 Strange, 1221; Platt on Cov. 503.

contain a covenant not to assign; for the assignment destroys the privity of estate. (*l*) The same rule prevails in equity. (*m*) If the covenant be merely *collateral* and *personal*, an assignee is not in any case liable, and the lessee alone can be sued. (*n*) Upon a covenant running with the land, the lessee, or the assignee of the lessee, may sue the *reversioner* for a breach of it, (*o*) as well in case of freehold as copyhold. (*p*) An assignee of a lease, to whom an assignment * has been made by way of mortgage security, is liable for the rent, although he has never entered, or taken actual possession. (*q*) *Debt* cannot be supported against the assignee of *part* of the land demised by a lease, but only against the assignee of the whole, (*r*) though *covenant* is sustainable. (*s*)

When there is an *express* covenant in a lease to pay rent or perform any other act, the original lessee, and his personal representatives, having assets, are liable to an action of *covenant* during the lease for non-performance of covenants; notwithstanding, before the breach complained of, the interest in the lease has been assigned, and rent has been accepted from the assignee. (*t*) But an action cannot, it seems, be supported against the lessee, or his personal representatives, for a breach of a covenant merely *implied* by law, committed after acceptance of rent from the assignee; (*u*) nor can the lessor, after such acceptance of the assignee, maintain an action of *debt* against the lessee or his representatives, even upon an express covenant. (*v*)

An *under-lessee*, not having the *whole* of the lessee's interest assigned to him, cannot be sued by the original lessor for any breach of covenant contained in the original lease; (*w*) though for voluntary and not mere permissive waste he would be liable to an action on the case. (*x*)

(*l*) *Paul v. Nurse*, 8 B. & C. 486.

(*m*) *Onslow v. Currie*, 2 Mad. 330; *Valiant v. Dodemede*, 2 Atk. 546; *Richmond v. City of London*, 1 Bro. P. C. 516.

(*n*) *Bac. Abr. Covenant*, E. 3, 4; *Bally v. Wells*, 3 Wils. 25; 2 *Saund.* 304, note (12).

(*o*) *Jourdain v. Wilson*, 4 B. & Ald. 266.

(*p*) 1 *Saund.* 241 *a*; *ante*, 18, 19.

(*q*) *Williams v. Bosanquet*, 3 Moore, 500; 1 B. & B. 238, S. C.

(*r*) *Curtis v. Spitty*, 1 Bing. N. C. 756.

(*s*) *Conghart v. King*, Cro. Car. 221. [In *Bronson v. Coffin*, 108 Mass. 188, Gray J. said: "Questions have sometimes arisen upon the effect of a covenant, the burden of which runs with the land, as against an assignee of part of the land charged with the burden. Where the assignees are tenants in common, they have been held jointly liable upon the covenant. Upon covenants to keep in repair, the assignee of part of the land has been held liable for not repairing his part." To these points he cites many authorities. In *Adams v. Van Alstyne*, 25 N. Y. 232,

235, Chief Justice Denio was of opinion, that every part of the premises charged with maintaining a fence was as much bound as the whole of the premises originally charged.]

(*t*) 1 *Saund.* 241, note (5); *Ludford v. Barber*, 1 T. R. 92. See *Marks v. Upton*, 7 T. R. 305; *Mills v. Auriol*, 1 H. Bl. 443; *Auriol v. Mills*, in error, 4 T. R. 94, 100; *Bac. Abr. Covenant*, E. 4; *Boot v. Wilson*, 8 East. 311; *Platt on Cov.* 539. See 6 Geo. 4, c. 16, s. 75, as to bankrupt lessees.

(*u*) 1 *Saund.* 241 *b*; *Auriol v. Mills*, 4 T. R. 98; *Tilden v. Walter*, 1 Sid. 447; *Bacheloure v. Gage*, Sir W. Jones, 223; *Brett v. Cumberland*, Cro. Jac. 523. See *Platt on Cov. Index*, "Implied Covenants;" *Adams v. Gibney*, 6 Bing. 656.

(*v*) *Ludford v. Barber*, 1 T. R. 92; 1 *Saund.* 241, note (5).

(*w*) *Holford v. Hatch*, Doug. 183.

(*x*) *Kinlyside v. Thornton*, 2 Bl. Rep. 1111; *Jones v. Hill*, 1 Moore, 100; *Gibson v. Wells*, 1 New Rep. 290.

In the case of a *joint* contract, if one of the parties die, his executor or administrator is *at law* discharged from liability, and the survivor alone can be sued; (y) and if the executor be sued, he may either plead the survivorship in bar, or give it in evidence under the general issue; (z) but in equity the executor of the deceased party is liable, unless in some instances of a surety. (a) If the contract were *several*, (a¹) * or joint and several, the executor of the deceased may be sued at law in a separate action; (b) but he cannot be sued jointly with the survivor, because one is to be charged *de bonis testatoris*, and the other *de bonis propriis*. (c) When the surviving party dies, his executor or administrator is to be made defendant. (d) It is not unusual to declare, at least in one count, against the survivor as such, noticing the death of his co-obligee or copartner; (e) but the survivor or his executor may be declared against

4thly. When one of several obligors, &c. is dead.

(y) *Godson v. Good*, 2 Marsh. Rep. 302; 6 Taunt. 387, S. C.; Bac. Abr. Obligation, vol. 3, D. 4; Vin. Ab. Obligation, P. 20; *Eays v. Donnithorne*, 2 Burr. 1196; *Devaynes v. Noble*, 1 Meriv. 563, 566; *Sumner v. Powell*, 2 Meriv. 30; [Gere v. Clarke, 6 Hill (N. Y.), 350; 2 Chitty Contr. (11th Am. ed.) 1356, 1411; *Foster v. Hooper*, 2 Mass. 573; *Atwell v. Milton*, 4 Hen. & M. 253; *Braxton v. Hilyard*, 2 Munf. 59; *Chandler v. Nell*, 2 Hen. & M. 124; *Simonds v. Center*, 6 Mass. 18; *Ayer v. Wilson*, 2 Const. Ct. 319; *Rowan v. Woodward*, 2 A. K. Marsh. 140; *Lawrence v. Interest*, 2 Penn. 724; *Poole v. M'Leod*, 1 Sm. & M. 391; *Rice*, appellant, 7 Allen, 112, 114; *Grant v. Shurter*, 1 Wend. 148. By statute, in Tennessee, a joint action will lie against a surviving partner, and the representatives of a deceased partner. *Simpson v. Young*, 2 Humph. 518; *Taylor v. Taylor*, 5 Humph. 110. So in North Carolina, *Brown v. Clary*, 1 Hayw. 107; *Davis v. Wilkinson*, 1 Hayw. 334. It is provided by statute in Massachusetts (Genl. Sts. c. 97, § 28), that upon the death of one of two or more indebted in a joint contract, his estate shall be liable therefor as if the contract had been joint and several. See *Burnside v. Merrick*, 4 Met. 544; *Curtis v. Mansfield*, 11 Cush. 152. With regard to this statute, Mr. Chief Justice Bigelow, in *Rice*, appellant, 7 Allen, 115, said: "It is obvious from the terms in which this enactment is expressed, that it does not affect the rule of the common law, which renders the survivor severally liable on a joint contract, after the decease of his co-contractor. This rule still remains in full force." Under the above act of Massachusetts, an action of contract for a debt due from a partnership may be maintained, and a verdict rendered against the executor of a deceased partner, although the estate of such partner is insolvent. *Sampson v. Shaw*, 101 Mass. 145.] The rule is so (upon a judgment against several) as to the personality, but not as to the realty. 2 Saund. 51, note

(4); *Tidd*, 9th ed. 1121; *Richards v. Heather*, 1 B. & Ald. 31. See 47 Geo. 3, sess. 2, c. 74. Where several persons jointly contract for a chattel to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor, that his executors shall pay his proportion of the price of the article to be furnished. *Prior v. Hembrow*, 8 M. & W. 873.

(z) *Postan v. Stanway*, 5 East, 261; [*Burgwyn v. Hosterer*, Tayl. 124; S. C. 2 Hayw. 154; *Rowan v. Woodward*, 2 A. K. Marsh. 140.]

(a) Bac. Abr. Obligation, vol. 7; *Addenda*, Obligation, 506; *Thomas v. Frazer*, 3 Ves. jr. 399; *Bishop v. Church*, 2 Ves. jr. 106; *Jacomb v. Harwood*, 2 Ves. jr. 265; *Lane v. Williams*, 2 Vern. 277, 292; *Chitty on Bills*, 8th ed. 50; *Daniel v. Cross*, 3 Ves. 277; *Anderson v. Maltby*, Bro. C. C. 423; *Jacomb v. Harwood*, 2 Ves. 265; *Devaynes v. Noble*, 1 Meriv. 568; [*Jenkins v. De Grout*, 1 Caines Cas. 122; *Lang v. Keppelle*, 1 Binn. 123.] *Quære*, whether equity would give relief against the executor, if the creditor could obtain payment from the surviving partner.

(a¹) [*Harrison v. Field*, 2 Wash. 136; *Weaver v. Shryock*, 6 Serg. & R. 262.]

(b) *Enys v. Donnithorne*, 2 Burr. 1190; [*Grant v. Shurter*, 1 Wend. 148.]

(c) *Kemp v. Andrews*, Carth. 171; *Hall v. Huffam*, 2 Lev. 228; 2 Vin. Abr. 67, 70.

(d) *Calder v. Rutherford*, 3 B. & B. 302; 9 Co. 89 a; *Richards v. Heather*, 1 B. & Ald. 31; [*Gere v. Clarke*, 6 Hill (N. Y.), 350; 2 Chitty Contr. (11th Am. ed.) 1356, 1411. The executors or administrators of two deceased obligors cannot be joined in the same action. *Watkins v. Tate*, 3 Call, 521; *Grymes v. Pendleton*, 4 Call, 130.]

(e) *Per Le Blanc J. Bovill v. Wood*, 2 M

without noticing the first deceased party ; (f) and in an action against such survivor, a debt which became due from himself separately, before or after the death of his partner, may be included ; (g) and when the survivor is sued for his own separate debt, he may set off a demand due to him as surviving partner. (h)

When the contracting party is dead, his *executor or administrator*, or, in case of a joint contract, the executor or administrator of the survivor, is the party to be made defendant, (i) and is liable, though not expressly named in the covenant (i¹) or contract. But no action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform ; (j) or for the breach of a personal contract, where the breach can occasion no injury to the personal estate of the testator or intestate, and where therefore the remedy dies with the person, as a breach of a promise of marriage. (k) The executor of a lessee is liable as such upon a breach of covenant committed after the testator's death by the assignee of the lease. (l) But the executors of a lessor, who was tenant for life, have been held not liable to the lessee to whom a term of years was granted, for the breach of the *implied* covenant, or covenant in law, for quiet enjoyment resulting from, and created by, the word *demise*, the lessee having been evicted by the remainder-man. (m)

If a person intermeddle as executor with the estate of the deceased, he may in general be sued as executor *de son tort*, although there be a lawful executor ; (n) and in such case he is uniformly declared * against as if he were a lawful executor, though the party died intestate, and he may be joined in the same action with the lawful executor, though not with the lawful administrator ; (o) and if the husband

& Sel. 25 ; *Spalding v. Nurse*, 6 T. R. 363 ; *Vin. Abr. Obligation*, P. 20.

(f) *Richards v. Heather*, 1 B. & Ald. 29 ; *Calder v. Rutherford*, 3 B. & B. 302 ; 7 Moore, 158 ; [*Raborg v. Bank of Columbia*, 1 H. & Gill, 231 ; *Goelet v. M'Kinstry*, 1 John. Cas. 405. In *Harwood v. Roberts*, 5 Greenl. 441, it was held, in an action against two of four joint and several promisors, that if it is stated in the writ that four promised, it is material also to allege that the other two are dead, or otherwise incapable of being sued, or it will be bad, and may be reversed on error.]

(g) *Smith v. Barrow*, 2 T. R. 476. See *French v. Andrane*, 6 T. R. 582. See, as to joinder of actions, *post*.

(h) *Slipper v. Sidstone*, 5 T. R. 493 ; 1 Esp. R. 47 ; [*Hogg v. Ashe*, 1 Hayw. 477.]

(i) 9 Co. 89 a ; 3 Bl. Com. 302 ; 1 Com. on Contr. 258. As to the liability of the executor or administrator of the contracting party, see *Williams's Executors*, 3d ed. 1350-1356.

(i²) [*Harrison v. Sampson*, 2 Wash. 155 ; *Lee v. Cooke*, 1 Wash. 306.]

(j) *Bally v. Wells*, 3 Wils. 29 ; *Hyde v. The Dean and Canons of Windsor*, Cro. Eliz. 553 ; 1 Rol. Rep. 359. As to what are such contracts, see *Wentworth v. Cock*, 2 P. & D. 251 ; 10 Ad. & El. 45 ; *Siboni v. Kirkman*, 1 M. & W. 423 ; *Marshall v. Broadhurst*, 1 Tyrw. 349 ; 2 Str. 1266 ; 2 W. Black. 856 ; S. C. 3 Wils. 380.

(k) *Chamberlain v. Williamson*, 2 M. & S. 408 ; 1 Com. on Contr. 528 ; *ante*, p. 22 ; [*Lattimore v. Simmons*, 13 Serg. & R. 183 ; *Stebbins v. Palmer*, 1 Pick. 71 ; *Smith v. Sherman*, 4 Cush. 408. This action, for breach of promise of marriage, was held to survive the death of the defendant, in North Carolina. *Shuler v. Mills*, 71 N. Car. 297.]

(l) *Wilson v. Wigg*, 10 East, 313 ; [*Van Rensselaer v. Platner*, 2 John. Cas. 17, 24.]

(m) *Adams v. Gibney*, 6 Bing. 656.

(n) 5 Co. 34 a.

(o) 1 Saund. 265, note (2) ; Com. Dig. Administrator, C. 3 ; Toller, 340, 369.

of an executrix after her death detain part of the goods of the testator, he may be sued as executor *de son tort*. (*p*) So if a stranger take away the goods of the deceased, and there be no lawful executor, he also is liable to be sued as executor *de son tort*, (*p*¹) though he claim them as his *own*; (*q*) but in this case if there be a lawful executor or administrator, the stranger cannot be sued as executor *de son tort*. (*r*) And no person can ever be sued as *administrator de son tort*, (*r*¹) nor can an executor *de son tort* of an executor *de son tort* be sued *as such* at law. (*s*) The 3 & 4 W. 4, c. 42, s. 14, gives an action of debt on simple contract against an executor or administrator in any court of law.

If there be several executors, they should all be sued, in case they have all administered and have assets, or the defendant may plead the non-joinder in abatement; but if one hath not proved, nor administered, he may be omitted. (*t*) A plaintiff who sues several persons as executors, shall not be defeated *in toto* upon causes of action stated in the declaration to have accrued to the deceased, merely on the ground that one of the defendants was not an executor, and succeeded on his plea to that effect; but in such case the plaintiff cannot recover on counts laying promises by the defendants as executors. (*u*) So if several executors plead *plene administravit*, the plaintiff may succeed as to one of them only. (*u*¹) If a married woman be executrix, the husband must be joined in the action; (*v*) and an infant cannot be an executor till he be of full age; (*w*) nor can an executor be sued as such for money lent to, (*x*) or had and received by him, (*y*) or upon a

(*p*) Anonymous, Cro. Eliz. 472.

(*p*¹) [Glenn v. Smith, 2 Gill & J. 494; Campbell v. Tousey, 7 Cowen, 64.]

(*q*) 5 Co. 33 b. As to what acts constitute an executor *de son tort*, see Williams's Executors; [7th Eng. ed. 259-273; Haskins v. Hawkes, 108 Mass. 379; Outlaw v. Farmer, 71 N. Car. 31; Leach v. Pillsbury, 15 N. H. 137, 139; Pickering v. Coleman, 12 N. H. 148; Willard v. Hammond, 21 N. H. 382, 385; Hatch v. Proctor, 102 Mass. 351, 354; Alvord v. Marsh, 12 Allen, 630; Lee v. Chase, 58 Maine, 432, 435; Rayner v. Kochler, L. R. 14 Eq. 262; Meyrick v. Woodburn, 15 Q. B. 719.]

(*r*) 5 Co. 34 a. [It is said that if an executor *de son tort* obtains letters of administration *pendente lite*, it legalizes his previous tortious acts. Alvord v. Marsh, 12 Allen, 603; 10lt J. in Hatch v. Proctor, 102 Mass. 354; Outlaw v. Farmer, 71 N. Car. 35; 1 Williams's Ex'rs (7th Eng. ed.) 273.]

(*r*¹) [See Willard v. Hammond, 21 N. H. 385.]

(*s*) Anonymous, 2 Mod. 293, 294; Hammond v. Gatcliffe, And. Rep. 252.

(*t*) Toller, 367; Douglas v. Forrest, 1 Moo. & P. 663; Munt v. Stokes, 4 T. R. 565. Several executors, though of different things, and though not jointly appointed, &c. may be joined in an action. 1 Vin. Ab.

139; Rose v. Bartlett, Cro. Car. 293. As to plaintiff's executors, see *ante*, 21-25.

(*u*) Griffiths v. Franklin, 1 M. & M. 146; 1 Saund. 207 a.

(*u*¹) [App v. Dreisback, 2 Rawle, 287.]

(*v*) Mounson v. Bourn, Cro. Car. 519; Toller, 367.

(*w*) He may be appointed at any age, but he cannot act until he is twenty-one. 38 Geo. 3, c. 87, s. 6; Williams's Executors, 3d ed. 165.

(*x*) Rose v. Bowler, 1 H. Bl. 109; 2 Saund. 117 d; Jennings v. Newman, 4 T. R. 347. As to suing him as such for funeral expenses, see Tugwell v. Heyman, 3 Campb. 298; or money paid, see Ashby v. Ashby, 7 B. & C. 444, 449; 1 Man. & R. 180, S. C.; account stated, Powell v. Graham, 7 Taunt. 580; 1 Moore, 305, S. C.; Corner v. Shew, 3 M. & W. 350. If an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another who has given such orders, he makes himself liable individually. Brice v. Wilson, 8 Ad. & El. 349 (c); S. C. 3 Nev. & M. 512; Corner v. Shew, 3 M. & W. 350. In Lucy v. Walrond, 3 Bing. N. C. 841, the action was supported against the defendant in his representative character, but as money was paid into court, this cannot be looked upon as an authority for such an action.

(*y*) Ashby v. Ashby, 7 B. & C. 444; 1 Man. & R. 180, S. C.

penal statute. (z) By the statute against frauds the representatives of a deceased person are not personally liable without a * written promise, and even such promise is not available in this respect, unless there be an adequate consideration; (a) but in some cases executors will render themselves personally liable, if they contract as principals, and on their own personal liability. (b) If a creditor appoint his debtor to be his *executor*, *such voluntary act* is deemed a *release at law*; but when a debtor becomes *administrator*, *such* appointment being only by an act of court, and not of the creditor himself, it merely suspends the right. (c)

If the contract be under seal (or of record), the *heir* of the party contracting is liable at common law to an action for the breach of an *express* covenant therein; provided the ancestor expressly bound himself "and his *heirs*" by the deed or obligation; and provided the heir have *legal* assets by descent from the obligor. (d) And if there be a *devisee* (otherwise than for the payment of debts, or in pursuance of a marriage contract entered into before marriage), he may by statute (e) be sued in an action of debt or covenant for the breach of a contract of the testator under seal, or of record; but the heir, if there be one, must be joined in the action; but if there be no heir, the devisee is liable alone. (f) But an equity of redemption is not assets at

(z) Com. Dig. Administration, B. 15.

(a) See note to *Mitchinson v. Hewson*, 7 T. R. 350; *Childs v. Monins*, 2 B. & B. 460; [*Stebbins v. Smith*, 4 Pick. 97.]

(b) *Childs v. Monins*, 2 B. & B. 460; 5 Moore, 282, S. C.

(c) See Went. Off. Ex. c. 2, p. 76, 14th ed.; *Needham's case*, 8 Coke R. 136; *Wankford v. Wankford*, 1 Salk. 306; *Crosmann's case*, 1 Leonard, 326; [*Ipswich Manufacturing Co. v. Story*, 5 Met. 310; *Freakley v. Fox*, 9 B. & C. 130; *Winship v. Bass*, 12 Mass. 199; *Stevens v. Gaylord*, 11 Mass. 267; *Benchley v. Chapin*, 10 Cush. 173.]

(d) Bac. Ab. Heir & Ancestor, F.; 2 Saund. 136, 137, note (4); Plowd. 439, 441; *Dyke v. Sweeting*, Willes, 585; 2 Bl. Com. 243; *Platt on Cov.* 41, 449. [So the heir of the heir is liable so far as he has assets by descent from the original obligor. *Walker v. Ellis*, 2 Munf. 88.]

(e) 11 Geo. 4 & 1 W. 4, c. 47, s. 3.

(f) Same stat. s. 4. Before the 3 W. & M. if the obligor in a bond, wherein the heirs were bound, died intestate, his land descended on the heir, and the heir (to the extent of the land descended) was liable to the creditor. If the obligor devised away his land, so that nothing descended, the right of the creditor was defeated. The heir was not liable, because by the act of the debtor, in devising away his land, the heir was enabled to plead *riens per descent*. The devisee was not liable, for the bond or other specialty in no way affected him. To remedy this evil the legislature interfered by

putting the creditor in all cases in the same situation as if no will had been made, the statute 3 & 4 W. & M. declaring all wills void as against him. Such is the express enactment of the second section. But if the statute had stopped there, the creditor might have had considerable difficulty in knowing how to proceed. His obvious course would seem to have been to proceed against the heir, for the will being declared void as against creditors, he might have contended that the lands had descended on the heir. On the other hand, the will not being void against the heir, the heir might have truly pleaded *riens per descent*. To obviate this incongruity, the third section of the statute gave a remedy of a special nature, by enabling the creditor to sue the heir and devisee jointly. But if there were no heir, the devisee could not, before the 11 Geo. 4 & 1 W. 4, c. 47, be sued alone by a specialty creditor, there being no provision for such a case in the statute. *Hunting v. Sheldrake*, 9 M. & W. 256. Nor could he maintain an action of covenant on a personal contract against the devisee. To obviate this mischief the 11 Geo. 4 & 1 W. 4, c. 47, was passed, whereby a remedy is given against the heir and devisee jointly on any bond, covenant, or other specialty, whereby the heir was bound, or, if there be no heir, against the devisee alone. See sects. 3 and 4. And by the 3 & 4 W. 4, c. 104, creditors are further secured against fraudulent devises, as freehold and copyhold estates are in all cases made assets for the payment of specialty and

law, in respect of which an heir or devisee is chargeable, and the creditor must proceed in a court of equity. (g) An heir or devisee having a legal estate, is liable to an action for the breach of a covenant running with the land committed in his own time. (h) If there be several heirs, as in the case of gavelkind, or of parceners, they should all be joined, or the defendant may plead in abatement; (i) and a devisee must be sued with the heir jointly at law as well as in equity. (k) And though an executor cannot in any case be sued jointly with the heir, (l) yet the executor may be sued at the same time as the heir, and if the heir be also executor, separate actions may be sustained against him in both capacities. (m) If assets by descent vest in the heir, it appears that the charge will continue to run against his heir taking the same assets. (n)

When the contracting party has become bankrupt and has obtained his certificate, he is in general no longer liable to be sued in respect of any debt due from him when he became bankrupt, or of any claim or demand which the creditor might have proved under the fiat. (o) The 6 Geo. 4, c. 16, enables creditors to prove under the fiat in respect of *contingent* debts, although the contingency had not happened at the time of the proof; (p) consequently such debts will now be barred by the certificate as effectually as other debts. In cases where the plaintiff has an election to sue either in form *ex contractu* or *in tort*, (p¹) though the bankruptcy will be no answer to the latter mode of proceeding, (q) it will be a bar to any action founded on contract if the amount of the plaintiff's demand was capable of being ascertained at the time of the bankruptcy, (r) and might have been proved under the fiat. (r¹)

There are also some demands which are barred by the certificate, though they were not provable under the fiat. Thus, where an action upon a contract has been brought against a party, and he becomes bankrupt *before* verdict, the *costs* in such actions, for want of a pre-

simple contract debts. As to real assets in general, see Williams's Executors, 3d ed. 1325-1344.

(g) 2 Saund. 7, note (4), 8 d, 5th ed.

(h) If only equitable estate descend, the heir cannot be sued at law. Per Lord Hardwicke, Plunkett v. Pearson, 2 Atk. 294.

(i) 2 Vin. Ab. 67; Com. Dig. Abatement, F. 9. [Heirs, and assigns by deed, are respectively jointly chargeable for breach of covenants real. Morse v. Aldrich, 1 Met. 544.]

(k) 2 Saund. 7, note (4); Bac. Ab. Heir; Vin. Ab. Heir, Z. d.; [Norris v. Johnston, 5 Barr. 287.] See Warren v. Stawell, 2 Atk. 125; Galton v. Hancock, 2 Atk. 433, why preferable to proceed in equity.

(l) 18 Edw. 3, 4; Com. Dig. Abatement, F. 10; Vin. Ab. Actions, C. d. pl. 8.

(m) Com. Dig. Pleader, 2 E. 3.

(n) Dyer, 368 a, pl. 46; Jenks's case, Cro. Car. 151; Holley v. Weeden, 2 Ch. Cas. 175; Plowd. 441.

(o) 6 Geo. 4, c. 16, s. 121; and 5 & 6 Vict. c. 122, s. 37. [See Burnside v. Brigham, 8 Met. 75; Knabe v. Hayes, 71 N. Car. 109; Saunders v. Smallwood, 8 Ired. 125.]

(p) Sect. 56.

(p¹) [But see Livingston J. in Hatten v. Speyer, 1 John. 41, 42.]

(q) Goodtitle v. North, Doug. 584; Parker v. Norton, 6 T. R. 695; Parker v. Crole, 5 Bing. 63.

(r) Parker v. Norton, 6 T. R. 699, 701; and see De Tastet v. Sharpe, 3 Madd. 51; De Tastet v. Walker, Buck, 153.

(r¹) [See Dussar v. Murgtroyd, 1 Wash. C. C. 15.]

6thly. In the case of bankruptcy.

vious verdict, are not provable under the fiat, but they are notwithstanding considered as accessorial to the original debt and barred together with such debt by the certificate. (s)

But in certain cases the bankrupt may still remain liable to an action in respect of contracts made before his bankruptcy. Leasehold property belonging to the bankrupt does not pass to the assignees unless they elect to take it. (s¹) By the 6 Geo. 4, c. 16, s. 75, the bankrupt is enabled to free himself from future liability upon the lease by *delivering it up to the lessor within fourteen days after he shall have had notice that the assignees have declined to accept the same; but unless he avail himself of this privilege, he will still continue subject to such liability.

The bankrupt may also *revive* his liability upon a contract made before his bankruptcy, by a subsequent promise to pay the debt; which promise, it appears, will in general be equally available to the creditor, whether made before or after the allowance of the certificate. (t) But it should be observed, that promises and contracts made with a

(s) *Scott v. Ambrose*, 3 M. & Sel. 326; *Dinsdale v. Eames*, 2 B. & B. 8. See, also, *Vansandau v. Corsbie*, 3 B. & A. 13; *Eden*, 2d ed. 136; *Greenway v. Fisher*, 7 B. & C. 436; 1 M. & R. 330, 8 C.; *Haswell v. Thorogood*, 7 B. & C. 705; [*Warne v. Constant*, 5 John. 135.]

(s¹) [The discharge of an insolvent is no bar to an action on an express covenant, brought to recover rent accruing subsequent to the insolvent's discharge. *Lansing v. Prendergast*, 9 John. 127; *Hamilton v. Atherton*, 1 Ash. 67; *Murray v. De Rottenham*, 6 John. Ch. 63; *Buel v. Gordon*, 6 John. 126.]

(t) *Trueman v. Fenton*, Cowp. 544; *Birch v. Sharland*, 1 T. R. 715; *Brix v. Braham*, 1 Bing. 281; [*Earle v. Oliver*, 2 Exch. 71; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; 1 *Chitty Contr.* (11th Am. ed.) 263; *La Tourrette v. Price*, 28 Miss. (6 Cush.) 702; *McWillie v. Kirkpatrick*, 28 Miss. (6 Cush.) 802; *Badger v. Gilmore*, 33 N. H. 361; *Scouton v. Eislord*, 7 John. 36; *Erwin v. Saunders*, 1 Cowen, 249; *Shippey v. Henderson*, 14 John. 178; *Maxim v. Morse*, 8 Mass. 127; *Fields's estate*, 2 Rawle, 351; *Turner v. Chrisman*, 20 Ohio, 332; *Williams v. Robbins*, 32 Maine, 181; *Valentine v. Foster*, 1 Met. 522, 523; *Spooner v. Russell*, 30 Maine, 454; *Trumbull v. Tilton*, 21 N. H. 128; *Corliass v. Shepherd*, 28 Maine, 550; *Otis v. Garlin*, 31 Maine, 567; *Kingston v. Wharton*, 2 Serg. & R. 208; *McNair v. Gilbert*, 3 Wend. 344. But a promise by the maker to the payee of a note discharged by the maker's bankruptcy, that he would pay the same, has been held not to pass to the indorsee. *Wardwell v. Foster*, 31 Maine, 558; *White v. Cushing*, 30 Maine, 267; *Depuy v. Swart*, 3 Wend. 135; *Moore v. Veile*, 4 Wend. 420; *Walbridge v. Harrison*, 18 Vt. 448; *Carson v. Osborne*, 10

B. Mon. 155; *Graham v. Hunt*, 8 B. Mon. 7. These decisions rest upon the ground that the discharge in bankruptcy *annuls* the validity of the note, and does not merely *suspend* it; and therefore the action is grounded on the new promise, and not on the old demand. *White v. Cushing*, 30 Maine, 267; *Carson v. Osborne*, 10 B. Mon. 155; *Dusenbury v. Hoyt*, 45 How. Pr. 147. But this doctrine was expressly rejected in *Way v. Sperry*, 6 Cush. 238, where it is held that such a promise to the payee is a promise to him or his order, or bearer, according to the tenor of the note. *Badger v. Gilmore*, 33 N. H. 361. As to the effect of a conditional promise by the bankrupt in such cases, see *Samuel v. Cravens*, 5 Eng. 380; *Mason v. Hughart*, 9 B. Mon. 480; *Patten v. Ellingwood*, 32 Maine, 163; *Scouton v. Eislord*, 7 John. 36; *Shippey v. Henderson*, 14 John. 178; *Branch Bank v. Boykin*, 9 Ala. 320; *Bush v. Barnard*, 8 John. 407. By statute in Maine, a writing is necessary to the validity of a promise by a bankrupt to pay a debt discharged under the bankrupt act. *Williams v. Robbins*, 32 Maine, 181; Act Aug. 3, 1848. So in Massachusetts, Act 1856, c. 18. Such a promise, in Vermont, may be by parol. *Barron v. Benedict*, 44 Vt. 518. The promise must be express. *Porter v. Porter*, 31 Maine, 169; *Merriam v. Bayley*, 1 Cush. 77. Payment by the bankrupt of part of the debt does not revive the obligation to pay the remainder. *Merriam v. Bayley*, 1 Cush. 77; *White v. Cushing*, 30 Maine, 267; *Stark v. Sinson*, 23 N. H. 259. Nor does the payment of interest upon the entire sum. *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. 110. A promise by the bankrupt to give a new note for such a debt will not revive the debt. *Porter v. Porter*, 31 Maine, 169.]

creditor in consideration of his forbearing to oppose or consenting to the allowance or confirmation of the certificate, are void, under the express provisions of the bankrupt acts. (u) In order that the preëxisting obligation should be revived by a subsequent promise, the promise should be express, distinct, and unequivocal; (y) and by the provisions of the bankrupt act, 5 & 6 Vict. c. 122, such promise must be in writing, signed by the bankrupt, or by some person thereto lawfully authorized in writing by him. (z) When the subsequent promise is effectual, it is sufficient to declare upon the original consideration; (a) unless the promise be conditional, in which case it seems to be necessary for the creditor to declare specially. (b)

In cases where a party becomes bankrupt after a former bankruptcy, a prior discharge under an insolvent act, or after a composition with his creditors, the certificate only extends to protect his person, and his future effects are liable to the claims of his creditors, unless he pays 15s. in the pound. And before the 6 Geo. 4, c. 16, the bankrupt was still liable to be sued in respect of his subsequently acquired effects; (c) but by the provisions of that act, the future estate and effects of the bankrupt are declared to vest in the assignees under the second commission. (d)

Where there are several contracting parties, and one has been bankrupt, the action should be brought jointly against the solvent partner or partners and the bankrupt, and if the latter should have obtained his certificate, and should plead it, a *nolle prosequi* may be entered as against him. (e)

The following points, relative to the liability of the assignees of a bankrupt to actions in form *ex contractu*, may be here noticed. No action can be brought by any creditor against the assignees for the recovery of any dividend, (e¹) the only remedy being by petition to the lord chancellor. (f) Nor are the assignees liable to an action at the suit of the bankrupt, for his allowance in respect of the amount of dividends paid under his estate, (g) unless he shall have obtained his certificate before the declaration and payment of the dividend, so as to enable the assignees to take such allowance into account, and to retain

(u) 6 Geo. 4, c. 16, s. 125; 5 & 6 Vict. c. 122, s. 40; Hankey v. Cobb, 1 G. & D. 57.

(y) Fleming v. Hayne, 1 Stark. 370; Synbay v. Weightman, 5 Esp. 198.

(z) Sect. 43.

(a) Williams v. Dyde, Peake R. 68; Bedford v. Saunders, 2 H. Bl. 116; Penn v. Bennett, 4 Campb. 205, *quære*. [An action upon a debt barred by a certificate of discharge in bankruptcy or insolvency, and revived by a new promise, counts upon the original debt. The new promise need not be alleged in the declaration, and, at common law, might have been replied or given in evidence in support of the promise declared on. Way v. Sperry, 6 Cush. 241; Gray J. in Cook v. Shearman,

103 Mass. 22, 23; Shipley v. Henderson, 14 John. 178; but see Dusenbury v. Hoyt, 45 How. Pr. 147.]

(b) Penn v. Bennett, 4 Campb. 205.

(c) Hovil v. Browning, 7 East, 154.

(d) Sect. 127.

(e) Bovill v. Wood, 2 M. & Sel. 23; Moravia v. Glass, 2 M. & Sel. 444; Noke v. Ingham, 1 Wils. 89. The bankrupt's certificate is expressly excepted from extending to discharge a partner or joint contractor with the bankrupt. 5 & 6 Vict. c. 122, s. 37.

(e¹) [See Peck v. Randall, 1 John. 165.]

(f) 6 Geo. 4, c. 16, s. 111.

(g) Ib. s. 128.

for the same before the assets are exhausted. (*h*) It has been previously noticed, that assignees of a bankrupt lessee will not be liable to be sued in respect of the rent and covenant, unless they elect to take to the premises comprised in the lease. (*i*) And when they have elected to take possession, they may nevertheless discharge themselves from future liability, by assigning their interest in the premises even to a pauper. (*k*) The assignees are not liable to be sued by the messenger under the fiat for fees due to him before the choice of assignees, the petitioning creditor being the party answerable for these expenses. (*l*) And though assignees cannot contract debts in their political capacity, and be sued therein as such; (*m*) yet when they personally contract, or when they receive money to the use of another, (*n*) they are liable to be sued in their individual capacities. An assignee who has been removed, and assigned his interest to his co-assignee, may be sued by them. (*o*)

A certificate of discharge obtained in a foreign country is a bar to an action upon a contract made in such country before the certificate, (*p*) but not to an action by a creditor, a subject of this country, for a debt contracted here. (*q*) And it has been decided, that a certificate under an Irish commission of bankruptcy, though it be since the Union, is no discharge of a debt contracted in England; (*r*) but it has been held, that a debt contracted in this country, by a trader resident in Scotland, is barred by a discharge under a Scottish sequestration, issued in conformity to the statute 54 Geo. 3, c. 137. (*s*)

By the 1 & 2 Vict. c. 110, (*t*) an insolvent complying with the requisitions of that act is to be discharged by the court, "as to the several debts and sums of money due, or claimed to be due, at the time of making the vesting order from such prisoner, to the several *persons named in his schedule as creditors, or claiming to be creditors for the same, respectively, or for which such persons shall have given credit to such prisoner, before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons not known to such pris-

7thly. In the case of an insolvent debtor.

(*h*) *Ex parte Grier*, 1 Atk. 207.

(*i*) *Ante*, 61; and see *Bourdillon v. Dalton*, Peake N. P. C. 238; *Turner v. Richardson*, 7 East, 335; *Copeland v. Stephens*, 1 B. & Ald. 593. The provisional assignee of a bankrupt under 6 Geo. 4, c. 16, was not responsible for the fraud of an agent appointed with due care. *Raw v. Cutten*, 9 Bing. 96.

(*k*) *Taylor v. Shum*, 1 B. & P. 21.

(*l*) *Burwood v. Felton*, 3 B. & C. 43; 4 D. & R. 621, 8 C. C.; 6 Geo. 4, c. 16, s. 14; *Hartop v. Jukes*, 2 M. & Sel. 438.

(*m*) *Ridout v. Brough*, Cowp. 134, 135.

(*n*) *Randall v. Bell*, 1 M. & Sel. 714, dis. Lord Ellenborough C. J.

(*o*) *Smith v. Jameson*, Peake N. P. C. 213.

(*p*) *Potter v. Brown*, 5 East, 124. [See *Hicks v. Brown*, 12 John. 142; *Smith v. Brown*, 3 Binn. 201; *Walsh v. Farrand*, 13 Mass. 19.]

(*q*) *Smith v. Buchanan*, 1 East, 6.

(*r*) *Lewis v. Owen*, 4 B. & Ald. 654; and see *Quin v. Keefe*, 2 H. Bl. 553.

(*s*) *Sidaway v. Hay*, 3 B. & C. 12; 4 D. & R. 658, 8 C. C. See *Bank of Scotland v. Cuthbert*, 1 Ross, 462; *Odwin v. Forbes*, Buck, 57; *Philpotts v. Reed*, 3 Moore, 623.

(*t*) Sect. 75.

oner at the time of such adjudication, who may be indorsers or holders of any negotiable security set forth in such schedule." (u)

And by sect. 79 it is provided, that the discharge shall extend to all process for contempt of any court for non-payment of money, (u¹) and to all costs relative thereto; also to all costs incurred in any actions brought against the insolvent before the filing of his schedule for any debt or damages; and the persons bringing actions are to be deemed creditors for the amount of such costs subject to taxation, and also to examination as in the case of other claims. The discharge is also declared to extend to sums payable by way of annuity. (x)

Sect. 91 of this act empowers the insolvent, his heirs, executors, &c. to plead the discharge in bar of any action for any debt or sum, in respect of which the insolvent shall have become entitled to the benefit of the act, or upon any new contract or security for payment thereof. The 5 & 6 Vict. c. 116, s. 10, enacts that to any suit or action brought against any petitioner under that act, for or in respect of any debt contracted before the date of filing his petition, the final order of the commissioner shall be a sufficient plea in bar.

It was decided upon a former insolvent act (the 1 Geo. 4, c. 119), that the effect of the discharge was only to liberate the insolvent to the extent of the specific debts described in the schedule; and where *less than the full amount due was specified, the balance in favor of the creditor still remained as a debt for which the insolvent was liable. (y) But by the 1 & 2 Vict. c. 110, s. 93, it is provided, that

(u) See, as to holders of negotiable securities, and what a sufficient description of the debt, &c. in the schedule, *Forman v. Drew*, 4 B. & C. 15; 6 D. & R. 75, S. C.; *Reeves v. Lambert*, 4 B. & C. 914; *Nias v. Nicholson*, Ry. & Moo. 322; 2 C. & P. 123; *Levy v. Dolbell*, 1 Moo. & Mal. 202; *Pascall v. Brown*, 3 Stark. R. 54; *Carpenter v. White*, 3 Moore, 231. The 53 Geo. 3, c. 102, s. 10, directed that the order of discharge should name the creditors as to whose claim the prisoner should be discharged. *Baker v. Sydee*, 7 Taunt. 179. But this is no longer necessary. See 1 & 2 Vict. c. 110, s. 83. And it suffices, if the schedule name the creditor or the debt, as distinctly as the debtor can do, which is still necessary. With respect to the necessity of naming the creditor in the schedule, it is observable that the 69th and 75th sections require that the name of the creditor be named if possible, but suppose the difficulty of stating such creditor in the case of negotiable security? Under the 1 Geo. 4, c. 119, s. 50 (nearly corresponding in terms with the above), where an insolvent contracted for goods with A., the agent for a company, and after giving him two promissory notes for the debt, amounting to 82l. 2s. 6d., took the benefit of the act, without describing the company as his creditors, and stating the

debt to be only 82l.; it was held, that his discharge was an answer to the action by the company upon the promissory notes. *Forman v. Drew*, 6 D. & R. 75; 4 B. & C. 15, S. C. So where an insolvent in his schedule stated that A. held his acceptance, and A. had in fact indorsed it to B., but unknown to the insolvent: it was held, that the description was sufficient. *Reeves v. Lambert*, 4 B. & C. 214; *Nias v. Nicholson*, 2 C. & P. 120; R. & M. 322, S. C. And if an insolvent state a bill in his schedule, as drawn by himself on M., whereas it was drawn by M. on him, if the jury are satisfied that the same bill was meant, and the description was by mistake, it is a good discharge. *Nias v. Nicholson*, 2 C. & P. 120; 1 R. & M. 322, S. C. Where a creditor authorizes his debtor to omit any statement of his debt in the schedule, he cannot take advantage of such omission, and the discharge will be a bar to any action. *Carpenter v. White*, 3 Moore, 231. See, further, *Tabram v. Freeman*, 4 Tyr. 180.

(u¹) [*Maag's case*, 1 Ashm. 97.]

(x) Sect. 80. See, as to the construction of the former insolvent acts, *Collins v. Lightfoot*, 5 B. & C. 581; *Freeman v. Burgess*, 1 Moore & P. 91.

(y) *Taylor v. Buchanan*, 4 B. & C. 419; 6 D. & R. 491, S. C.

the discharge shall protect the insolvent, although there has been an error in the amount of the debt specified in the schedule, where there has been no culpable negligence, fraud, or evil intention on the part of such prisoner. (z) Formerly an insolvent was only considered to be discharged as to his person, and he remained liable to be sued as to his subsequently acquired effects by the creditors named in the schedule; but it is now provided, that no future execution shall issue against the goods of a prisoner discharged, upon any judgment for any debt in respect of which such prisoner shall have become entitled to the benefit of the act; nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner in the name of the assignee, or provisional assignee, according to the provisions of the insolvent act in that behalf. (a)

A married woman may, under the 101st section of the same act, petition and obtain her discharge from debts the same as a *feme sole*, on assigning her separate property, but so as not to prejudice any rights of her husband to her property. (b) The discharge of the husband under the insolvent act does not preclude a creditor from taking the wife in execution for her debt contracted *dum sola*, unless she has no separate property. (c)

When a prisoner has been discharged under the *lords' act*, the judgment obtained against the prisoner remains in force, and execution may at any time be taken out thereon against the property and effects of the prisoner, except his wearing apparel, bedding, and tools of trade, to the value of 10*l.*, but no action of debt can be supported upon such judgment. (d)

In general a *feme covert* cannot be sued alone at law; (e) and when

8thly. In the case of marriage. a *feme sole*, who has entered into a contract, marries, (f) the husband and wife must in general be jointly sued, (f¹)

(z) See *ante*, 64, note (u).

(a) 1 & 2 Vict. c. 110, s. 91. See *Wilmer v. White*, 6 Bing. 293.

(b) 1 & 2 Vict. c. 110, s. 101. That clause was introduced into a former insolvent act, 7 Geo. 4, c. 57, in consequence of the decision in *Ex parte Deacon*, 5 B. & Ald. 759.

(c) *Sparkes v. Bell*, 8 B. & C. 1; 2 Man. & R. 124, S. C. But see *Lockwood v. Salter*, 5 B. & Ad. 303. [But under the law of New York (Code, § 114, *ante*, 32, note (v¹)), where a married woman carries on a business in her own name, and contracts debts, she may be sued therefor in her own name, and the judgment collected out of her separate property. *Klen v. Gibney*, 24 How. Pr. 31; *Morrell v. Cawley*, 17 Abb. Pr. 76; *Barton v. Beer*, 35 Barb. 78; *Schmidt v. Costa*, 2 Daly, 251; *Arnold v. Bernard*, 8 Abb. Pr. N. S. 116.

(d) 32 Geo. 2, c. 28, s. 20.

(e) *Beard v. Webb*, in error, 2 B. & P.

105; Com. Dig. Plead. 2 A. 1; *Kay v. Duchesse de Pienne*, 3 Campb. 123. A woman is not liable for goods supplied to her after the death of her husband, where neither she, nor the party supplying the goods, knew of his death at the time they were supplied, and credit had previously been given to the husband. See *Smout v. Ilberry*, 10 M. & W. 1.

(f) A marriage in fact, though not strictly legal, is sufficient for this purpose. *Norwood v. Stevenson*, Andr. 227, 228; *Robinson v. Mahon*, 1 Campb. 245; *Watson v. Threlkeld*, 2 Esp. 637. [If a *feme sole* marries pending a suit against her, the marriage need not be noticed in the subsequent proceedings. It does not affect the form of the proceedings. The suit goes on as if no marriage had taken place. *Roosevelt v. Dale*, 3 Cowen, 581.]

(f¹) [*Lennox v. Eldred*, 65 Barb. 410; *Angel v. Felton*, 8 John. 149. By the 33 &

though the husband state an account, and expressly promise to pay the debt or perform the contract; (*g*) and where the wife was a yearly tenant before marriage, * at a rent payable quarterly, and she married before a quarter's rent became payable, it was held, that in an action to recover such quarter's rent, the wife should be joined. (*h*) But if the husband, in respect of some new consideration, as for forbearance, &c. expressly undertake in writing to pay the debt, or perform the contract of the feme, he may be sued alone on such undertaking. (*i*)

When rent becomes due after the marriage, upon a lease to the feme whilst sole, or any other breach of the covenants contained in such lease is committed during the coverture, (*i*¹) the action may be against both, or against the husband alone. (*k*) But the feme can in no case be sued upon a mere *personal* contract made during coverture, (*l*) although she live apart from her husband, and have a separate maintenance secured to her by deed, (*m*) or be separated under a sentence of divorce *à mensa et thoro*. (*n*) But it seems that she is liable upon such a contract, if, being under a moral obligation in regard to the nature of the contract, she, after the death of the husband, expressly promise to perform it. (*o*) And an action on the assumpsit of husband and wife, against both, is bad, for *quoad* the wife the promise is void. (*p*) But an action of covenant on the warranty in a

34 Vict. c. 93, s. 12, a married woman is made liable to be sued for her debts contracted before marriage, and any property belonging to her for her separate use, is made liable to satisfy such debts as if she had continued unmarried. 1 Chitty Contr. (11th Am. ed.) 257.]

(*g*) *Mitchinson v. Hewson*, 7 T. R. 348; *Drue v. Thorne, Alleyn*, 72; *Robinson v. Hardy*, 1 Keb. 281; *Foster v. Allanson*, 2 T. R. 480; *Obrian v. Ram*, 3 Mod. 186; *Bac. Abr. Baron & Feme*, 4; *Morris v. Norfolk*, 1 Taunt. 217; *Com. Dig. Pleader*, 2 A. 1. [In an action against husband and wife, for the debts of the wife contracted by her while sole, a plea of infancy of the husband is no bar to a recovery. *Roach v. Quick*, 9 Wend. 238.]

(*h*) *Richardson v. Hall*, 3 Moore, 307; 1 B. & B. 50, S. C.

(*i*) *Drue v. Thorne, Alleyn*, 73; *Mitchinson v. Hewson*, 7 T. R. 349.

(*i*¹) [See *Grasser v. Eckhart*, 1 Binn. 175; *Robinson v. Reynolds*, 1 Aiken, 125.]

(*k*) *Anonymous*, 6 Mod. 239; 1 Roll. Abr. 348, pl. 45, 50; *Thomp. Ent.* 117; *Com. Dig. Baron & Feme*, Y.; *Lake v. Smith*, 1 New R. 174.

(*l*) *Marshall v. Rutton*, 8 T. R. 545; *Beard v. Webb*, in error, 2 B. & P. 105; *Risley v. Stafford*, Palm. 312; *Morris v. Norfolk*, 1 Taunt. 217; *Stone v. M'Nair*, 4 Price, 48; [Shannon v. Canney, 44 N. H. 592.]

(*m*) *Marshall v. Rutton*, 8 T. R. 545;

Muse v. Craig, 2 New R. 148. How and when liable in equity on a bill or note, *Stuart v. Kirkwall*, 3 Mad. 387.

(*n*) *Faithorne v. Blaquiere*, 6 M. & Sel. 73; *Lewis v. Lee*, 3 B. & C. 291. *Aliter*, as to a divorce *à vinculo matrimonii*, *Anstey v. Manners*, 1 Gow R. 10.

(*o*) *Lee v. Muggerridge*, 5 Taunt. 36; *Loyd v. Lee*, 1 Stra. 94; *Meyer v. Haworth*, 8 Ad. & El. 467.

(*p*) *Risley v. Stafford*, Palm. 313; *Morris v. Norfolk*, 1 Taunt. 217. See *Stone v. M'Nair*, 7 Taunt. 432; 1 Moore, 126; [Carleton v. Haywood, 49 N. H. 314; *Edwards v. Davis*, 16 John. 286; *Tilghman C. J.* in *Grasser v. Eckart*, 1 Binn. 586; *Parker C. J.* in *Leslie v. Harlow*, 18 N. H. 518, 520; *Ames v. Foster*, 42 N. H. 381; *Bailey v. Pearson*, 29 N. H. 77; *Ingram v. Ned*, 44 Vt. 462. So, where a married woman received money from the plaintiff under an agreement that she would keep it for him or loan it for him, according to her judgment, and subsequently she and her husband, jointly, wrongfully and fraudulently converted the money to their own use, it was held that assumpsit against the husband and wife jointly, for money had and received, would not lie. *Carleton v. Haywood*, 49 N. H. 314.] If in a declaration in assumpsit against husband and wife it is alleged that the defendant promised, without stating whether promise was made before or during the marriage, it is bad for uncertainty on special demurrer

fine, or on a covenant running with the land of the wife demised by her, pursuant to the statute, during the coverture, may be supported against her; (*q*) and it is said that upon a lease to the husband and wife for her benefit, the action may be against both. (*r*) If the husband be *civiltiter mortuus*, or even transported for a term of years, or has been abroad seven years and not heard of, (*s*) though he voluntarily left the kingdom, (*t*) the wife may be sued alone upon a contract made by her during that time; (*u*) but a woman by birth an alien, and the wife of an alien, cannot be sued as a *feme sole*, if her husband has lived with her in this country, although he has left her here, and entered into the * service of a foreign state. (*x*) In the case of a *feme covert* executrix or administratrix, she must be joined with the husband in an action on any personal contract of the deceased; (*y*) and if a man marry an administratrix to her former husband, who had wasted the assets during her widowhood, they may be jointly sued for such *devastavit*; (*z*) but for rent due during the coverture on a lease which the wife has as executrix, the husband may be sued alone. (*a*)

When the *husband survives*, he is not liable to be sued in that character for any contract of the *feme* made before the coverture, unless judgment had been obtained against him and his wife before her death; (*a*¹) and if she die before judgment the suit will abate. (*b*) But if the husband neglect during her life to reduce her *chooses in action* into possession, the creditor may sue the person who administers thereto, for debts due before her marriage; (*c*) and for rent accruing during the coverture, or for money due upon a judgment obtained against husband and wife, he may be sued alone as the survivor. (*d*)

In case the *wife survive*, she may be sued upon all her unsatisfied

(per Maule J.), but good after verdict. *France v. White*, 1 M. & Gr. 731.

(*q*) 2 Saund. 180, note (9). [But where a married woman joined her husband in the conveyance of land of which they were seised in her right, and in the covenant of warranty, it was held that she was not bound by the covenant of warranty. *Wadleigh v. Glines*, 6 N. H. 17; *Colcord v. Swan*, 7 Mass. 291; *Sawyer v. Little*, 4 Vt. 414; *Aldridge v. Burlison*, 3 Blackf. 201.]

(*r*) 1 Roll. Abr. 348, 350; Bac. Abr. Baron & Feme, L. [A wife may be jointly sued with her husband, on a joint note or contract, when executed by them for the benefit of her separate property. *Smotheridge v. Lovell*, 35 Texas, 58.]

(*s*) *Hopewell v. De Pinna*, 2 Campb. 113; *Lambert v. Atkins*, Ib. 273.

(*t*) Ib.

(*u*) *De Gaillon v. L'Aigle*, 1 B. & P. 358, note (*f*); Co. Litt. 133 a; *Beard v. Webb*, in error, 2 B. & P. 105; *Carroll v. Blencow*, 4 Esp. Rep. 27, 28; [*ante*, 32, note (*z*). So, she may be sued alone where her husband,

being an alien, and never within the United States, has deserted her. *Gregory v. Paul*, 15 Mass. 31; *ante*, 32, note (*z*). See *Starrett v. Wynn*, 17 Serg. & R. 230.]

(*x*) *Kay v. Duchesse de Pienne*, 3 Campb. 123. See, also, *Stretton v. Busnach*, 1 Bing. N. C. 139; and *Barden v. Keverberg*, 2 M. & W. 61.

(*y*) *Mounson v. Bourn*, Cro. Car. 519; Com. Dig. Administrators, *ante*.

(*z*) *Kings v. Hilton*, Cro. Car. 603.

(*a*) Com. Dig. Baron & Feme, Y.; Thomp. Ent. 117.

(*a*¹) [*Buckner v. Smith*, 4 Desaus. Ch. 371; *Beach v. Lee*, 2 Dall. 257.]

(*b*) *Mitchinson v. Hewson*, 7 T. R. 350; Com. Dig. Baron & Feme, 2 C.; *Heard v. Stamford*, Rep. temp. Talb. 173; 3 P. W. 410; [*Williams v. Kent*, 15 Wend. 360.]

(*c*) *Heard v. Stamford*, 3 P. W. 409; Rep. temp. Talb. 173.

(*d*) *Obrian v. Ram*, 3 Mod. 189, note (*k*); Anonymous, 6 Mod. 339; Com. Dig. Baron & Feme, 2 B.

contracts made before coverture. (e) But the bankruptcy and certificate of the husband will discharge her from all liability to satisfy debts which could have been proved under his commission; and if the husband and wife be sued jointly, his bankruptcy may be pleaded in bar. (f)

Where wife survives.

However, we have seen that the discharge of her husband under the insolvent act does not preclude a creditor from taking a married woman, having separate property, in execution for a debt, contracted by her *dum sola*. (g)

If the husband be sued alone upon the contract of his wife before coverture, and the objection appear upon the face of the declaration, the defendant may demur, move in arrest of judgment, or bring a writ of error. (h) If the contract were misdescribed as being that of the husband, the plaintiff would be nonsuited under the general issue at the trial upon the ground of a variance between the contract stated in the declaration and that proved. But if the wife be sued alone upon her contract before marriage, she must plead her coverture in abatement, or a writ of *error coram nobis* must be brought; and the coverture in such case cannot be pleaded in bar, or given in evidence upon the trial as a ground of nonsuit; (i) and if she marry pending an action against her, it will not abate, but the plaintiff may proceed to execution without noticing the husband. (k) But if a *feme covert* be sued upon her supposed contract made during coverture, she may in general plead the coverture in bar, or give it in evidence under the general issue, or under *non est factum*, in the case of a deed. (l) And if the husband and wife be improperly sued jointly on a contract after marriage, the action will fail as to both. (m)

Consequences of mistake.

II. IN ACTIONS IN FORM EX DELICTO.

The rules which direct who are to be the parties to an action in form *ex delicto*, whether as plaintiffs or defendants, may, as in actions in form *ex contractu*, be considered with reference,

GENERAL RULES.

(e) *Mitchinson v. Hewson*, 7 T. R. 350; *Woodman v. Chapman*, 1 Campb. 189.

(f) *Miles v. Williams*, 1 P. W. 249; *Walker v. Denne*, 2 Ves. 181; *Cullen*, 392.

(g) *Ante*, 65; *Sparkes v. Bell*, 8 B. & C. 1; 2 Man. & R. 124, S. C.

(h) *Mitchinson v. Hewson*, 7 T. R. 348; *May v. House*, 2 Chit. Rep. 697; [*Carl v. Wonder*, 5 Watts, 97.]

(i) *Milner v. Milnes*, 3 T. R. 631; 2 Roll. Rep. 53; Sty. 280; Bac. Abr. Baron & Feme, L.

(k) *King v. Jones*, 2 Stra. 811; *Cooper v. Hanchin*, 4 East, 531; *Doyley v. White*, Cro. Jac. 323; Bac. Abr. Abatement, G.; [*Roosevelt v. Dale*, 2 Cowen, 581; *Williams v. Kent*, 15 Wend. 360; *Johnson v. Parmely*, 17 John. 271.]

(l) *James v. Fowks*, 12 Mod. 101; *Linch v. Hooke*, 1 Salk. 7; *Cole v. Delawn*, 3 Keb. 228; Bul. N. P. 172. The rules of Hil. T. 4 W. 4, expressly require coverture to be pleaded in confession and avoidance, see r. 3; but *quære* whether the rule applies to coverture existing at the time of the contract, when in point of law there would be either no contract at all or a contract between the husband and the defendant. See *Meyer v. Haworth*, 8 Ad. & El. 467. In *Moss v. Smith*, 1 M. & Gr. 228; 3 N. & P. 462, the point was raised, but not decided.

(m) *Risley v. Stafford*, Palm. 312; *ante*, 67; [*Carleton v. Haywood*, 49 N. H. 314; *Page v. Deleuw*, 58 Ill. 85; *Grasser v. Eckhart*, 1 Binn. 175.]

1st, to the *interest* of the plaintiff in the matter affected, and the liability of the defendant; 2dly, the *number* of the parties, and who must or may sue or be sued; 3dly, where there has been an *assignment* of interest, &c.; 4thly, in the case of *survivorship*; 5thly, where the party injured, or committing the injury, is *dead*; 6thly, in the case of *bankruptcy*; 7thly, *insolvency*; and, 8thly, in that of *marriage*.

1. Who to be Plaintiffs.

The action for a tort must in general be brought in the name of the person whose *legal* right has been affected, and who was *legally* interested in the property at the time the injury thereto was committed; (*n*) for he is impliedly the party injured by the tort, and whoever has sustained the loss is the proper person to call for compensation from the wrong-doer.

PLAINTIFFS.

1st. Who to sue, with reference to the interest of the plaintiff.

A *cestui que trust* or other person having only an *equitable* interest, cannot in general sue in the courts of common law against his trustee, or even a third person; (*o*) unless in cases where the action is against a mere wrong-doer, and for an injury to the actual possession * of the *cestui que trust*. (*p*) Many of the rules and instances which have been stated in respect to the person to be made the plaintiff in actions in form *ex contractu*, here also govern and are applicable. (*q*)

Actions in form *ex delicto* are for injuries to the *absolute* or *relative* rights of *persons*, or to *personal* or *real property*.

The action for an injury to the *absolute* rights of *persons*, as for assaults, batteries, wounding, injuries to the health, liberty, and reputation, can only be brought in the name of the party immediately injured, and if he die, the remedy determines. With respect to injuries to the *relative* rights of persons, the instances in which a *husband* may sue alone, or should join his wife in an action for injuries to the person of his wife, will be hereafter noticed. (*r*) In the case of *master and servant*, the master may sue alone for the battery of, or for debauching his servant, although they are not related, when there is evidence to prove a consequent loss of service; (*s*) and a father may sue for the seduction of his daughter.

For injuries to the person.

(*n*) Per *Ld. Kenyon*, *Dawes v. Peck*, 8 T. R. 332; *Benjamin v. Bank of England*, 3 Campb. 417. Thus in *Story v. Richardson*, 6 Bing. N. C. 123, where the plaintiff and his two partners employed the defendants as accountants for hire to make out the accounts of the firm and of the separate balance of each partner, and the defendants made out the plaintiff's separate balance so erroneously and negligently that, relying on their statement, he was a considerable loser thereby, it was held that the plaintiff might sue alone in case for misfeasance, and that it was no variance to allege that he had employed

the defendants. See, also, *Coates v. Chaplin*, 2 G. & D. 552.

(*o*) 1 *Saunders on Uses and Trusts*, 222, 223; *Goodtitle d. Jones v. Jones*, 7 T. R. 47. See *Allen v. Imlett*, *Holt C. N. P.* 641; 8 Taunt. 263, S. C.; 2 Moore, 240, S. C.

(*p*) *Graham v. Peal*, 1 East, 244; 2 Saund. 47 d.

(*q*) *Ante*, 2-9.

(*r*) *Post*, 82.

(*s*) *Fores v. Wilson*, *Peake C. N. P.* 55; *Jones v. Brown*, *Ib.* 233; *Dean v. Peal*, 5 East, 45, 47; 3 Bl. Com. 142; *Irwin v. Dearman*, 11 East, 23; 9 Co. 113; 10 Co. 330;

ter, although she was married, provided some loss of service can be proved. (t) But if there be no evidence of such loss, an action cannot be supported in the name of the master. (u) A parent cannot, it should seem, sue in that character, even for taking away his child, unless it be his son and heir, or unless a loss of service be sustained; (x) clearly he cannot support an action for debauching his daughter, or beating his child, unless there be evidence to support the allegation *per quod servitium amisit*. (y) And if, from its extreme

Woodward v. Walton, 2 New Rep. 476; Martinez v. Gerben, 3 Scott N. R. 386. As to the damage recoverable, see Hodson v. Stallebrass, 11 Ad. & El. 301.

(t) Harper v. Luffkin, 7 B. & C. 387; 1 Man. & R. 166, S. C.

(u) Harper v. Luffkin, 3 Bl. Com. 142; 9 Co. 113; 10 Co. 330.

(x) Gray v. Jeffries, Cro. Eliz. 55; Barham v. Dennis, Ib. 770; 3 Bl. Com. 141. See Holroyd J. Hall v. Hollander, 4 B. & C. 662; 7 D. & R. 138, S. C. [A person in *loco parentis* may maintain an action on the case *per quod servitium amisit* for an abduction of his daughter's illegitimate offspring. Morris v. Garnhart, 7 Watts, 302.]

(y) Dean v. Peel, 5 East, 45. [In some cases it has been held that a daughter under age is presumed to be so under the control and in the service of her father as to entitle him to maintain the action, without proof of actual service. But where the daughter is above age, she must be in her father's service, so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for the seduction of her. Nickleson v. Stryker, 10 John. 115; Mercer v. Walmsley, 5 Harr. & J. 27; Millar v. Thompson, 1 Wend. 447; Stewart v. Kip, 1 Wend. 376; Hewitt v. Prime, 21 Wend. 79; Lockwood v. Betts, 8 Conn. 130; Parker v. Elliott, Gilmer, 33. These cases hold that the relation of master and servant between the father and his daughter results constructively from his right to reclaim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from home. See, also, Martin v. Payne, 9 John. 387; Bartley v. Richtmyer, 4 Comst. 38; Mulvehall v. Millard, 1 Kernan, 343; Hornketh v. Barr, 8 Serg. & R. 36; Van Horn v. Freeman, 1 Halst. 322; Ames J. in Kennedy v. Shea, 110 Mass. 150. In the above case of Kennedy v. Shea, it appeared that the daughter, who was a minor, was employed by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him, and it was held that she was his servant, so that he could maintain the action. It is no objection to the maintenance of an action for seducing the plaintiff's daughter, that the sexual intercourse between the daughter and the defendant was had by force. Kennedy v. Shea, 110 Mass. 147; Furman v. Applegate, 3 Zab.

28; Chamberlain v. Hazlewood, 5 M. & W. 515. In Pennsylvania an action cannot be maintained by a mother for debauching her daughter *per quod servitium amisit*, where the seduction occurred during the life of the father, with whom the daughter resided at the time, although after her father's death she remained with her mother, who was at the expense of her lying-in, and who supported her and her child. Logan v. Murray, 6 Serg. & R. 175; otherwise, in New Jersey, Coon v. Moffett, 2 Penn. 583. The action, in Abrahams v. Kidney, 104 Mass. 222, was brought in the name of the mother, and no objection was raised on that ground. So, in the case of Boyle v. Brandon, 13 M. & W. 738. It was held, in Abrahams v. Kidney, 104 Mass. 222, that it is not necessary to the maintenance of this action that the seduction should be followed by pregnancy or sexual disease. "The rule," says Judge Morton, "which governs the numerous cases upon this subject is that where the proximate effect of the criminal connection is an incapacity to labor, by which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action." See Van Horn v. Freeman, 1 Halst. 322; Boyle v. Brandon, 13 M. & W. 738; Knight v. Wilcox, 4 Kernan, 413.] See Farmer v. Joseph, Holt N. P. 453, note, very slight evidence of service is sufficient; Bennett v. Allcott, 2 T. R. 168; Weedon v. Timbrell, 5 T. R. 360; Fores v. Wilson, Peake C. N. P. 55; Jones v. Brown, Ib. 233; Hunt v. Wotton, Sir T. Raym. 259; [Moran v. Dawes, 4 Cowen, 412; Ames J. in Kennedy v. Shea, 110 Mass. 150, 151.] A. with intent to seduce B.'s servant, hires her as his servant and then seduces her; B. may sue A. for the seduction. Speight v. Oliveira, 2 Stark. Rep. 493. An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person, although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service. Blaymire v. Haley, 6 M. & W. 55; [Thompson v. Ross, 5 H. & N. 16; Kennedy v. Shea, 110 Mass. 150, 151.] See, also, Harris v. Butler, 2 M. & W. 539. *Quære*, whether the father cannot maintain an action, although the child be in the service of another person, on the ground

youth, no services could be rendered by the child, the parent cannot sue for a personal injury inflicted upon the child; the father not having necessarily incurred any expense upon the occasion. (z) In cases of the battery of the wife or servant, if there was any evidence sufficient to support an action in the name of the husband or master, it was before the late statute * 5 & 6 Vict. c. 97, considered advisable to proceed accordingly, because in such action, if the plaintiff recovered less than 40s. damages, he was entitled to full costs. (a) The wife, the child, and the servant, having no legal interest in the person or property of the husband, the parent, or master, cannot support an action for an injury to them. (b)

In treating of the action of *trover*, it is proposed to consider the nature and extent of the property in or right to *personal* property, necessary to support an action against a wrong-doer, but it may be expedient to notice in this place some of the general rules upon the subject.

The *absolute* or *general* owner of *personal* property, having also the right of immediate possession, may in general support an action for any injury thereto, although he never had the actual possession. (c)

An action for an injury to *personalty* may also be brought in the name of the person having only a *special* property or interest of a limited or temporary nature therein. (d) But in this case the general rule seems to be, that the party should have had the actual possession. (e)

There are cases in which the party having the *bare possession* of goods, which is *prima facie* evidence of property, may sue a mere wrong-doer who takes or injures them, although it should appear that the plaintiff has not the strict legal title; there being no claim by the real owner, and the defendant having no right or authority from him. (f)

of his liability to support the child. Grinnell v. Wells, Gloucester Summer Assizes, 1843. [Although the daughter be a servant *de facto* of another, and the father has relinquished all claim to her services, still the latter may maintain the action, he being liable for the expenses of her lying-in. Clark v. Fitch, 2 Wend. 459; Kennedy v. Shea, 110 Mass. 150.]

(z) Hall v. Hollander, 4 B. & C. 660; 7 D. & R. 133, S. C.

(a) Batchelor v. Bigg, 3 Wils. 319; Browne v. Gibbons, 1 Salk. 206; 2 Lord Raym. 831; but this is now otherwise. See the statute in the appendix.

(b) 3 Bl. Com. 143; Russell v. Corne, 1 Salk. 119.

(c) 2 Saund. 47 a, note (1); [Thorp v. Burling, 11 John. 285; Bird v. Clark, 3 Day, 272; Williams v. Lewis, 3 Day, 498; Cary v. Hotelling, 1 Hill, 311. An action

for injury to personal property is rightly brought in the name of the owner at the time of the injury, although it is sold at the time of the action brought, or although it was in the possession of his factor, who had a lien thereon. Holly v. Huggesford, 8 Pick. 73; Boynton v. Willard, 10 Pick. 166.]

(d) 2 Saund. 47 b, c, d. [An officer who has seized goods under an execution, may bring trespass or trover against a stranger for taking them away. Barker v. Miller, 6 John. 195; Gibbs v. Chase, 10 Mass. 125; Dillenback v. Jerome, 7 Cowen, 294; Taylor v. Manderson, 1 Ashm. 130.]

(e) Fowler v. Down, 1 B. & P. 47; 2 Saund. 47 d; Nicolls v. Bastard, 2 Cr., M. & R. 659.

(f) 2 Saund. 47 c, d; Nicolls v. Bastard, 2 Cr., M. & R. 659. [See Dillenback v. Jerome, 7 Cowen, 294.]

Although in the above instances the action may be brought by the general or special owner of goods against a stranger (*f*¹) yet a judgment obtained by one in an action against a stranger for a conversion is a bar to an action by the other. (*g*)

When the general owner has not the right of immediate possession, as where he has demised the goods, or let them to hire for a term unexpired, he cannot maintain trespass or trover, which are forms of action founded on possession, even against a stranger; (*h*) although if the injury were sufficient to affect his reversionary interest, he may support a special action on the case to recover damages to the extent of the injury he has sustained; (*i*) and a recovery in an action by a party having the possessory title for the damage he has sustained, * would be no bar to an action for an injury to the reversionary interest. (*k*)

The person in possession of *real property corporeal*, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title; (*l*) and in trespass to land, the person actually in possession, though he be only a *cestui que trust*, should be the plaintiff, and not the trustee. But the rule is otherwise in ejectment, which is an action to try the right; and the fictitious demise must be in the name of the party legally entitled to the possession, although the beneficial interest may be in another, (*m*) and according to the strict nature of the right; thus tenants in common *cannot join*, but must *sever*, in separate demises in a declaration in ejectment. (*n*) Nor should tenants in common join in debt for double rent. (*o*) . The party, however, must be in the *actual possession*, or he must have the general property, in

For injuries to real property.

(*f*¹) [Putnam v. Wylie, 8 John. 432; Bulkley v. Dolbear, 7 Conn. 232.]

(*g*) 2 Saund. 47 e; Flewellin v. Rave, 1 Balst. 68; 2 Vin. Abr. 49, pl. 6; 2 Cr., M. & R. 660.

(*h*) Gordon v. Harper, 7 T. R. 9; Benjamin v. Bank of England, 3 Campb. 417; Pain v. Whittaker, 1 R. & M. 99; Davies v. Connop, 1 Price, 53. See an illustrative case, Bloxam v. Sanders, 4 B. & C. 941; 7 D. & R. 396, S. C.

(*i*) Gordon v. Harper, 7 T. R. 9; Bedingfield v. Onslow, 3 Lev. 209; Attersoll v. Stevens, 1 Taunt. 190, 191.

(*k*) Bedingfield v. Onslow, 3 Lev. 209; Attersoll v. Stevens, 1 Taunt. 190, 191, 194; 2 Cruise, 458.

(*l*) Graham v. Peat, 1 East, 244; Lambert v. Strother, Willes, 221; Harker v. Birkbeck, 3 Burr. 1563; 2 Stra. 123; Thorn v. Shering, Cro. Car. 586; Philpot v. Holmes, Peake, 67; Attersoll v. Stevens, 1 Taunt. 183, 190, 191, 194; Welch v. Nash, 8 East, 394; Dyson v. Collick, 5 B. & Ald. 600; 1 D. & R. 225, S. C.; Heath v. Milward, 2 Bing. N. C. 28; Holmes v. Newlands, 11 Ad. & El. 44.

(*m*) Goodtitle d. Jones v. Jones, 7 T. R. 47, 50.

(*n*) Doe v. Errington, 3 Nev. & Man. 616; [Each tenant in common recovers only his own aliquot part or share. Morley v. Bruner, 59 Penn. St. 481; Minke v. McNamee, 30 Md. 294; Jones v. Walker, 47 Ala. 175. In Massachusetts, any two or more persons claiming the same premises as joint tenants, tenants in common, or coparceners, may join in a suit for the recovery thereof, or any one may sue alone for his share. Genl. Sts. c. 134, § 9; Tilden v. Tilden, 13 Gray, 108. This provision is held not to be applicable to a writ of entry by joint mortgages for foreclosure of the mortgage. Webster v. Vandeventer, 6 Gray, 428. By a practice established in Connecticut, one of several joint owners of real estate may recover the whole, in ejectment, against a defendant who has no title, and will hold it, when recovered, as well for the other owners as for himself. Bush v. Bradley, 4 Day, 303, 304; Metcalf J. in Webster v. Vandeventer, 6 Gray, 431, 432.]

(*o*) Wilkinson v. Hall, 1 Bing. N. C. 718

respect of which possession *immediately* follows (as in the instance of the possession of his mere servant), (*p*) or he cannot maintain an action of trespass; a mere *right* to enter is not sufficient. (*q*) In the case of *real* property, there is not that constructive possession which may exist in the case of personalty, and the party entitled to possession cannot maintain trespass, unless he has had actual possession by himself or his servant, though he have the freehold in law; (*r*) and after a feoffment with livery of seisin, the feoffee may maintain trespass, notwithstanding a tenant at will was in possession at the time of such feoffment, and did not assent to the same. (*s*) These rules will be more fully considered in the next chapter, when considering the cases in which an action of trespass is sustainable. (*t*) A person having the *immediate* reversion or remainder in fee or in tail, or for a less estate, may support an action on the *case* for waste, or any nuisance of a permanent nature, * or which affects, litigates, and injures the *right*, and which is injurious to his reversionary interest; (*u*) but he cannot sue in *trespass* when the possession is lawfully in his tenant or other person. (*x*) The *tenant* may support *trespass* against a stranger for an injury to his possession; and the *immediate reversioner* may, at the same time, support an action on the *case*, if the injury were sufficient to prejudice his right and interest; and a recovery by one will be no bar to an action by the other. (*y*) But the reversioner,

(*p*) Peter v. Kendal, 6 B. & C. 703.

(*q*) Dyson v. Collick, 5 B. & Ald. 600; 1 D. & R. 225, S. C.; The Duke of Newcastle v. Clark, 2 Moore, 666. [See Bulkley v. Dolbeare, 7 Conn. 232. The owner of a brick-yard who has authorized a third person to enter and make bricks at will, may still maintain an action for an injury to the possession merely. Shaw v. Cumiskey, 7 Pick. 76.] Commissioners of sewers cannot maintain an action against the commissioners of a harbor, for breaking down a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as will enable them to maintain such action. 2 Moore, 666. But the contractors for making a navigable canal having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong-doer. Dyson v. Collick, 5 B. & Ald. 600; 1 D. & R. 225, S. C. So overseers who inclosed a parcel of a waste, under 39 Geo. 3, c. 42, were held to have sufficient possession to maintain trespass against an inhabitant of the parish, who destroyed their fence, without establishing any right of common, notwithstanding they failed to show the consent of the lord of the manor to the inclosure. Matson v. Cook, 4 Bing. N. C. 392.

(*r*) Com. Dig. Trespass, B. 3; but see Butcher v. Butcher, 7 B. & C. 399.

(*s*) Ball v. Cullimore, 1 Gale, 96.

(*t*) Post.

(*u*) 1 Saund. 323 b; 2 Saund. 252 b; Beddingfield v. Onslow, 3 Lev. 209; Panton v. Isham, 3 Lev. 360; Jesser v. Gifford, 4 Burr. 2141; Com. Dig. Action, Case, Nuisance; Attersoll v. Stevens, 1 Taunt. 183, 190, 191, 194; Jackson v. Pesked, 1 M. & S. 234; Shadwell v. Hutchinson, 3 C. & P. 617; 2 B. & Ad. 97, S. C.; Baxter v. Taylor, 4 B. & Ad. 72. The remedy for waste is fully considered under the head of Case, post.

(*x*) Ib.; Attersoll v. Stevens, 1 Taunt. 190; Gordon v. Harper, 7 T. R. 9; [Campbell v. Arnold, 1 John. 511; Tobey v. Webster, 3 John. 468; Austin v. Sawyer, 9 Cowen, 39; Addleman v. Way, 4 Yeates, 218. But it has been held, in some states, that trespass *quare clausum* may be maintained by the owner of land for an injury to the freehold, though it be in the occupation of a tenant at will. Starr v. Jackson, 11 Mass. 519; Hingham v. Sprague, 15 Pick. 102; Kimball v. Souther, 62 Maine, 309; Bartlett v. Perkins, 13 Maine, 87; Davis v. Nash, 32 Maine, 411.]

(*y*) Jesser v. Gifford, 4 Burr. 2141; Beddingfield v. Onslow, 3 Lev. 209; Panton v. Isham, 3 Lev. 360; Com. Dig. Action, Case, Nuisance, B.; Attersoll v. Stevens, 1 Taunt. 183, 190, 191, 194. As to remedy by reversioner or tenant against the hundred in case of a malicious fire, see 7 & 8 Geo. 4, c

when he sues, must allege and prove such a permanent injury as necessarily affects his interest. (z) When trees are excepted in a lease, the lessee has no interest therein, and cannot sue even a stranger for cutting them down, though he might for the trespass to the land; and in such case the lessor may support trespass against the lessee or a stranger, if he either fell or damage them; but if there be no exception of the trees in the lease, the lessee has a particular interest therein, and may support trespass against the lessor or a stranger for an injury to them during the term; but the interest in the body of the trees remains in the lessor as part of his inheritance, and he may support an action on the case against a lessee or a stranger for an injury thereto, or even trover, if they be cut down and carried away. (a) But to sustain a count for an injury to an alleged *reversionary* interest subject to a demise, the written lease or agreement must be proved. (b) After a recovery in an action of ejectment, trespass for mesne profits may be brought in the name of the lessor of plaintiff or of the nominal plaintiff, (c) and after an escape in the latter action, the sheriff may be sued for it in the name of the nominal plaintiff. (d)

Many of these rules prevail also in the case of an injury to real property *incorporeal*, and if there be any injury to such right, an action may be supported, however small the damage; and therefore a commoner may maintain an action on the case for an injury done to *the common, though his proportion of the damage be found to amount only to a farthing. (e)

When two or more persons are *jointly entitled*, or have a *joint legal interest* in the property affected, they must in general join in the action, or the defendant may plead *in abatement* (f) and though the interest be several, yet if the wrong complained of caused an entire joint damage, the parties may join or

2dly. Who to join, or sever with reference to the number of plaintiffs

31, and *Pellew v. The Inhabitants of Wotton*, 9 B. & C. 134, 142; 4 M. & R. 130, S. C.

(z) *Jackson v. Pesked*, 1 M. & S. 234; *Atteroll v. Stevens*, 1 Taunt. 202. Building a roof with eaves, which discharge rain water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion. *Tucker v. Newman*, 11 Ad. & El. 40. As to how the right of action is affected by the default of the tenant, see *Bell v. Twentymen*, 1 G. & D. 223. The reversioner has no ground of complaint by reason of an *intention* to do an unlawful act. *Durham & Sunderland Railway Company v. Walker*, 2 G. & D. 326, 341.

(a) 1 Saund. 322, note (5); *Gordon v. Harper*, 7 T. R. 13; *Com. Dig. Biens*; *Atteroll v. Stevens*, 1 Taunt. 190, 191, 194;

Blackett v. Lowes, 2 M. & Sel. 498, 499. [See *Bulkley v. Dolbeare*, 7 Conn. 232.]

(b) *Cotterill v. Hobby*, 4 B. & C. 465.

(c) *Doe v. Jones*, 2 M. & Sel. 473; *Adams on Eject.* 333. See *Chamier v. Willett*, 5 M. & Sel. 64; *Chamier v. Llingon*, 2 Chit. Rep. 410. See *post*, as to the action for mesne profits.

(d) *Doe v. Jones*, 2 M. & Sel. 473.

(e) *Pindar v. Wadsworth*, 2 East, 154.

(f) *Post*, 75. [Where two or more persons are deceived and injured in the purchase of real estate for partnership purposes, by the false and fraudulent affirmations of a third person, which are actionable, they may join in an action against him to recover damages for the deceit and injury. *Medbury v. Watson*, 6 Met. 246. If a bill of sale be made to one who purchases for himself and a dormant partner, both may join in an action of trespass for taking away the goods. *Robinson v. Mansfield*, 13 Pick. 189; *Rus-*

sever in the action; but as the courts will not in one suit take cognizance of distinct and separate claims of different persons, where the damage as well as the interest is several, each party injured must, in that case, sue separately. (*g*) If a third person collude with one partner in a firm to injure the other partners, the latter may jointly maintain an action on the case against the third person so colluding. (*h*)

Therefore, several parties cannot, in general, sue jointly for injuries to the *person*, as for slander, battery, or false imprisonment of both, and each must bring a separate action. (*i*) In these cases the wrong done to one person cannot in law be to the prejudice of the other; nor is there any criterion by which an entire sum can be awarded to them for damages. But partners in trade may join in an action for slanderous words spoken, or a libel published concerning them in the way of their joint business, without showing the proportion of their respective shares. (*k*) So joint tenants or coparceners may join in an action for slander of their title to the estate. (*l*) A husband and wife may sue jointly for a malicious prosecution and imprisonment of both, or the husband may sue alone. (*m*) And two persons may jointly sue for a malicious arrest of both in an action brought without reasonable cause, if it be laid as special damage that they jointly incurred an expense in procuring their liberation. (*n*) For in these instances there is an entirety of interest, or a joint damage resulting from the tort. Where an action was brought, and a verdict obtained by two plaintiffs against a defendant for a malicious arrest, and the declaration alleged as a special damage, not only a joint expense incurred, but also the false imprisonment of both, the court ordered the judgment to be arrested; but as the verdict confined the damages to the *joint expense* incurred by the plaintiffs in obtaining their liberation, an amendment of the *postea* was allowed. (*o*)

In actions for injuries to *personal property*, joint tenants and tenants * in common must join, or the defendant may plead in abatement; (*p*) but parties having several and distinct interests cannot in

sell *v.* Stocking, 8 Conn. 237; Sweigart *v.* Berk, 8 Serg. & R. 308; Glover *v.* Austin, 6 Pick. 209; Gilmore *v.* Wilbur, 12 Pick. 120.]

(*g*) *Ante*, 11; 1 Saund. 291 *g*; 2 Saund. 116, note (2); Bac. Abr. Action, C.; Wel-
ler *v.* Baker, 2 Wils. 423.

(*h*) Longman *v.* Pole, 1 Moo. & Mal. 223.
See Story *v.* Richardson, 6 Bing. N. C. 123.

(*i*) 2 Saund. 117 *a*; Barratt *v.* Collins, 10
Moore, 446, 451.

(*k*) Cook *v.* Batchellor, 3 B. & P. 150;
Maitland *v.* Goldney, 2 East, 426; and see,
fully, Foster *v.* Lawson, 3 Bing. 452; 11
Moore, 360, S. C. [So, an action lies for
copartners in trade against two or more, also
copartners, for falsely and fraudulently rec-

ommending an insolvent person as worthy
of credit, whereby the plaintiffs were induced
to trust him with goods, and incurred a loss.
Patten *v.* Gurney, 17 Mass. 182. But a
false and fraudulent affirmation, made by the
seller of an estate to two or more purchas-
ers, is in its nature a several tort to each,
and they cannot join in an action therefor.
Baker *v.* Jewell, 6 Mass. 460.]

(*l*) 2 Saund. 117 *a*.

(*m*) Dalby *v.* Dorthall, in error, Cro. Car.
553.

(*n*) Barratt *v.* Collins, 10 Moore, 446.

(*o*) *Ib.*

(*p*) Bac. Abr. Joint Tenants, K.; Sedg-
worth *v.* Overend, 7 T. R. 279; Bloxam *v.*
Hubbard, 5 East, 407; Co. Litt. 198 *a*.

general join. (*p*¹) Thus, if goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in the replevin; (*q*) and an *audita querela* in the joint names of the consors of a statute staple, for levying several executions on their lands respectively, cannot be supported; (*r*) nor could persons robbed on the highway join in an action against the hundred, unless they were jointly interested in the property. (*s*)

But though the interests of the parties be distinct, yet if the injury occasion an entire joint damage to them, they may in some cases join; (*t*) as where two persons were severally seised of two ancient mills, at one or the other of which the defendant ought to have ground his corn, but neglected to grind at either, it was decided that both might join; (*u*) and on the same principle it was holden, that the dipperers at Tunbridge Wells might join in an action against a person who exercised the business of a dipper, not being duly appointed. (*x*) And where goods are bailed to two, and only one has the possession in fact, and a stranger carries them away, both may have detinue or trespass, or the one who had actual possession may sue alone. (*y*)

In actions for injuries to real property, joint tenants, (*z*) and parceners, (*a*) must join in real as well as personal actions, or the non-joinder may be pleaded in abatement; and if one of several joint tenants die pending a real action, it will abate, as the survivor is entitled to a different estate; but it is otherwise in personal and mixed actions. (*b*) Tenants in common must in general sever in real actions, unless in a *quare impedit*, and in ejectment a joint demise would be improper; (*b*¹) but in personal actions, as for

For injuries
to real prop-
erty.

[See *Gock v. Keneda*, 29 Barb. 120; *Rice v. Hollenback*, 19 Barb. 664; *Wells v. Cone*, 55 Barb. 285; *Bradish v. Schenck*, 8 John. 151; *Pickering v. Pickering*, 11 N. H. 141; *Smoot v. Wathen*, 8 Missou. 522; *Hart v. Fitzgerald*, 2 Mass. 509. Joint owners of goods must join in replevin to recover them. *M'Arthur v. Lane*, 15 Maine, 245; *Ellis v. Culver*, 2 Harr. 129; *Hart v. Fitzgerald*, 2 Mass. 509. But several persons, having separate and distinct interests in a chattel, were held not entitled to join in replevin, in *Chambers v. Hunt*, 3 Harr. 339. Tenants in common must all join in an action of assumpsit for the avails of a tort that is waived. *Gilmore v. Wilbur*, 12 Pick. 120. Joint owners of a vessel must sue together for the hire of such vessel; *Coster v. New York & Erie R. R. Co.* 3 Abb. Pr. 332; or for freight carried by such vessel. *Donnell v. Walsh*, 33 N. Y. 43; *Merritt v. Walsh*, 32 N. Y. 683. All the owners must join as plaintiffs to recover property jointly bailed. *Sachely v. Peirce*, 28 Texas, 328.]

(*p*¹) [Where there is no joint injury, and the tenants in common are not jointly interested in the damages, the remedy may be by a several action. *Lothrop v. Arnold*, 25

Maine, 136; *Melville v. Brown*, 15 Mass. 82.]

(*q*) Co. Litt. 145 b.

(*r*) *Worsley v. Charnock*, Cro. Eliz. 473; *Farmer v. Downes*, Noy, 1.

(*s*) *Dyer*, 370; 2 Saund. 116 a, 377 a.

(*t*) 2 Saund. 115.

(*u*) 2 Saund. 115, 116.

(*x*) *Weller v. Baker*, 2 Wils. 423; 2 Saund. 116, note (2).

(*y*) 2 Vin. Abr. 59; Com. Dig. Abatement, E. 12.

(*z*) 2 Vin. Abr. 59; Bac. Abr. Joint Tenants, K.; *Barratt v. Collins*, 10 Moore, 466; but see *Doe d. Marsack v. Read*, 12 East, 61; *Doe d. Clarke v. Grant*, 12 East, 221. See *Steel v. Western*, 7 Moore, 29.

(*a*) Vin. Abr. Parceners; *Barratt v. Collins*, 10 Moore, 466; *Doe d. Marsack v. Read*, 12 East, 61; *Doe d. Clarke v. Grant*, 12 East, 221. [In Connecticut, one, or any number of them, may bring an action against a person who has no title. *Bush v. Bradley*, 4 Day, 298; *Sanford v. Button*, 4 Day, 310.]

(*b*) *Middleton & Croft*, Rep. temp. Hard. 398; Co. Litt. 188, 197.

(*b*¹) [But see *Jackson v. Bradt*, 2 Caines,

a trespass or nuisance to their land, they may join, because in these actions, though their estates are several, yet the damages survive to all, and it would be unreasonable when the damage is thus entire to bring several actions for a single trespass. (c) A tenant in common may however, in general sue separately; (c¹) as in ejectment for his undivided share, or in trespass for the *mesne* profits, or in debt for double value against a person who has held over after the expiration of his *tenancy. (d) But a joint action for *mesne* profits may be supported by several lessors of the plaintiff in ejectment, after recovery therein, although there were only separate demises by each. (e)

In actions in form *ex delicto*, and which are not for the breach of a contract, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial; (e¹) and the defendant cannot, as in actions in form *ex contractu*, give in evidence the

Consequences of non-joinder.

169; Hicks v. Rogers, 4 Cranch, 165; Smith v. Harrow, 1 Bibb, 97.]

(c) Bac. Abr. Joint Tenants, K.; Cutting v. Derby, 2 Bl. Rep. 1077; Harrison v. Barnby, 5 T. R. 247; Stone v. Bromwich, Yelv. 161; Cro. Jac. 231; Culley v. Spearman, 2 H. Bl. 386; Pullen v. Palmer, 5 Mod. 151; [De Pay v. Strong, 3 Keyes, 603; S. C. 37 N. Y. 372; Thacher v. Phinney, 7 Allen, 146; Bullock v. Hayward, 10 Allen, 460; Gilmore v. Wilbur, 12 Pick. 120; Daniels v. Daniels, 7 Mass. 137; May v. Parker, 12 Pick. 38, 39; ante, 14, note (m); Austin v. Hall, 13 John. 286; Decker v. Livingston, 15 John. 479. A person having an equitable title to land may be joined with one having the legal title, in an action to recover for damages done to a building erected thereon at the expense of both. Schuylkill Navigation Co. v. Farr, 4 Watts & S. 362. In an action for nuisance to land, all the cotenants must join as plaintiffs. Low v. Mumford, 14 John. 426. So, tenants in common may join in an action of waste. Greenly v. Hall, 3 Harring. 9. Two persons in joint possession, and claiming to be joint owners of wood cut upon land which was originally owned by one of them alone, may maintain a joint action against a wrong-doer for its conversion, although no deed of conveyance of the land from the original owner to the other is proved. Parker v. Parker, 1 Allen, 245. Where five persons were seised of a mill, as tenants in common, and the mill was burned in consequence of the negligence of one of them, it was held that the other four might maintain an action on the case against him. Chesley v. Thompson, 3 N. H. 1. See Daniels v. Daniels, 7 Mass. 135. Tenants in common may properly join in an action for use and occupation. Porter v. Bleiler, 17 Barb. 149. But, although tenants in common may sue severally, or all may join in an action for the rents and profits of the estate owned by them in common, two or more cannot sue jointly,

if there be other heirs not joined in such action. Kimball v. Sumner, 62 Maine, 305.]

(c¹) [An owner of an undivided part of an estate may maintain alone an action for disturbance of a right of way. Blake v. Everett, 1 Allen, 248.]

(d) Harrison v. Barnby, 5 T. R. 248; Cutting v. Derby, 2 Bl. Rep. 1077. In some cases he may sue in ejectment for the whole premises. Doe d. Pitcher v. Mitchell, 3 Moore, 229.

(e) Chamier v. Willett, 5 M. & Sel. 64; Chamier v. Llingon, 2 Chit. Rep. 410.

(e¹) [Cooper v. Grand Trunk Railway, 49 N. H. 209; Moulton v. Robinson, 27 N. H. 564; Webber v. Merrill, 34 N. H. 202; True v. Congdon, 44 N. H. 48, 59 and cases; Sherman v. Fall River Iron Works Co. 2 Allen, 524; S. C. 5 Allen, 213; Wheeler v. Worcester, 10 Allen, 591; Gray J. in Bullock v. Hayward, 10 Allen, 460; Gould Pl. c. 5, §§ 111, 112; Frazier v. Spear, 2 Bibb, 385; Gilbert v. Dickerson, 7 Wend. 439; Wheelwright v. Depeyster, 1 John. 471; Pickering v. Pickering, 11 N. H. 141; Hart v. Fitzgerald, 2 Mass. 509, 511; Call v. Buttrick, 4 Cush. 345; Putney v. Lapham, 10 Cush. 232; White v. Webb, 15 Conn. 302; Johnson v. Richardson, 17 Ill. 302; Edwards v. Hill, 11 Ill. 22; Lothrop v. Arnold, 25 Maine, 136; Hobbs v. Hatch, 48 Maine, 55; Phillips v. Cummings, 11 Cush. 469; Morley v. French, 2 Cush. 130; Bell v. Layman, 1 T. B. Mon. 40; Thompson v. Haskins, 11 Mass. 419; Chouteau v. Hewitt, 10 Missou. 131; Wilson v. Gamble, 9 N. H. 74; Garvin v. Paul, 47 N. H. 158; Dubois v. Glaub, 52 Penn. St. 238; Winters v. McGhee, 3 Sneed (Tenn.), 128; Chandler v. Spear, 22 Vt. 388; Briggs v. Taylor, 35 Vt. 57. But if it appear from the plaintiff's own showing, in an action of replevin of a chattel unlawfully taken and detained, that he is only one of two or more part-owners, the court will abate the writ *ex officio*. Hart v. Fitzgerald, 2 Mass. 109. In this case

non-joinder, as the ground of nonsuit on the plea of the general issue; (*e*²) or demur; or move in arrest of judgment; (*e*³) or support a writ of error; although it appear upon the face of the declaration, or other pleading of the plaintiff, that there is another party who ought to have joined. (*f*) And if one of several part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owners may afterwards sue alone for the injury to their undivided shares, and the defendant cannot plead in abatement of such action. (*g*)

If, however, *too many* persons be made co-plaintiffs, the objection, if it appear on the record, may be taken advantage of either by demurrer, in arrest of judgment, (*h*) or by writ of error; (*i*) or if the objection do not appear on the face of the pleadings, it would be a ground of nonsuit on the trial; (*k*) though if two tenants in common join detinue of charters, it is said if one be nonsuit the other shall recover. (*l*)

Consequences of misjoinder.

We have already seen that *choses in action ex contractu* are not in general assignable at law, so as to enable the assignee to sue in his own name; (*m*) the same rule also prevails in the case of injuries *ex delicto* either to the person, or to personal (*m*¹) or real property. Therefore an heir cannot main-

tidly. When the interest in the property has been assigned.

Parsons C. J. stated the distinction in the principles of law regulating the forms of actions for injuries to chattels, and of actions of replevin. 2 Mass. 311, 312.]

(*e*) [But see *Smoot v. Wathen*, 8 Missou. 522, in which a different rule is adopted. See, also, *Ellis v. Culver*, 2 Harr. 129.]

(*e*²) [See *Wheelright v. Depeyster*, 1 John. 471; *Brotherson v. Hodges*, 6 John. 108; *Bradish v. Schenck*, 8 John. 151.]

(*f*) 1 Saund. 201; *Addison v. Overend*, 6 T. R. 766; *Sedgworth v. Overend*, 7 T. R. 279; 2 Saund. 117, ~~and~~ *Scott v. Godwin*, 1 B. & P. 75; *Mainwaring v. Newman*, 2 B. & P. 123; *Bloxam v. Hubbard*, 5 East, 407, 420. ["In actions of tort, there is a distinction between non-joinder and misjoinder of plaintiffs. Non-joinder is matter of abatement only. *Thompson v. Hoskins*, 11 Mass. 419; *Phillips v. Cummings*, 11 Cash. 469." *Metcalf J. in Gerry v. Gerry*, 11 Gray, 381, 382; *Hart v. Fitzgerald*, 2 Mass. 509, 511, 512; *Bradish v. Schenck*, 8 John. 151; *Rich v. Penfield*, 1 Wend. 380; *Hall v. Adams*, 1 Aiken, 166; *Bell v. Layman*, 1 T. B. Mon. 40; *Wilson v. Gamble*, 9 N. H. 74; *Putney v. Lapham*, 10 Cush. 232; *Call v. Bettrick*, 4 Cush. 345.]

(*g*) *Sedgworth v. Overend*, 7 T. R. 279; *Bloxam v. Hubbard*, 5 East, 407; [*Brizendine v. Frankfort Bridge Co.* 2 B. Mon. 32. But it has been held in Vermont that one of two tenants in common of real property may maintain an action for a trespass

by a stranger upon such real property, without joining his cotenant; and may recover in such action the whole damage to the property, for the benefit of himself and the cotenant. *Bigelow v. Rising*, 42 Vt. 678.] If one joint tenant bring an action of detinue, the objection that the other tenants should have joined can only be taken by plea in abatement. *Broadbent v. Ledward*, 11 Ad. & El. 209; 3 P. & D. 45; *Cook v. Batchellor*, 3 B. & P. 150.

(*h*) *Barratt v. Collins*, 10 Moore, 446.

(*i*) 2 Saund. 116 a; *Worsley v. Charnock*, Cro. Eliz. 473; [*Whiting v. Cook*, 8 Allen, 63.]

(*k*) *Hare v. Celey*, Cro. Eliz. 143. [Misjoinder of plaintiffs in tort, not appearing on the declaration, may be taken advantage of at the trial, without pleading it in abatement. *Gerry v. Gerry*, 11 Gray, 381; *Gray J. in Bullock v. Hayward*, 10 Allen, 462; *Gould Pl. c. 5*, § 113; *Glover v. Hunnewell*, 6 Pick. 222. As to misjoinder of plaintiffs in a *qui tam* or popular action to recover a penalty, see *Vinton v. Welch*, 9 Pick. 87; *Hill v. Davis*, 4 Mass. 187. In actions for malicious prosecution of suit against the plaintiffs jointly, see *Ainsworth v. Allen*, Kirby, 145; *Leavet v. Sherman*, 1 Root, 159.]

(*l*) Co. Litt. 197 b; *Govett v. Radnidge*, 3 East, 62; *Weall v. King*, 12 East, 452; *Max v. Roberts*, 2 New Rep. 365, 454.

(*m*) *Ante*, 17.

(*m*¹) [But it has been held that the as-

tain an action for waste committed in the time of his ancestor ; nor the grantee of a reversion for waste committed before the grant ; (n) though we have already seen that if a person have the immediate reversion or remainder in fee, in tail, or for life, or years, vested in him at the time of the waste committed, he may maintain an action on the case for such injury to his estate. (o) * And a devisee may support an action for the continuance of a nuisance erected in the lifetime of the testator, for every continuance of a nuisance makes it a fresh one. (p) So a remainder-man may support an action for undermining a wall during a tenancy for life, if the excavation should be continued, and the wall fall down during his own time. (q) And if the owner of an estate deliver the title-deeds to a bailee, and afterwards convey away the estate, the new proprietor must be the plaintiff if the bailee wrongfully detain the deeds after the purchase. (r) And the assignee of a copyright, or the purchaser of any personal chattel, may sue for an injury after he became the proprietor. (s) So it seems that the wrongful seizure of goods by a sheriff, under a *fi. fa.* against B., does not preclude C. the real owner, from afterwards, and whilst the goods remain in the possession of the sheriff, selling and assigning his property in the goods to D., and if the sheriff afterwards sell the goods, D. may support trover against him. (t)

When one or more of several parties jointly interested in the property at the time the injury was committed is dead, the action should be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately ; and therefore to an action of trover brought by the survivor of three partners in trade, it cannot be objected that the two deceased partners and the plaintiff were joint merchants, and that in respect of the *lex mercatoria* the right of survivorship did not exist, for the *legal* right of action survives, though the beneficial interest may not. (u) But if the parties had separate interests in respect of which they might have severed in suing, the personal representative of the deceased may maintain a separate action, provided the *tort* was not of such a nature that it died with the person. At common law, when an action had been commenced in the name of two or more persons, and one of them died pending the suit, it abated ; but by the 8

signee of a bond may maintain trover for it, in his own name, against the obligor, who has got it into his possession and converted it. *Clowes v. Hawley*, 12 John. 484.]

(n) 2 Saund. 252 a, note (7) ; 2 Inst. 305.

(o) *Ante*, 72 ; 2 Saund. 252 b.

(p) *Same v. Barwish*, Cro. Jac. 231.

(q) *Gillon v. Boddington*, 1 R. & Moo. N. P. C. 161 ; *Howell v. Young*, 5 B. & C. 263, 268 ; 2 Dow. & R. 14 S. C.

(r) *Phillips v. Robinson*, 4 Bing. 106.

(s) See *Pattison v. Robinson*, 5 M. & S. 105.

(t) *Friday v. Hart*, tried at Maidstone, and afterwards decided in King's Bench on motion for a new trial. N. B. Osbaldestone & Murray, attorneys. MS.

(u) *Kemp v. Andrews*, 1 Show. 188 ; Carth. 170. See, also, the judgment in *The King v. The Collector of the Customs*, 2 M. & S. 225.

§ 9 W. 3, c. 11, s. 7, (x) it was enacted, "that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants;" and consequently, since that statute, * if one of several plaintiffs die pending a suit, and the cause of action would survive to the survivor, he may proceed in the action. But if the cause of action do not survive, then the action would abate; as if the husband and wife sue for the slander of the wife, if she die pending the suit, the husband cannot proceed further. (y)

We have seen that the right of action for the breach of a contract upon the death of either party, in general survives to and against the executor or administrator of each; (z) but in the case of torts, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise; it being a maxim that *actio personalis moritur cum persona*; (a) and we shall find that the statute 4 Ed. 3, c. 7, (a¹) has altered this rule only in its relation to *personal property*, and in favor of the personal representatives of the *party injured*; but if the action can be framed in form *ex contractu*, this rule does not apply. (b) We will now consider the rule as it affects actions for injuries to the *person*, and to *personal* and *real* property.

In the case of injuries to the *person*, whether by assault, battery, (b¹) false imprisonment, slander, (b²) or otherwise, if either the party who received or committed the injury die,

5thly. In case of the death of the party injured.

Injuries to the person.

(x) See the cases in 2 Saund. 73 i; Rep. temp. Hardw. 295; Bac. Abr. Joint Tenants, K.

(y) *Inland v. Champneys*, 4 Taunt. 884.

(z) *Ante*, 21.

(a) See the observations on this rule in general, 3 Bl. Com. 302; 1 Saund. 216, 217, note (1); Comp. 371-377; 3 Woodes. Lect. 73; Vin. Abr. Executors, 123; Com. Dig. Administrator, B. 13; [Morton J. in *Wilbur v. Gilmore*, 21 Pick. 252.]

(a¹) [In force in Pennsylvania, *Roberts's Dig.* 248; Report of the Judges, 3 Binn. 610; and in Massachusetts, *Morton J. in Wilbur v. Gilmore*, 21 Pick. 252.]

(b) See 3 Woodes. Lect. 78, 79; Marsh. 14; [Middleton v. Robinson, 1 Bay, 58; Pitts v. Hale, 3 Mass. 321; Stetson v. Kempton, 13 Mass. 273; M'Evers v. Pitkin, 1 Root, 216; Jones v. Hoar, 5 Pick. 285; Cooper v. Crane, 4 Halst. 173; Troup v. Smith, 20 John. 43.]

(b¹) [*Miller v. Umberhower*, 10 Serg. &

R. 31; *Kimbrough v. Mitchell*, 1 Head (Tenn.), 539.]

(b²) [Action on the case for libel does not survive. *Waters v. Nettleton*, 5 Cush. 544; *Long v. Hitchcock*, 3 Ohio, 274; *Browner v. Sterdevant*, 9 Geo. 69. But under statute in Maine an action of slander survives to the executor. *Nutting v. Goodridge*, 46 Maine, 82. An action on the case for malicious prosecution does not by law survive, in Massachusetts. • *Nettleton v. Dinehart*, 5 Cush. 543. Actions for deceit in sale or exchange of property, or otherwise doing damage, held not to survive, in *Coker v. Crozier*, 5 Ala. 369; *Newsom v. Jackson*, 29 Geo. 61; *Cutting v. Tower*, 14 Gray, 183; *Read v. Hatch*, 19 Pick. 47; *Henshaw v. Miller*, 17 How. (U. S.) 212; *Grim v. Carr*, 51 Penn. St. 533.. Actions for seduction do not survive. *McClure v. Miller*, 4 Hawks, 133; *Browner v. Sterdevant*, 9 Geo. 69. Otherwise in Iowa, *Shafer v. Grimes*, 23 Iowa, 550. An action by husband for crim-

no action can be supported either by or against the executors or other personal representatives; (c) for the statute 4 Ed. 3, c. 7, has made no alteration in the common law in that respect; (d) and the statute 3 & 4 W. 4, c. 42, s. 3, only gives executors and administrators an action for *torts* to the *personal* or *real estate* of the party injured, and not for mere injuries to the *person*; and a promise to *marry* is considered of so *personal* a nature, that although the action for its breach is in form *ex contractu*, yet the executor of a party to whom the promise was made cannot sue. (e)

At *common law*, in case of injuries to *personal property*, if either party died, in general no action could be supported, either by or against the personal representatives of the parties, where the action must have been in *form ex delicto* and the plea not guilty; (f) but if any *contract* could be implied, as if the wrong-doer converted the property into money, or if the goods remained in specie in the hands of the executor of the wrong-doer, *assumpsit* for money had and received might be supported at common law by or against the executors in the former case, and *trover* against the executors in the latter. (g) By the statute 3 Ed. 3, c. 7, intituled "Executors shall have an action of **trespass* for a *wrong* done to the testator," and reciting "that in times past executors have not had actions for a *trespass* done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespassers have hitherto remained un-

inial conversation with his wife does not survive. *Clarke v. McClellan*, 9 Penn. St. 128. In New York by statute, and in North Carolina, actions for deceit in sale of real or personal estate survive against the personal representatives of the defendant. *Haight v. Hoyt*, 19 N. Y. 464; *Arnold v. Lanier*, 4 Law Rep. (N. Car.) 529. Actions for malicious arrest and imprisonment held to survive the death of the person injured. *Huggins v. Toler*, 1 Bush (Ky.), 192; *Whitcomb v. Cook*, 38 Vt. 477. Action against a physician for malpractice survives by statute in Indiana, though not at common law. *Long v. Morrison*, 14 Ind. 595. An action against an attorney for neglect, survives his decease. *Miller v. Wilson*, 24 Penn. St. 114. Actions for personal injuries, sustained by defects in highways, or by neglect in the carriage of passengers on railroads, have been held to survive the death of the person injured. *Hooper v. Gorham*, 45 Maine, 209; *Demond v. Boston*, 7 Gray, 544; *Peeble v. North Carolina R. R. Co.* 63 N. Car. 238; *James v. Christy*, 18 Missouri, 162.]

(c) 3 Bl. Com. 302; *Chamberlain v. Williamson*, 2 M. & S. 408; [*Browner v. Sterdevant*, 9 Geo. 69; *Baltimore &c. R. R. Co. v. Ritchie*, 31 Md. 191; *Gibbs v. Belcher*, 30 Texas, 79; *Harrison v. Moseley*, 31 Texas, 608; *Woodward v. Chicago &c. R. Co.* 23 Wisc. 400.]

(d) 1 Saund. 217, note (1); *Mason v. Dixon*, Sir W. Jones, 174.

(e) *Ante*, 22, 58.

(f) *Hamby v. Trott*, Cowp. 371-377. [An action by a father for seduction of his daughter abates by his death. *McClure v. Miller*, 4 Hawks, 133. See *Miller v. Umbehower*, 10 Serg. & R. 31; *Morris v. Corson*, 7 Cowen, 281. But the death of the plaintiff in a replevin suit does not abate it; his representatives may prosecute it. *Fisher v. Beal*, 1 Harr. & J. 31; *Pitts v. Hale*, 3 Mass. 321; *Jenney v. Jenney*, 14 Mass. 232; *Reist v. Heilbrenner*, 11 Serg. & R. 131. The death of one of several plaintiffs in an action of trespass to real estate does not abate the suit. *Haven v. Brown*, 7 Greenl. 431; *Boynton v. Rees*, 9 Pick. 528; *Wilson v. Slaughter*, 3 J. J. Marsh. 595.]

(g) Cowp. 374; *Mason v. Dixon*, Latch, 168; *Chamberlain v. Williamson*, 2 M. & S. 415, 416; [*Middleton v. Robinson*, 1 Bay, 58; *Jones v. Hoar*, 5 Pick. 285; *Cooper v. Crane*, 4 Halst. 173; *Wilbur v. Gilmore*, 21 Pick. 250; *United States v. Daniel*, 6 How. (U. S.) 11; *Nettles v. Barnett*, 8 Porter (Ala.), 181; *McEvers v. Pitkin*, 1 Root, 216; *Pitts v. Hale*, 3 Mass. 321; *Freeman v. Frank*, 10 Abb. Pr. 370; *Watson v. Loop*, 12 Texas, 11; *Nettles v. D'Oyley*, 2 Brevard, 27; *Cooper v. Crane*, 9 N. J. (Law) 173; *Coleman v. Woodworth*, 28 Cal. 567.]

punished," it is enacted, "that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were in life;" and this remedy is further extended to executors of executors, (h) and to administrators. (i) It has been observed, that the taking of goods and chattels was put in the statute merely as an instance, and not as restrictive to such injuries only, and that the term "trespass" must, with reference to the language of the times when the statute was passed, signify *any wrong*; (k) and accordingly the statute has been construed to extend to every description of injury to *personal* property, by which it has been rendered *less beneficial* to the executor, whatever the form of action may be; (l) so that an executor may support trespass or trover, (m) case for a false return to final process, (n) and case for an escape, &c. on final process. (o) And although it has been doubted whether an executor could sue for an escape on *mesne process* in the lifetime of his testator, (p) it seems that on principle he might; (q) and he may support debt for not setting out tithes; (r) or against a tenant for double value for holding over; (s) or case against an attorney for negligence; (t) or debt against an executor, suggesting a *devastavit* in the lifetime of the plaintiff's testator; (u) or case against the sheriff for removing goods taken in execution, without paying the testator a year's rent; (x) or an action of ejectment or *quare impedit*, for the disturbance of the testator. (y) We will presently state the extension of remedy by 3 & 4 W. 4, c. 42, s. 2.

With respect to injuries to *real* property, if either party die, no action in form *ex delicto* could be supported either by or against his personal representatives before the 3 & 4 W. 4, c. 42, s. 2; and although the statute 4 Ed. 3, c. 7, *might* bear a

Injuries to
real prop-
erty.

(h) 25 Edw. 3, c. 5.

(i) 31 Edw. 3, c. 11. See *Elliott v. Kemp*, 7 M. & W. 307.

(k) *Sale v. Bishop of Lichfield*, Owen, 99; *Wilson v. Knubly*, 7 East, 134, 136; 11 Vin. Abr. 125; *Mason v. Dixon, Latch*, 167.

(l) *Chamberlain v. Williamson*, 2 M. & S. 416.

(m) *Mason v. Dixon, Latch*, 168; *Sir W. Jones*, 174; 5 Co. 27 a; [*Coleman v. Woodworth*, 28 Cal. 567; *Nettles v. D'Oyley*, 2 Brer. 27; or *replevin*, *Reist v. Heilbrenner*, 11 Serg. & R. 131. An executor need not describe himself as such, in an action of trover to recover property of the testator, wrongfully converted by a stranger: *Trask v. Donoghue*, 1 Aiken, 370. See *Towle v. Lovet*, 6 Mass. 394; *Snider v. Croy*, 2 John. 227; *Valentine v. Jackson*, 9 Wend. 302.]

(n) *Williams v. Cary*, 4 Mod. 403; 12 Mod. 71.

(o) *Berwick v. Andrews*, Lord Raym. 973. [So an executor may support case

against a sheriff for the default of his deputy in not returning an execution. *Paine v. Ulmer*, 7 Mass. 317.]

(p) 1 Vent. 31; 1 Roll. Abr. 912; *Mason v. Dixon, Latch*, 168; *Sir W. Jones*, 173; *Williams v. Cary*, 4 Mod. 404; *Cro. Car.* 297; *Vin. Abr. Executors*, P. pl. 2, *acc.*; *Berwick v. Andrews*, Lord Raym. 973; *Williams v. Cary*, 12 Mod. 72; 1 Salk. 12 *contra*.

(q) *Sale v. Bishop of Lichfield*, Owen, 99; *Wilson v. Knubly*, 7 East, 134, 136.

(r) *Holl v. Bradford*, 1 Sid. 88; *Morton v. Hopkins*, 1 Sid. 407; *Weeks v. Trussell*, 1 Sid. 181; 1 Eagle & Young on Tithes, 437, 440, 480; 2 Ib. 307, 308.

(s) 4 Geo. 2, c. 28.

(t) *Knights v. Quarles*, 2 B. & B. 103.

(u) *Berwick v. Andrews*, 1 Salk. 314.

(x) *Palgrave v. Windham*, 1 Str. 212.

(y) *Vin. Abr. Executors*, P. pl. 7; *Mason v. Dixon, Latch*, 168, 169; *Sir W. Jones*, 175; *Lemasons & Dickson's case*, Poph. 190; 1 Vent. 30.

more liberal construction, the decisions confined its operation to injuries to *personal* * property; (z) and therefore an executor could not support an action of trespass *quare clausum fregit*, or merely for cutting down trees or other waste in the lifetime of his testator; (a) and though in *Emerson v. Emerson* (b) it was holden that a declaration by an executor for mowing, cutting down, taking and carrying away corn, might be supported, the allegation of the cutting down being considered merely as a description of the manner of taking away the corn, for which an action is sustainable by virtue of the statute; yet it was decided that if the declaration had been *quare clausum fregit, et blada asportavit*, it would have been insufficient; and that if the defendant had merely cut the corn and let it lie, or if the grass of the testator had been cut and carried away at the same time, no action could have been supported by the executor. We have seen, however, that an action may be supported by a devisee for the continuance of a nuisance erected in the lifetime of the testator. (c) And a bill in equity, for an account of *equitable* waste committed by a tenant for life, may be maintained against his *personal* representative. (d)

The 3 & 4 W. 4, c. 42, s. 2, has introduced a material alteration in the common law doctrine, *actio personalis moritur cum persona*, as well in favor of executors and administrators of the party injured, as against the personal representative of the party injured, but respects only injuries to *personal* and *real* property, and subject to certain *restrictions* as regards the commencement of an action for such injury within *a short time after the death*, and declaring that the damages to be recovered from an executor or administrator shall be ranked or classed with *simple contract debts*. The act *re-cites*, that there is no remedy provided by law for injuries to the

(z) 1 Saund. 207, note (1); *Mason v. Dixon*, Sir W. Jones, 174; *Latch*, 169; *Vin. Abr. Executors*, P. 22, &c.; *Toller*, 168; *Emerson v. Emerson*, 1 Vent. 187.

(a) *Mason v. Dixon*, Sir W. Jones, 174; *Williams v. Breedon*, 1 B. & P. 330, note (a).

(b) 1 Vent. 187; *Emerson v. Annison*, 2 Keb. 874; *Mason v. Dixon*, Sir W. Jones, 174; *Williams v. Breedon*, 1 B. & P. 329.

(c) *Ante*, 76.

(d) *Lansdown v. Lansdown*, 1 Madd. 116; 1 Chit. Eq. Dig. 395. In *Powell v. Rees*, 2 N. & P. 571; 7 Ad. & El. 426, S. C., it was held that the administratrix of a party who had worked into his neighbor's land and dug coal, which he had sold, retaining the proceeds, was liable to be sued for money had and received for the value of the coal taken more than six months before the death of the deceased, and that an action of trespass might also be supported for the tres-

passes committed within the six months. In *Richmond v. Nicholson*, 8 Scott, 134, which was an action of trover for a watch against the defendant, as the executor of one Harriet Reeves, who pleaded that the deceased was not guilty within six months before the time of his death. It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer in September, 1837, that Spencer redelivered it to her in March, 1838, for the purpose of being pawned by her, that on its being demanded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor." Harriet Reeves died in March, 1839, and the court held that there was a sufficient conversion within six months before her death. As to the right of action of an executor against the hundred for damage done in the lifetime of the testator, see *Adam v. Inhabitants of Bristol*, 2 Ad. & El. 389, and 1 *Williams Executors*, 3d ed. 389.

real estate of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his *property, real or personal*; for remedy thereof it enacts, that an action of trespass or trespass on the case, as the case may be, may be maintained *by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person; so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such persons. (*d*¹)

We have before considered what rights of action pass to the assignees of a bankrupt, where the cause of action is founded on the *contract* of the bankrupt. (*e*) When the cause of action is founded on a *tort*, the question whether a right to sue will pass to the assignees will depend upon the nature of the right that has been injured. All the bankrupt's *property, real and personal*, passes to the assignees, and all powers to turn such property to profit, (*f*)

(*d*¹) [By statute in Massachusetts (Genl. Sta. c. 127, § 1), in addition to the actions which survive by the common law, it is provided that the following shall also survive: actions of replevin; of tort for assault, battery, imprisonment, or other damage to the person; for goods taken and carried away or converted by the defendant to his own use; or for damage done to real or personal estate; and actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies. "The words 'damage to the person,' in this statute, do not, indeed, extend to torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. *Smith v. Sherman*, 4 Cush. 408; *Nettleton v. Dinchart*, 5 Cush. 543. But they do include every action, the substantial cause of which is a bodily injury, or,

in the words of Chief Justice Shaw in 4 Cush. 413: 'damage of a physical character,' whether the connection between the cause and the effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law. *Hollenbeck v. Berkshire R. R. Co.* 9 Cush. 478; *Demond v. Boston*, 7 Gray, 544." Gray J. in *Norton v. Sewall*, 106 Mass. 143, 145. See *Cutting v. Tower*, 14 Gray, 183; *Aldrich v. Howard*, 8 R. I. 125. In Iowa, "No cause of action, *ex delicto*, dies with either or both the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." Laws of Iowa, Revis. of 1860, c. 138, § 3467; *Shafer v. Grimes*, 23 Iowa, 550.]

(*e*) *Ante*, 25.

(*f*) *Clark v. Calvert*, 8 Taunt. 751.

and consequently when the injury complained of consists in the unlawful detention of any part of *such* property, the assignees may bring actions for the purpose of recovering the possession or value thereof. Thus they may bring a real action to recover any part of the bankrupt's estate, (*g*) or an action of ejectment; they may sue in trover for any of his goods upon a conversion either before or after the bankruptcy, (*h*) or in debt to recover from the winner money lost at play by the bankrupt before his bankruptcy. (*i*) But for mere *personal torts* to the *bankrupt*, such as assault or slander, it seems no right of action passes to the assignees; (*k*) such rights are not considered in law as the subject of property, and there are no expressions in the bankrupt laws which direct that they shall pass by the appointment of the assignees. It has been made a subject of some discussion among writers on the bankrupt laws, whether any right of action passes to the assignees in respect of mere *torts*, not consisting in the detention or conversion of any property legally belonging to the bankrupt, but which have only * had the effect of *deteriorating* the value of some part of the bankrupt's estate before the title of the assignees accrued. (*l*) It does not appear that there has been any express determination of the courts on this subject, but it seems reasonable, and consistent with the spirit of the bankrupt laws, that the assignees should be entitled to recover satisfaction for injuries of this description.

When the right of action does not pass to the assignees, the bankrupt may, it should seem, sue, notwithstanding his bankruptcy; (*m*) and even where the assignees are entitled to sue in respect of injuries to property acquired by the bankrupt after his bankruptcy, and before certificate, it follows, from the principle before noticed (*n*) (*viz.* that the bankrupt has a right against all other persons when his assignees do not interpose), that the bankrupt will, on the non-intervention of his assignees, be entitled to maintain actions of *tort* for all such injuries. Thus he may sue in trover against a stranger for goods acquired by him *after* his bankruptcy (*o*) (though not for goods acquired *before*); (*p*) and an action of trespass is maintainable by a tenant

(*g*) *Smith v. Coffin*, 2 H. Bl. 444.

(*h*) *Cullen*, 418, 419; *Bloxam v. Hubbard*, 5 East, 407.

(*i*) *Brandon v. Pate*, 2 H. Bl. 308; and see *Thomason v. Frere*, 10 East, 418.

(*k*) *Benson v. Flower*, Sir W. Jones, 215; *Cullen*, 177; *Eden's B. L.* 2d ed. 235; *Howard v. Crowther*, 8 M. & W. 603; [*Rogers v. Spence*, 13 M. & W. 571; S. C. 12 Cl. & Fin. 700; *Stone v. Boston*, 7 Gray, 539; *Bird v. Hempstead*, 3 Day, 272; *Beckham v. Drake*, 11 M. & W. 315. Deceit in the sale of goods (*Shoemaker v. Keeley*, 2 Dall. 213; S. C. 1 Yeates, 245); malicious abuse of legal process (*Sommer v. Wilt*, 4 Serg. & R. 19); libel (*Strong v. White*, 9

John. 161); carelessness or unskilfulness of the master of a vessel, by which goods are damaged (*Dusar v. Murgatroyd*, 1 Wash. C. C. 13), are cases not affected by the discharge of a party as an insolvent debtor or bankrupt.]

(*l*) See 4 *Evans's Stat.* 329, 2d ed. See per Cur. *Clark v. Calvert*, 8 Taunt. 751, 752; 3 Moore, 96, S. C.; *Cullen*, 418; *Eden's B. L.* 235, 2d ed.

(*m*) *Ib.*

(*n*) *Ante*, 29.

(*o*) *Webb v. Fox*, 7 T. R. 391; *Cullen*, 414; *Fyson v. Chambers*, 9 M. & W. 460.

(*p*) *Lea v. Telfer*, 1 Car. & P. 147; *Taylor v. Buchanan*, 4 B. & C. 419; 6 Dow. &

from year to year, who had become bankrupt after the committing the trespass, and before the commencement of the suit; and the right of such action does not pass to the assignees, unless they interfere, as the bankrupt may sue as a trustee for, and has a good title against all persons but them. (q) But an uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors for breaking open his house, and seizing his after-acquired property, his assignees having assented to the seizure; though they were unknown to the defendants until after the commencement of the action. (r) A party may support trover or trespass against his assignees if he were not liable to the fiat. (s)

The general provisions of the insolvent acts (t) with regard to the transfer to the assignees of the insolvent's rights and property, have been already mentioned. (u) Certain articles ^{7thly. In case of insolvency.} are to be excepted from the vesting order, namely, "wearing apparel, bedding, and other such necessities (x) of the insolvent and his family, and his working tools and implements, not exceeding in the whole the value of £20." * As to the excepted articles, the insolvent retains his rights and remedies. It seems that an insolvent may maintain an action for an injury to or conversion of, chattels which he acquires after the petition, though before his discharge, and which are in his possession, provided the assignees do not interfere. (y) But with regard to property acquired before the petition, and which passes by the vesting order, it appears that the insolvent cannot sue, although the assignees do not interpose. (z) The rules upon this subject appear to be analogous to those which prevail in the case of bankruptcy. (a) With regard to remedies for personal torts, as they do not appear to pass to the insolvent's assignee, it would seem he retains the right of action. (a¹)

Ry. 491, S. C.; Hull v. Pickersgill, 3 Moore, 612; *infra*, "Insolvency."

(q) Clark v. Calvert, 3 Moore, 96; 8 Taunt. 742, S. C. See *ante*, 29, 30; but see Lea v. Telfer, 1 Car. & P. 147. [A bankrupt may in his own name maintain a suit brought before he was declared a bankrupt for a wrong done, unless his assignee should interpose an objection. Sawtelle v. Rollins, 23 Maine, 196; Tunno v. Edwards, 3 Brev. 510; Kirwan v. Latour, 5 H. & John. 289; Haylar v. Sherwood, 2 Nev. & M. 401.]

(r) Hull v. Pickersgill, 3 Moore, 612; Nias v. Adamson, 3 B. & Ald. 225.

(s) Perkin v. Proctor, 2 Wils. 382; Ex parte Nutt, 1 Atk. 102; M'Culloch v. Robinson, 2 New Rep. 352; Cullen, 412. When not, see Donovan v. Duff, 9 East, 21. This action lies, though the fiat be not superseded. Perkin v. Proctor, 2 Wils. 383, 384. *Sed quære*, vide Matthews v. Dickinson, 7 Taunt. 400.

(t) 1 & 2 Vict. c. 110, and 5 & 6 Vict. c. 116.

(u) *Ante*, 30.

(x) 1 & 2 Vict. c. 110, s. 37. That is, *ejusdem generis*, and it seems these words would not comprehend plate. Lea v. Telfer, 1 C. & P. 147.

(y) Lea v. Telfer, 1 C. & P. 146, 147; Taylor v. Buchanan, 4 B. & C. 419; 6 Dow. & R. 491, S. C. Interference by assignees after action brought, *semble*, sufficient. Hull v. Pickersgill, 3 Moore, 612.

(z) Lea v. Telfer, 1 C. & P. 147; *Doe dem.* Palmer v. Andrews, 4 Bing. 384. As to the right of the creditor's assignee to sue for a conversion which took place in the time of the provisional assignee, see Yorks v. Brown, 10 M. & W. 78.

(a) See *Ib.* and *ante*, 30.

(a¹) [A claim for an injury done to a party by the negligence of another, did not pass by an assignment of his estate under the

The wife having no legal interest in the person or property of her husband, cannot in general join with him in any action for an injury to them, (b) except in an action for a joint malicious prosecution of both, in which they may join in respect of the injury to both, or the husband may sue alone for the injury to himself and expenses of defence. (c)

For injuries to the person, or to the personal or real property of the wife, committed *before* the marriage, when the cause of action would survive to the wife, she *must* join in the action, and if she die before judgment therein it will abate. (d)

But in detinue to recover personal chattels of the wife, in the possession of the defendant before the marriage, perhaps the husband must sue alone, because the law transfers the property to him, and the wife has no interest. (e) In detinue for charters of the wife's inheritance, they may join, on account of the continuing interest of the wife in the estate to which they relate. (f)

When an injury is committed to the *person* of the wife *during coverture*, by battery, slander, &c. the wife cannot sue alone in any case; (g) and the husband and wife *must* join, if the action be brought for the personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not to that of the husband alone; for the damages will survive to the wife if the husband die before they are recovered. (h) Care must be taken not to include

insolvent laws of Massachusetts, before the recovery of judgment. *Stone v. Boston & Maine R. R.* 7 Gray, 539.]

(b) 3 Bl. Com. 143; *Newton v. Hatter*, Id. Raym. 1208; *Weller v. Baker*, 2 Wils. 424; *Coleman v. Harcourt*, 1 Lev. 140; *Russell v. Corne*, 1 Salk. 119, note (b); *Anon.* Sir W. Jones, 440.

(c) Com. Dig. Baron & Feme, X. *ante*, 64. Where wife may make use of husband's name against his will, see *Chambers v. Donaldson*, 9 East, 471; 2 Chit. Arch. 7th ed. 996.

(d) *Milner v. Milnes*, 3 T. R. 627, 631; *Mitchinson v. Hewson*, 7 T. R. 348, 349; Com. Dig. Baron & Feme, V.; 1 Rol. Ab. 347, R. pl. 3; *ante*, 33, 34; [Smith J. in *Saltmarsh v. Candia*, 51 N. H. 73; *Stroop v. Swart*, 12 Serg. & R. 76.]

(e) Bac. Abr. Detinue, A.; *Bull. N. P.* 50; *Nelthrop v. Anderson*, 1 Salk. 114; *sed vide Bem v. Mattaire*, R. temp. Hardw. 120.

(f) 1 Roll. Abr. 347, R. pl. 1; Bac. Abr. Detinue, B. See *Ayling v. Whicher*, 6 Ad. & El. 259; 1 N. & P. 416, S. C., where Mr. Justice Coleridge states the true test whether the wife may join or not, to be not whether the husband might sue alone, but whether there is such a continuing interest in the wife, that under any state of things after the husband's death she would have a right of action.

(g) *Boggett v. Frier*, 11 East, 301; *Chambers v. Donaldson*, 9 East, 471. A marriage *de facto* is sufficient, unless it be void *ab initio*, as in the case of polygamy. *Westbrooke v. Strutville*, 1 Stra. 79; *Dickenson v. Davis*, 1 Stra. 480; *Norwood v. Stevenson*, Andr. 227, 228; *Birt v. Barlow*, Doug. 174; *ante*, 33. [By a late act of Massachusetts (St. 1871, c. 312), a married woman may sue and be sued in actions of tort in the same manner as if she were sole; and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit, but the same may be collected out of her property, real or personal; and all sums recovered by her in any such suit, shall be her sole and separate property. See *Spaulding v. Day*, 10 Allen, 96; *Fiske v. McIntosh*, 101 Mass. 66. A married woman in Michigan may, in her own name, sue for and recover damages for an assault on herself. *Berger v. Jacobs*, 21 Mich. 216. So in New York. *Mann v. Marsh*, 21 How. Pr. 372; S. C. 35 Barb. 68. As to the law upon this subject in Illinois, see *Peru v. French*, 55 Ill. 434; *Pierce v. Hasbrouck*, 49 Ill. 23. In Iowa, *Pancoast v. Burnell*, 32 Iowa, 394. In New York, *Rowe v. Smith*, 45 N. Y. 230; *Rawson v. Pennsylvania R. R. Co.* 48 N. Y. 212. In Wisconsin, *Boos v. Gamber*, 23 Wisc. 284; S. C. 24 Wisc. 499; *Kavanaugh v. Janesville*, 24 Wisc. 618.]

(h) 1 Sid. 346; *Slayer v. Davis*, 1 Sid.

in the declaration by the husband and wife any statement of a cause of action for which the husband alone ought to sue; (*h*¹) therefore, after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance, or expenses sustained in curing her. (*i*) If the battery, imprisonment, or malicious prosecution of the wife, deprive the husband for any time of her company or assistance, or occasion him expense, he may and ought to sue separately for such consequential injuries; (*k*) and he may in the same action proceed for a battery or other injury to himself. (*l*) Of course the husband must sue alone for criminal conversation with his wife. For words spoken of the wife not actionable of themselves, but which occasion some special damage to the husband, he must sue alone. (*m*)

With respect to *personal property*, when the cause of action had only its inception before the marriage but its completion afterwards: as in the case of trover before marriage, and conversion during it, or of rent due before marriage, and a rescue afterwards, the husband and wife may join, or they may sever in trover or trespass. (*n*) It seems that in detinue the husband should sue alone. (*o*) When the cause of action has its inception as well as completion after the marriage; the husband must sue alone, the legal interest in personalty being vested by the marriage in him; (*p*) and therefore a declaration in trover at the suit of husband and wife, should state that the wife was possessed before the marriage, or held the goods with him in her character of executrix; and if it be merely stated that the *husband and wife were possessed*, the defendant may demur: for the possession of the wife is in law the possession of the husband, and the property vests in him exclusively. (*q*) The same

386; *Newton v. Hatter*, Lord Raym. 1208; Com. Dig. Baron & Feme, V.; Pleader, 2 A. 1; 3 Bl. Com. 140; *Russell v. Corne*, 1 Salk. 119; *Higgins v. Butcher*, Yelv. 89; *Harwood v. Hardwick*, 2 Keb. 387, pl. 63; *Smith v. Sykes*, Freem. 224; [*Hooper v. Haskell*, 56 Maine, 251; *Smith v. Grant*, 56 Maine, 255. But if the wife die after judgment, the judgment survives to the husband. *Stroop v. Swarts*, 12 Serg. & R. 76.]

(*h*¹) [*Lewis v. Babcock*, 18 John. 443.]

(*i*) *Russell v. Corne*, 1 Salk. 119; Com. Dig. Pleader, 2 A. 1; *Dengate v. Gardiner*, 4 M. & W. 5.

(*k*) 3 Bl. Com. 140; *Hyde v. Scysson*, Cro. Jac. 538; *Dix v. Brookes*, 1 Stra. 61; *Smith v. Hixon*, 2 Stra. 977; Com. Dig. Baron & Feme, W.; *Dengate v. Gardiner*, 4 M. & W. 7; [*Filer v. New York Central R. R. Co.* 49 N. Y. 42; *Kavanaugh v. Janesville*, 24 Wisc. 618.]

(*l*) *Guy v. Livesey*, Cro. Jac. 501; *Russell v. Corne*, 1 Salk. 119; *Year Book*, 9 Edw. 4, 51.

(*m*) 1 Sid. 346; *Harwood v. Hardwick*, 2 Keb. 387, pl. 63; *Coleman v. Harcourt*, 1 Lev. 140; *Baldwin v. Flower*, 3 Mod. 120;

Russell v. Corne, 1 Salk. 119; Selw. N. P. 10th ed. 291; [*Williams v. Holdredge*, 22 Barb. 396; *Klein v. Hentz*, 2 Duer, 633; *Beach v. Ranney*, 2 Hill, 309.]

(*n*) 2 Saund. 47 b; *Nelthrop v. Anderson*, 1 Salk. 114; *Blackburne v. Greaves*, 2 Lev. 107; Com. Dig. Baron & Feme, X.; *Bac. Abr. Baron & Feme, K.*; *Ayling v. Whicher*, 6 Ad. & El. 259; 1 N. & P. 416.

(*o*) *Ante*, 82; *Bac. Abr. Detinue*; *Bul. N. P.* 53.

(*p*) 2 Saund. 47, A. i; *Buckley v. Collier*, 1 Salk. 114; *Bidgood v. Way*, 2 Bl. Rep. 1236; *Spooner v. Brewster*, 2 C. & P. 34; [*McCormick v. Pennsylvania Central R. R. Co.* 49 N. Y. 303. An action for the conversion of the wife's property may be maintained in her name in New York. *Ackley v. Tarbox*, 31 N. Y. 564; S. C. 29 Barb. 512; *Spies v. Accessory Transit Co.* 5 Duer, 662.]

(*q*) 2 Saund. 47 i; *Nelthrop v. Anderson*, 1 Salk. 114; Com. Dig. Pleader, 2 A. 1. See form of declaration in *Ayling v. Whicher*, 6 Ad. & El. 259; 1 N. & P. 416. [But, in the present state of the law in Massachusetts, no action can be sustained by a husband and wife jointly to recover for the conversion of

rule prevails in replevin; but if the husband and wife join as plaintiffs in that action, although the declaration *is bad on demurrer, if no special cause for joining her be specifically shown therein; (r) yet, if the defendant, instead of demurring, avow the taking, it will, *after verdict*, be intended (if the declaration show nothing to the contrary), that the taking was before the coverture, and that the plaintiffs then had a joint property; or that the wife held the goods as executrix; in either of which cases she might be joined. (s) Though the wife may join in trespass for cutting down corn upon her land, yet she cannot for carrying it away. (t) However, a *feme covert* executrix may and ought to join with her husband; the declaration stating her interest, and showing that she sues in *autre droit*. (u) And there are some cases in which, though the produce of the wife's labor be the property of the husband, yet in respect of her being the meritorious cause of action, she may be joined as in the case of the dippers at Tunbridge Wells. (x)

In *real* actions for the recovery of the land of the wife, and in a writ of waste thereto, the husband and wife must join. (y) But where the action is merely for the recovery of damages to the land or other real property of the wife during her coverture, (y¹) or for a *tort*, which prejudices a remedy by husband and wife, as in the case of *quare impedit*, a rescue, &c. the husband may sue alone, (z) or the wife may be joined; (a) her interest in the land being stated in the declaration. (a¹) But a demand for removal of personal property, as corn or grass when severed from the land,

With respect
to real prop-
erty.

property which they claim under a mortgage executed to the wife alone, to secure money lent by her, a portion of which was furnished to her by her husband. *Hennesey v. White*, 2 Allen, 18.]

(r) *Senes v. Dodd*, 2 New Rep. 405. See *Clarke v. Davies*, 7 Taunt. 72, replevin by the wife only.

(s) *Bourn v. Mattaire*, Bul. N. P. 53; Selw. N. P. Baron & Feme, III. 10th ed. 294; Com. Dig. Pleader, 3 K. 10. See *Senes v. Dodd*, 2 New R. 407; *France v. Hill*, 1 M. & Gr. 731.

(t) *Weller v. Baker*, 2 Wils. 424; *Arundel v. Short*, Cro. Eliz. 133.

(u) *Yard v. Ellard*, Salk. 117; Wentw. Exec. 207; *Bro. Baron & Feme*, pl. 85; *Bourn v. Mattaire*, *supra*, note (s).

(x) *Weller v. Baker*, 2 Wils. 414, 424; Com. Dig. Baron & Feme, X.; *ante*, 74.

(y) *Odill v. Tyrrell*, 1 Bulst. 21; 7 H. 4, 15 a; 3 Hen. 6, 53; Com. Dig. Baron & Feme, V. Wife must join in an *ejectione firmæ*, though ejection after marriage. *Flowd.* 418. By 3 & 4 W. 4, c. 27, s. 36, all real and mixed actions are abolished, except dower, *quare impedit*, and ejectment. See, further, Selw. N. P. 10th ed. 288, 296. [An action,

for the recovery of real property belonging to the wife, should be brought in the name of the wife, in New York. *Darby v. Callaghan*, 16 N. Y. 71; *Hillman v. Hillman*, 14 How. Pr. 456. But if the wife has a joint interest with the husband, he must be joined. *Smith v. Kearney*, 9 How. Pr. 466.]

(y¹) [In New York, the wife should sue without joining her husband in an action for trespass on premises hired by her. *Fox v. Duff*, 1 Daly, 196. So in an action for damages for the seduction of her servant. *Badgley v. Decker*, 44 Barb. 577.]

(z) *Bro. Baron & Feme*, pl. 16, 28, 41; Selw. N. P. 10th ed. 294; Com. Dig. Baron & Feme, X.; *Wallis v. Harrison*, 5 M. & W. 142; [Allen v. Kingsbury, 16 Pick. 235; *Clapp v. Stoughton*, 10 Pick. 470; *Adams v. Barry*, 10 Gray, 361; *Jackson v. Hopkins*, 19 Wend. 339.]

(a) Com. Dig. Baron & Feme, X.; *Weller v. Baker*, 2 Wils. 423, 424; *Bidgood v. Way*, 2 Bl. Rep. 1236; *Baker v. Brereman*, Cro. Car. 418; *Tregmiell v. Reeve*, Cro. Car. 437; Com. Dig. Baron & Feme, V. X.; Pleader 2 A. 1.

(a¹) [See *Dunderdale v. Grymes*, 16 How. Pr. 195.]

ought not, in the latter case, to be included, because, as we have seen, the entire interest in personalty is vested in the husband. (b)

If the *husband survive*, he may maintain an action of trespass, &c. for any injury in regard to the person or property of the wife, for which he might have sued alone during the coverture. Thus, he might maintain an action after his wife's death for any battery or personal *tort* to her, which occasioned him particular injury; as the loss of her society and assistance in his domestic affairs; or a pecuniary expense; (c) or for any injury to the land of the wife when living. (d) If the wife die pending an action by her husband and *herself for any *tort* committed either before or during coverture, and to which action she is a necessary party, the suit will abate. (e)

If the *wife survive*, any action for a *tort* committed to her personally, or to her goods or real property before marriage, or to her personal or real property during coverture, will survive to her; (f) and she may include in the declaration in such action counts for wrongs committed after her husband's death. (g)

The *consequences of a mistake* in the proper parties in the case of husband and wife, may be collected from the preceding observations, and seem to be nearly the same in actions in form *ex delicto* as in those *ex contractu*. (h) If the wife be improperly joined in the action, and the objection appear from the declaration, the defendant may in general demur, move in arrest of judgment, or support a writ of error; (i) though we have seen that after verdict the mistake may sometimes be aided by intendment. (j) If the husband sue alone when the wife ought to be joined either in her own right or in *autre droit*, he will be nonsuited; (k) for though in general the non-joinder of a party as a co-plaintiff in an action for a *tort* can only be pleaded in abatement; yet that rule only applies in those cases in which the party suing had some legal interest in his own right in the property affected. A husband has, *independently*

Consequences of misjoinder or non-joinder.

(b) 1 Salk. 119, note (b).

(c) *Ante*, 83.

(d) Com. Dig. Baron & Feme, Z.

(e) *Smith v. Sykes*, Freem. 225; *Higgins v. Butcher*, Yelv. 89. [But, under the law in New Hampshire, a suit by husband and wife for a personal injury to her may, upon the decease of the wife, be prosecuted by her administrator. *Saltmarsh v. Candia*, 51 N. H. 71. See *Buck v. Goodrich*, 33 Conn. 37. In *West v. Jordan*, 62 Maine, 484, it was held that an action on the case brought by a husband and wife for a personal injury to the wife cannot proceed after the death of the wife, except in the name of her legal representative; that the husband should withdraw as an original party; but that, when appointed administrator of the wife's estate, he may come in and prosecute in that capacity.]

(f) *Middleton v. Croft*, Rep. temp. Hardw. 398, 399; *Smith v. Sykes*, Freem. 224; *Peters v. Rose*, Palm. 313; but see *Bacon v. Smith*, 1 Q. B. Rep. 345, as to her inability to support an action for waste committed during her husband's lifetime.

(g) *Peters v. Rose*, Palm. 313; Com. Dig. Baron & Feme, 2 A.

(h) *Ante*, 37, 67; *Milner v. Milnes*, 3 T. R. 631. [See *Decker v. Livingston*, 15 John. 479.]

(i) *Nelthrop v. Anderson*, *Buckley v. Collier*, 1 Salk. 114; *Russell v. Corne*, 1 Salk. 119; *Bidgood v. Way*, 2 Bl. Rep. 1236; *May v. House*, 2 Chitty's Rep. 697.

(j) *Ante*, 38, 66; *Ashton's Entr.* 61; [*Lewis v. Babcock*, 18 John. 443.]

(k) According to the judgment in the case of *Wallis v. Harrison*, 5 M. & W. 142, this is not so, as it is there laid down that the non-joinder of the wife is only ground of plea in abatement.

of his wife, no legal interest or cause of action whatever for injuries to her, or her property, in those instances in which it is necessary to join her as a plaintiff in an action. (*k*¹)

2. Who to be Defendants.

In *personal* or *mixed* actions, in form *ex delicto*, the person committing the injury, either by himself or his agent, is in general to be made the defendant; but *real* actions can only be supported against the claimant of the freehold. (*l*) The general rule is, that all persons are liable to be sued for their own *tortious* acts, unconnected with, or in disaffirmance of, a contract. Therefore, although an *infant* cannot in general be sued in an action in form *ex contractu*, except for * necessities, he is liable for all *torts* committed by him, as for slander, assaults and batteries, &c.; (*m*) and also in detinue for goods delivered to him for a purpose which he has failed to perform, and which goods he refuses to return. (*n*) But a plaintiff cannot in general, by changing his *form* of action, charge an infant for a breach of contract; as for the negligent or immoderate use of a horse, &c.; (*o*) nor can he be a trespasser

(*k*¹) [Under the law of N. Y. (Code, § 114, *ante*, 32, note (*v*¹)), where an action was brought for damages to the separate property of the wife, in the name of both husband and wife, the husband was held to be an unnecessary party, but his joinder not such as to warrant a reversal of the judgment. *Ackley v. Tarbox*, 31 N. Y. 564; *Rusher v. Morris*, 9 How. Pr. 266.]

(*l*) *Booth*, 3, 28, 29; *Hunlock v. Petre*, 3 Lev. 330. Where there is *fraud*, and damage the result of that *fraud*, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured. See *Langridge v. Levy*, 2 M. & W. 532; 4 M. & W. 338. See, also, *Pilmore v. Hood*, 5 Bing. N. C. 97. But see *Winterbottom v. Wright*, 10 M. & W. 109. [An action on the case lies for fraud or a false affirmation in the sale of land; as where the land pretended to be sold has no real existence; notwithstanding any covenants in the deed. *Wardell v. Fouldick*, 13 John. 325; *Frost v. Raymond*, 2 Caines, 193; *Monell v. Colden*, 13 John. 395; *Bostwick v. Lewis*, 1 Day, 250.]

(*m*) *Jennings v. Randall*, 8 T. R. 336, 337; *Bac. Abr. Infancy*, H. [An infant is liable for a fraud or tort which is entirely independent of contract. *Fitts v. Hall*, 9 N. H. 441; *Prescott v. Norris*, 32 N. H. 101; *Eaton v. Hill*, 50 N. H. 235; *Humphrey v. Douglas*, 10 Vt. 71; *Baxter v. Bush*, 29 Vt. 465; *Bullock v. Babcock*, 3 Wend. 391; *Lewis v. Littlefield*, 15 Maine, 233; *Hartfield v. Roper*, 21 Wend. 615; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Sikes v. Johnson*, 16 Mass. 389. Where an infant fraudulently

obtained goods on credit, intending not to pay for them, he was held liable in an action of tort. *Wallace v. Morris*, 5 Hill (N. Y.), 391. So, where an infant has obtained a chattel by fraud, and has refused to deliver it on demand, he is liable to an action of tort for the conversion of the chattel, although he had sold it before the demand was made upon him, and had previously prevailed on a plea of infancy in an action against him upon a promissory note given by him for the chattel. *Walker v. Davis*, 1 Gray, 506.]

(*n*) *Mills v. Graham*, 1 New Rep. 140.

(*o*) *Jennings v. Randall*, 8 T. R. 335. [If a horse be let to an infant to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either would not subject him or an adult to an action in *tort*, the contract remaining in full force. But if the infant do any wilful or positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to immediate possession. If he wilfully and intentionally injure the animal, an action of trespass lies against him. If he should sell it, an action of trover would lie, and his infancy would not protect him. *Campbell v. Stokes*, 2 Wend. 137; *Eaton v. Hill*, 50 N. H. 235. So where an infant drove a horse he had hired to a much greater distance than that agreed upon, stopped and left the horse without food or shelter all night, and the horse died from this overdriving and exposure, he was held liable in trover. *Towne v. Wiley*, 23 Vt. 355. And so an infant who hired a

by prior or subsequent assent, but only by his own act. (p) A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior or subsequent assent. (q) And although a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit. (r)

Married
woman.
Lunatic.

With regard to the liability of corporations, it is a clear general rule that they are liable to be sued as such in case or trover for any torts they may cause to be committed. (s) And although it was formerly laid down that a corporation could not be sued in trespass, (t) yet it has lately been decided otherwise. (u) In these

Corpora-
tions.

horse to go to a place agreed upon, but went to another place in a different direction, was held liable in trover for an unlawful conversion of the horse. *Homer v. Thwing*, 3 Pick. 492; *Green v. Sperry*, 16 Vt. 590. See *Eaton v. Hill*, 50 N. H. 235. So where an infant converted goods which came into his hands under a prior illegal contract, by refusing to deliver them up when demanded. *Lewis v. Littlefield*, 15 Maine, 233; *S. C.* 17 Maine, 40. So where an infant has sold goods intrusted to him and converted the proceeds. *Peigne v. Sutcliffe*, 4 McCord, 387. In *Penrose v. Curran*, 3 Rawle, 351, and in *Wilt v. Welsh*, 6 Watts 9, it was decided that, for a constructive tort or conversion in driving a hired horse elsewhere than the contract allowed, or managing him negligently, an infant cannot be made liable. For an actual conversion of chattels intrusted to the care of an infant, it seems to be conceded that he would be liable. But it was said by Shepley J. in *Lewis v. Littlefield*, *supra*, "What amounts to proof of conversion has occasioned the difference between the courts of Massachusetts and Pennsylvania." See *Vasee v. Smith*, 6 Cranch, 226; *Schenck v. Strong*, 1 South. 87; *Curtin v. Parzen*, 11 Serg. & R. 310.]

(p) *Co. Litt.* 180 b, note (4).

(q) *Ib.*; *post*, 90.

(r) *Weaver v. Ward*, Hob. 134; *Haycraft v. Creasy*, 2 East, 104; *Bac. Abr. Trespass, G. Idiot, E.*; 2 Roll. Abr. 547, pl. 4, E.

(s) *Yarborough v. The Bank of England*, 16 East, 6; *Smith v. Birmingham Gas Light Company*, 1 Ad. & El. 526; *The Mayor & c. of Lyme Regis v. Henley*, 1 Bing. N. C. 222; [*Chestnut Hill Turnp. Co. v. Rutter*, 4 Serg. & R. 6; *Gray v. Portland Bank*, 3 Mass. 364.] In the case of *Rex v. Trustees of the Milkenhall Savings Bank*, 2 N. & P. 278, it was decided that where money belonging to the depositors in a savings bank has been embezzled, the remedy of the depositors is not by action against the trustees and managers, but by mandamus to compel them to appoint an arbitrator under s. 45 of 9 Geo. 4, c. 92.

(t) *Bro. Corporation*, pl. 43; *Bac. Abr. Trespass, E. 2*; *Doe v. Woodman*, 8 East, 230.

(u) *Maud v. The Monmouthshire & Staffordshire Canal Co.* 2 Dowl. N. S. 113. [Corporations are liable, by the common

law, in the actions of trespass, trover, trespass on the case, *ex delicto*, &c. for torts commanded or authorized by them; and, for this purpose, the acts of its agents are regarded as the acts of the corporation. *Hawkins v. Dutches & Steamboat Co.* 2 Wend. 452; *M'Cready v. Guardians of the Poor*, 9 Serg. & R. 94; *Lyman v. White River Bridge Co.* 2 Aiken, 255; *Barnard v. Stevens*, 2 Aiken, 429; *Goodloe v. Cincinnati*, 4 Ham. 500; *Hamilton Co. v. Cincinnati*, Wright, 603; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106; *Beach v. Fulton Bank*, 7 Cowen, 487; *Edwards v. Union Bank*, 1 Branch, 136; *Hay v. Cohoes Co.* 3 Barb. 42; *Underwood v. Newport Lyceum*, 5 B. Mon. 130; *Humes v. Knoxville*, 1 Humph. 403; *Crawfordsville R. Co. v. Wright*, 5 Ind. 252; *Hazen v. Boston & Maine R. R.* 2 Gray, 574; *Whitman v. Wilmington R. R. Co.* 2 Harr. (Del.) 514; *Bloodgood v. Mohawk R. R. Co.* 10 Wend. 9; *Ranger v. Great Western Ry. Co.* 5 H. L. Cas. 72, 87; *Brown v. South Kennebec Ag. Soc.* 47 Maine, 275; *N. Y. R. R. Co. v. Schuyler*, 38 Barb. 534; *S. C.* 34 N. Y. 30. It has been held that a railroad company is liable for the publication of a libel. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Whitfield v. South Eastern Ry. Co. El.*, Bl. & El. 115; *Lawless v. Anglo-Egyptian Co.* L. R. 4 Q. B. 262. A railroad company has been held liable for false imprisonment. *Goff v. Great Northern Ry. Co.* 3 El. & El. 672. Trespass on the case, and not trespass *vi et armis*, is the proper action to be brought against a corporation for the negligence of its servants. *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 530. And, generally, a corporation is liable for an injury done by one of its servants, in the same manner and to the same extent only, as a natural individual would be liable under like circumstances. *First Baptist Church v. Schenectady R. R. Co.* 5 Barb. 80; *Angell & Ames Corp.* (9th ed.) §§ 311, 388; *Green v. London Gen. Omnibus Co.* 7 C. B. (N. S.) 290; *Town of Akron v. McComb*, 18 Ohio, 229; *Moore v. Fitchburg R. R. Corp.* 4 Gray, 465; *McDougald v. Bellamy*, 18 Geo. 411. Thus, a corporation is liable in an action of tort for an assault and battery committed by one of its servants, acting under its authority and within the scope of his em-

cases it is often very material to fix the corporation with liability, and to be entitled to redress from the corporate funds, rather than to be driven to a remedy against servants of the corporation. It seems that a corporation may be sued for a false return. (*x*)

The *inhabitants of a county* are not a corporation, and therefore cannot be sued by that description for an injury occasioned by the neglect to build a public bridge, or for any other injury arising from the neglect of the county at large. (*y*)

It is a general rule that corporations and incorporated companies may be sued in that character for damages arising from the

Companies. breach by them of a duty imposed upon them by law. (*y*)
An individual who has suffered loss in consequence of the decay of seawalls, which a corporation is directed to repair, under the terms of a grant from the crown, conveying a borough, and pier or quay, with tolls, to the corporation, may sue the corporation for the recovery of damages. (*z*) *The Bank of England are liable to an action if they improperly refuse to transfer stock; (*a*) or are guilty of unreasonable delay in the passing of a power of attorney to transfer it; (*b*) but they are not liable for refusing to pay dividends due upon stock if they have not received the dividends from government. (*c*)

ployment. *Moore v. Fitchburg R. R. Corp. supra.* See *Weed v. Panama R. R. Co.* 5 Duer, 193; S. C. 17 N. Y. 362; *Vanderbilt v. Richmond Turnpike Co.* 2 Comst. 479; *Wright v. Wilcox*, 19 Wend. 343; *Fox v. Northern Liberties*, 3 Watts & S. 103; *Angell & Ames Corp.* § 388; but see, *contra*, *Orr v. Bank of United States*, 1 Ham. 36.]

(*x*) Per Lord Ellenborough, 16 East, 7.

(*y*) *Russell v. The Men of Devon*, 2 T. R. 667. See *Thornhill v. The Township of Huddersfield*, 11 East, 349, 355. [Quasi corporations, created by the legislature for the purposes of public policy, are subject, by the common law, to an indictment for a neglect of duty enjoined on them, but they are not liable to an action for any neglect of a corporate duty, unless the action be given by some statute. *Mower v. Leicester*, 9 Mass. 247; *Angell & Ames Corp.* (9th ed.) § 629; *Holman v. Townsend*, 13 Met. 297, 300; *Brady v. Lowell*, 3 Cush. 124; *Oliver v. Worcester*, 102 Mass. 489, 496; *Adams v. Wiscasset Bank*, 1 Greenl. 361; *Reed v. Belfast*, 20 Maine, 248; *Eastman v. Meredith*, 36 N. H. 284; *Ward v. County of Hartford*, 12 Conn. 404; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Pray v. Jersey City*, 32 N. J. 394; *Bigelow v. Randolph*, 14 Gray, 541, 543; *Dillon Munic. Corp.* 716-723, §§ 761-765; *Mayor & c. of Lyme Regis v. Henley*, 2 Cl. & Fin. (Am. ed.) 331, note (1), and cases cited.]

(*y*¹) [*Riddle v. Proprietors & c.* 7 Mass. 187; *Fowle v. Common Canal of Alexandria*, 3 Peters, 409; *Bushel v. Commonwealth Ins. Co.* 15 Serg. & R. 173; *Lee v. Village of Sandy Hill*, 40 N. Y. 442; *Angell*

& Ames Corp. (9th ed.) §§ 382, 383; *Townsend v. Susquehanna Turnp. Co.* 6 John. 90; *Steele v. Western Lock Co.* 2 John. 283.]

(*z*) *Henley v. The Mayor of Lyme*, 5 Bing. 91; [S. C. 2 Cl. & Fin. (Am. ed.) 331, and note (1), and cases cited; *Goshen v. Turnpike Co. v. Sears*, 7 Conn. 87.] So where an act of parliament constituted a company for the purpose of making and maintaining a canal, to be passable for boats, and all means were to be allowed to navigate the canal, and certain tolls were payable by them to the company. The act also provided, in case of obstruction by any sunken vessel, the owner of which should not weigh it up within a certain time, that it *should be lawful* for the company to do so, and to keep the same till payment was made of all expenses thereof. It was held that these words were compulsory upon the company, and that they were liable in an action on the case for an injury occasioned by their non-removal, in due time, of a sunken vessel. *Parnaby v. The Lancaster Canal Company*, 11 Ad. & El. 223, S. C.; 3 N. & P. 523; [Penn. & Ohio Canal Co. v. Graham, 63 Penn. St. 290.] But no action should ever be brought against a company constituted by act of parliament, without first examining the statute, as it frequently happens that the proper remedy is by *mandamus*, instead of action. See *The Queen v. The Northern Union Railway Company*, 8 Dowl. P. C. 329.

(*a*) *Henly v. The Mayor of Lyme*, 5 Bing. 108.

(*b*) *Sutton v. The Bank of England*, 1 C. & P. 193.

(*c*) *The Bank of England v. Davis*, 5 B. &

The London Dock Company is liable in case for the carelessness of their servants in unloading goods, although the company derive no profit from the labor; (*d*) and an action lies against an incorporated water-works company, if workmen employed by the persons contracting with the company to lay down pipes for conducting water through a public street, are guilty of negligence in performing the work, in consequence of which a passenger is injured. (*e*)

But trustees and commissioners acting gratuitously in the execution of acts of parliament for the benefit of the public, and intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence or unskilfulness of workmen and contractors necessarily employed by them in the execution of the works. (*f*) Upon this principle, where the defendant, as a trustee under a turnpike act, being authorized to cut a drain, had ordered it to be cut in an improper manner, it was decided that he was not liable for a resulting injury, as it appeared that he acted *bona fide* according to the best of his judgment, and under the best advice he could obtain. (*g*) And in another case, (*h*) the clerk to commissioners for making a road under an act which contained a clause directing actions to be brought against such clerk for acts done by the trustees, was holden not to be liable to an action for an injury sustained in consequence of heaps of dirt being left by the laborers employed by the side of the road, and no lights being placed to enable persons to avoid such heaps. And if a statute enable trustees to do an act, and do not give compensation, they are not liable for a consequential injury resulting to an individual from the act done in pursuance of the statute. (*i*)

But if commissioners or trustees under an act of parliament order something to be done which is not within the scope of their authority; (*k*) or are themselves guilty of negligence in doing that which they are empowered to do; (*k*¹) or are guilty of arbitrary, wanton, or oppressive conduct; (*l*) they render themselves liable to an action, although they are not answerable for the misconduct of persons they are obliged to employ in the execution of orders properly given. (*m*) Therefore, an action was held to be maintainable against commissioners of the lottery, who were compensated for their services, for their negligence, &c. in not adjudging a prize to the holder of a ticket

C. 185; 7 D. & R. 828, S. C. See S. C. Davis v. Bank of England, 2 Bing. 393.

(*d*) Gibson v. Inglis, 4 Campb. 72.

(*e*) Matthews v. West London Water Works Company, 3 Campb. 403.

(*f*) Hall v. Smith, 2 Bing. 156.

(*g*) Sutton v. Clarke, 1 Marsh. 429; 6 Taunt. 29, S. C. See Hall v. Smith, 2 Bing. 162.

(*h*) Harris v. Baker, 4 M. & S. 27. See Hall v. Smith, 2 Bing. 162.

(*i*) Boulton v. Crowther, 2 B. & C. 708; 4 D. & R. 195, S. C.

(*k*) Leader v. Moxon, 3 Wils. 461; 2 Bl. Rep. 924; Boulton v. Crowther, 2 B. & C. 710; 4 D. & R. 195, S. C.

(*k*¹) [Post, 161, note.]

(*l*) Boulton v. Crowther, 2 B. & C. 707; 4 D. & R. 195, S. C.

(*m*) Hall v. Smith, 2 Bing. 159, per Best C. J.; Boulton v. Crowther, 2 B. & C. 707; 4 D. & R. 195, S. C.

entitled to receive it. (n) And persons who negligently or unskilfully perform work, or omit proper precautions in the course of the necessary repair of a sewer, under the authority of the *commissioners of sewers*, are liable to an action for the consequential injury sustained by an individual. (o)

An action cannot be maintained against a civil or ecclesiastical judge or justice of the peace, acting *judicially* in a matter within the scope of his jurisdiction, although he may decide erroneously in the particular case. (p) Nor can an action be maintained against a jurymen, (q) or the attorney general, (r) or a superior military or naval officer, (s) for an act done in the execution of his office, and within the purview of his general authority. And commissioners of bankrupts are not liable to an action of *trespass* for committing a person who does not answer *to their satisfaction* when examined before them touching the bankrupt's estate and effects. (t)

But if a public officer have no jurisdiction whatever over the subject-matter, and his proceedings are altogether *coram non jndice*, he is responsible. (u) And it was held, that if a justice of the peace, acting ministerially, refuse an examination upon the statute of hue and cry, he was liable to an action. (x) And it has been observed with regard to the liability of ministerial officers not acting gratuitously, that "if a man take a reward, whatever may be the nature of that reward, for the discharge of a public duty, that instant he * becomes a public officer; and if by an act of negligence, or any abuse of his office, any individual sustain an injury, that individual is entitled to redress in a civil action." (y) But magistrates cannot be affected as

(n) *Schinotti v. Burnsted*, 6 T. R. 646; *Hall v. Smith*, 2 Bing. 161.

(o) *Jones v. Bird*, 5 B. & Ald. 837; 1 D. & R. 497, S. C.; *Boulton v. Crowther*, 2 B. & C. 710, 711; 4 D. & R. 201, 202, S. C.

(p) 1 Salk. 306; *Bushell's case*, Vaugh. 138; 12 Co. 24; *Gwenvelt v. Burwell*, Lord Raym. 466; *Bonnell v. Beighton*, 5 T. R. 186; *Warne v. Varley*, 6 T. R. 449; *Ackerley v. Parkinson*, 3 M. & S. 411; [*Yates v. Lansing*, 5 John. 282; S. C. 9 John. 365; *Briggs v. Wardwell*, 10 Mass. 356, 357; *Phelps v. Sill*, 1 Day, 315; *Gooch v. Avery*, 3 Dane Abr. 75; *Pratt v. Gardner*, 2 Cush. 63; *Chickering v. Robinson*, 3 Cush. 543; *Raymond v. Bolles*, 11 Cush. 315; *Walker v. Hallock*, 32 Ind. 239; *Lilienthal v. Campbell*, 22 La. An. 600; *Moran v. McClearn*, 41 How. Pr. 289; *Pike v. Megoun*, 44 Misou. 491.] As to justices in general, *post*, "Trespass." In some cases the justices are protected by statute, and a remedy is given by action of trespass against the parties applying for warrants, although such parties would not otherwise be liable. See 1 & 2 Vict. c. 74.

(q) *Johnstone v. Sutton*, 1 T. R. 513, 514, 535.

(r) *Ib.*

(s) *Johnstone v. Sutton*, 1 T. R. 493, 550, 784; *Warden v. Bailey*, 4 Taunt. 67; *Hannaford v. Hunn*, 2 C. & P. 146; [*Vanderheyden v. Young*, 11 John. 158.]

(t) *Doswall v. Impey*, 1 B. & C. 163; 2 D. & R. 353, S. C. See *Eden*, 2d ed. 97, 98.

(u) *Ackerley v. Parkinson*, 3 M. & S. 425; *Doswell v. Impey*, 1 B. & C. 163; 2 D. & R. 350, S. C.; [*Piper v. Pearson*, 2 Gray, 120; *Clarke v. May*, 2 Gray, 410; *Kelly v. Bemis*, 4 Gray, 83; *Sullivan v. Jones*, 2 Gray, 570; *Barker v. Stetson*, 7 Gray, 54; *Fisher v. McGirr*, 1 Gray, 1; *Kendall v. Powers*, 4 Met. 553.]

(z) *Green and the Hundred of Buccleuch's case*, 1 Leon. 323. The statute of hue and cry was repealed by 7 & 8 G. 4, c. 27, and other provisions substituted by c. 31.

(y) *Per Best C. J. Henly v. The Mayor of Lyme*, 5 Bing. 108.

trespassers, if facts stated to them on oath by a complainant were such whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement. (z) And before any action can be brought against a magistrate for anything done in the discharge of his duty, it must appear that his attention was drawn to all the facts necessary to enable him to form a judgment as to the course he ought to have pursued. (a)

With regard to *joint tenants* and *tenants in common* of realty, the general rule appears to be, that ejectment will lie by one ^{Tenants in common.} against the other only in the case of an *actual* ouster; (b) and after a recovery in such action, trespass for mesne profits may be brought. (c) So trespass will lie where there has been a total destruction of the subject-matter of the tenancy in common; (c¹) as if one tenant in common destroy the whole flight of a dove-cote, or all the deer in their park; (d) or if one grub up a hedge, (e) or destroy a wall, (f) holden in common. But if the wall, being old, be pulled down by one tenant in common with the intention of rebuilding it, and a new wall be accordingly erected, this is not such a total destruction of the wall as will enable his cotenant to maintain trespass. (g) And in other cases where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste, or an action upon the case, will lie by one tenant in common against the other; as if one tenant in common of a wood or piscary does waste against the will of the other, he shall have waste; or if one corrupt the water, the other shall have an action upon the case. There are other cases where the only remedy is to retake the property. (h)

(z) *Lowther v. Earl of Radnor*, 8 East, 113.

(a) *Pike v. Carter*, 3 Bing. 78.

(b) See *Ford v. Grey*, Salk. 285; *Peaceable v. Read*, 1 East, 568; *Adams on Ejectment*, 2d ed. 52, 53, 81, 89; [*Erwin v. Olmstead*, 7 Cowen, 229; *Halford v. Tetherow*, 2 Jones (Law), 393; *Johnson v. Swain*, Busb. 335. If one tenant in possession retains the whole and denies the title of his cotenant to any part of the land, it amounts to an ouster. See *Small v. Clifford*, 38 Maine, 213; *Wilson v. Collishaw*, 13 Penn. St. 276; *Peck v. Ward*, 18 Penn. St. 506; *Keyser v. Evans*, 30 Penn. St. 507; *Hannon v. Hannah*, 9 Grattan, 146; *Corbin v. Cannon*, 31 Miss. 570; *Goewey v. Urig*, 18 Ill. 238; *Young v. Adams*, 14 B. Mon. 127; *Challefoux v. Decharme*, 4 Wisc. 554; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Abercrombie v. Baldwin*, 15 Ala. 363; *Noble v. McFarland*, 51 Ill. 226. The general doctrine is, that one tenant in common cannot maintain trespass against his cotenant for an entry upon and enjoyment of the common property. *Chapman C. J. in Hastings v. Hastings*, 110 Mass. 285; 4

Kent, 370; *Gill v. Fauntleroy*, 8 B. Mon. 177.]

(c) *Goodtitle v. Tombs*, 3 Wils. 118.

(c¹) [One tenant in common of real estate cannot maintain an action against his cotenant to recover possession of the documents relative to the title to the estate held in common. *Clowes v. Hawley*, 12 John. 484. But he may sustain an action against him for destroying them; *Daniels v. Daniels*, 7 Mass. 10; and for negligence, in consequence of which a mill of which they were seized in common was burned. *Chesley v. Thompson*, 3 N. H. 9.]

(d) *Com. Dig. Estates*, K. 8; *Cubitt v. Porter*, 8 B. & C. 268; 2 M. & Ry. 272, S. C.

(e) *Voyce v. Voyce*, Gow, 201. As to the property in trees growing in a hedge dividing two estates, *Holder v. Coates*, 1 M. & M. 112.

(f) *Matts v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 B. & C. 257; 2 Man. & Ry. 267, S. C.

(g) *Ib.*

(h) *Per Littledale J. Cubitt v. Porter*, 8 B.

With respect to a tenancy in common of a *chattel*, the rule is, that one tenant in common cannot sue his cotenant if he merely take the chattel away: for in law the possession of one is the possession of both, and each has equally a right to take and retain such possession. (i) But if one of the tenants in common destroy, misuse, or spoil the chattel, the other may maintain an action at law. (k)

Against a partner or a third person colluding with him.

If a *third* person collude with one partner in a firm to injure the * other partners in their joint trade, the latter may maintain a joint action against the person so colluding. (l)

Who are liable as principals.

All persons who direct or order the commission of a trespass, or the conversion of personal property, or assist upon the occasion, are in general liable as principals, though not benefited by the act; (m) and therefore trover may be supported against a person who illegally makes a distress or seizes goods, though the same were taken by him in the character of bailiff for another, or as a custom-house officer, &c. (n) And where several are concerned,

& C. 268; 2 M. & R. 272, S. C.; Heath v. Hubbard, 4 East, 117, 121; Co. Litt. 200 a; Martyn v. Knowlly, 8 T. R. 145; 2 Saund. 47 h; Holliday v. Cammell, 1 T. R. 668.

(i) Ib. Ibid.; [Cowan v. Buyers, Cooke, 53; Oviatt v. Sage, 7 Conn. 95; Shaw C. J. in Barnes v. Bartlett, 15 Pick. 75; 2 Kent, 350, note (g); Farr v. Smith, 9 Wend. 338; Lucas v. Wasson, 3 Dev. 398; Cole v. Terry, 2 Dev. & B. 252; Herrin v. Eaton, 13 Maine, 192; Mersereau v. Norton, 15 John. 179.]

(k) Ib. Ibid.; [McLellan v. Jenness, 43 Vt. 183; Webb v. Mann, 3 Mich. 139; Lowe v. Miller, 3 Grattan, 205; Agnew v. Johnson, 17 Penn. St. 373. So, if one tenant in common assume to own and sell the thing holden in common, the other may bring trover against him. Wilson v. Reed, 3 John. 175; Thompson v. Cook, 2 South. 580; Weld v. Oliver, 21 Pick. 559; Dewey J. in Burbank v. Crooker, 7 Gray, 159, 160; Wheeler v. Wheeler, 33 Maine, 347; Dain v. Cowing, 22 Maine, 347; Smith v. Tankersley, 20 Ala. 212; Hyde v. Stone, 7 Wend. 354; White v. Osborn, 21 Wend. 72; Waddell v. Cook, 2 Hill, 47.]

(l) Longman v. Pole, 1 Mood. & Mal. 223. *Quære*, whether a joint tenant is necessarily liable for the wilful holding over of his cotenant; Hirst v. Horn, 6 M. & W. 393.

(m) 2 Saund. 47 i; Bull. N. P. 41; Shipwick v. Blanchard, 6 T. R. 300; Menham v. Edmonson, 1 B. & P. 369; Ward v. Haydon, 2 Esp. R. 553; Flewster v. Royle, 1 Campb. 187; Wheatley v. Patrick, 2 M. & W. 650; Chandler v. Broughton, 1 Cr. & M. 29; [Whitaker v. England, 1 Bay, 15; Chanet v. Parker, 1 Rep. Const. Ct. 333; Johnson v. Thompson, 1 Baldwin, 571; Prince v. Flynn, 2 Litt. 240; Johnson v. Walsh, 14 John. 406; Morgan v. Varick, 8 Wend. 587; Stoughton v. Mott, 15 Vt. 152; Bell v. Miller, 5 Ohio, 150; Whitney

v. Turner, 1 Scam. 254; Palmer v. Crosby, 1 Blackf. 142; Ridge v. Wilson, 1 Blackf. 410; Berry v. Fletcher, 1 Dill. 67; Thorp v. Burling, 11 John. 285. But case for deceit in the nature of a conspiracy cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone. Such action can be sustained only where some affirmation or representation wilfully false, or some designed and positively fraudulent artifice is directly proved, or is necessarily to be presumed from the circumstances attending the transaction itself, by means whereof a damage resulted to the plaintiff. Page v. Parker, 40 N. H. 48. To sustain an action *ex delicto* against several defendants, the act complained of must be the joint act of all of them, either in fact or in legal intentment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intentment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. Page v. Parker, 40 N. H. 68; Parsons v. Winchell, 5 Cush. 592. If an action is brought against a railroad corporation and their conductor jointly for an assault committed by the latter in putting a passenger out of their cars, and a verdict is returned against the corporation, and in favor of the conductor, the joinder of the defendants is no ground of exception by the corporation. Moore v. Fitchburg R. R. Corp. 4 Gray, 465. See Orr v. Bank of United States, 1 Ham. 36.]

(n) Farebrother v. Ansley, 1 Campb. 343; post, 92; [Hoyt v. Gelston, 13 John. 141. The removal and retention of the personal property of a stranger, by an officer acting under the direction of the party causing it, is a conversion by both, aside from any demand and refusal. Calkins v. Lockwood, 17 Conn. 154.]

they may be jointly sued, (*n*¹) whether they assented to the act before or after it was committed, (*o*) unless the party be an infant or a *feme covert*, who, we have seen, cannot be sued in respect of a subsequent assent; (*p*) and no person can be guilty of a forcible entry by such assent. (*q*) And it may appear unnecessary to say, that if a person does not assist in a trespass either in word or deed he is not liable, though it may have been done by a person assuming to act on his behalf. (*r*) Nor can a pound-keeper be sued merely for receiving into the pound a distress illegally taken. (*s*) If, however, a person sue out execution, and give a bond of indemnity to the sheriff to induce him to sell the goods of another, this is a sufficient interference to subject him to an action; (*t*) so if he be in company with the sheriff's officer at the time of the execution; (*u*) or he adopt his acts by receiving the goods or money; (*x*) but the mere act of making an inventory or drawing a notice of distress by a stranger, is not such an interference as will subject him to an action. (*y*) Although trespass may be supported against a sheriff for the act of his bailiff in taking the goods of A. under an execution against B., (*z*) it cannot be brought against the plaintiff in the action, unless he actually interfered or assented to the levy. (*a*) And in general where goods are sold under the authority of a sheriff in the exercise of his official duty, he is the proper party to be made defendant in an action by the owner for selling his goods, and a *bonâ fide* purchaser without notice at the sale cannot be sued; (*b*) but the purchaser of the goods of B. illegally taken by the *sheriff under an execution against C. is liable to be sued in trover by B.; because in that case the seizure and sale are wholly unauthorized by the writ. (*c*)

In some cases a party may be liable to be sued for a *tort*, though in fact he neither committed the act, nor assented to the commission of it. Thus a *master* or *principal* is liable to be sued for injuries occasioned by the *negligence* or *unskilfulness* of his servant or agent whilst in the course of his employ, though the act was obviously

(*n*¹) [Bishop v. Ely, 9 John. 294; Thorp v. Barling, 11 John. 285. A demand upon and refusal by a person who claimed property, and his vendee, who together had possession, was held to prove a joint conversion. Chamberlain v. Shaw, 18 Pick. 278.]

(*o*) Rafael v. Verelst, 2 Bl. Rep. 1055; 2 Rol. 1, 7, 555; Com. Dig. Trespass, C. 1; Co. Litt. 180 b, note (4); Cowp. 478; Barker v. Barham, 3 Wils. 377; Gibson, Lane, 90; but see Wilson v. Barker, 4 B. & Ad. 614.

(*p*) Co. Litt. 180 b, note (4), *ante*, 86.

(*q*) *Ib. Ibid.*

(*r*) Timothy v. Simpson, 6 C. & P. 499.

(*s*) Cowp. 476; Brandling v. Kent, 1 T. R. 62; Olliott v. Bessey, Sir T. Jones, 214; *sed vide* Aaron v. Alexander, 3 Campb. 35.

(*t*) Bal. N. P. 41.

(*u*) Menham v. Edmonson, 1 B. & P. 369.

(*x*) Allanson v. Atkinson, 1 M. & S. 583; Cator v. Stokes, 1 M. & S. 599; Bush v. Baker, Stra. 996.

(*y*) Ward v. Haydon, 2 Esp. Rep. 553.

(*z*) Sanderson v. Baker, 3 Wils. 309.

(*a*) *Ib. Ibid.* See a *quære* whether the receipt of the money is an interference. 1 Mont. B. & L. 476; Allanson v. Atkinson, 1 M. & S. 583; Cator v. Stokes, 1 M. & S. 599.

(*b*) 2 Rol. Abr. 556, pl. 50; Bro. Abr. Trespass, pl. 48; Doe v. Thorn, 1 M. & S. 425; 8 Co. Rep. 191; Goodyer v. Junce, Yelv. 179; Cole v. Davies, 1 Lord Raym. 724. But landlord may sue purchaser of fixtures from tenant. *Ib.* Farrant v. Thompson, 2 D. & R. 1.

(*c*) Farrant v. —, 3 Stark. 130; Farrant v. Thompson, 2 D. & R. 1.

tortious; as if he laid lime in the street without any direction for that purpose from the principal: (d) so for the negligent driving of a carriage (d¹) or navigating a ship (e) (even whilst the servant was driving out of the direct road, and for his own purpose); (f) or for a libel inserted in a newspaper of which the defendant was the proprietor; (g) and the party in a cause is liable for any irregularity in the proceedings of his attorney, (h) or his attorney's agent. (i) The principal is also liable not only for the acts of those immediately employed by him and by his steward or general agent, but even for the act of a sub-agent, however remote, if committed in the course of his service; (k) and a corporate company, acting for their own benefit, are liable to be sued for the negligence of their servants. (l) But a party is not liable for the act of another, unless the latter acted as his servant at the time when *the injury was committed*; (m) and

(d) *M'Manus v. Crickett*, 1 East, 106; *Morley v. Gaisford*, 2 H. Bl. 442; *Sander-son v. Baker*, 2 Wils. 317; *Bush v. Steinman*, 1 Bos. & Pul. 404; 1 Bl. Com. 431; *Michael v. Alestree*, 2 Lev. 172; *Anon. Lord Raym.* 739; *Dyer*, 238; *Boson v. Sandford*, 3 Mod. 323; [*Harlow v. Humiston*, 6 Cowen, 189.]

(d¹) [But the master and servant cannot be sued jointly in such a case. *Parsons v. Winchell*, 5 Cush. 592. The servant is answerable to the party injured by his acts done as servant, and is answerable to the master for any damages which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. But if the master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly as joint wrong-doers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution. *Metcalf J. in Parsons v. Winchell*, *supra*; *Merryweather v. Nixon*, 8 T. R. 186; *Vose v. Grant*, 15 Mass. 505, 521; *Campbell v. Phelps*, 1 Pick. 62; *Campbell v. Portland Sugar Co.* 62 Maine, 552.]

(e) *M'Manus v. Crickett*, 1 East, 106, *supra*, note (c). But the owner of a ship is not liable for the neglect of a pilot he was obliged to take on board. *M'Intosh v. Slade*, 6 B. & C. 657; 9 D. & R. 738, S. C.; *Lucey v. Ingram*, 6 M. & W. 302; [*Caruthers v. Sydebotham*, 4 M. & Sel. 77; *Rodrigues v. Melhuish*, 10 Exch. 110; *The Maria*, 1 W. Rob. 95; *The Agricola*, 2 W. Rob. 10. See *Snell v. Rich*, 1 John. 305; *Bussey v. Donaldson*, 4 Dall. 206; *The Carolus*, 2 Curtis C. C. 69; *Grier J. in Smith v. The Creole*, 2 Wallace C. C. 485; *Bark Lotty*, *Olcott Adm.* 329; *The Julia M. Hallock*, 1 Sprague, 539. But where the owner is not obliged to take a pilot on board, he is, in general, responsible for injuries resulting from the pilot's default. *Atty. General v. Case*, 3 Price, 302; *The Neptune*, 1 Dod. 467; *The Carolus*, 2 Curtis C. C. 69; *Smith v. The Creole*, 2 Wallace C. C. 485; *The Julia M.*

Hallock, 1 Sprague, 539. Pilots are always answerable personally for their own negligence or default. *Yates v. Brown*, 8 Pick. 24; *Heridia v. Ayres*, 12 Pick. 334; *Lawson v. Dunlin*, 9 C. B. 54.]

(f) *Joel v. Morrison*, 6 C. & P. 501. A master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service, but not so if the act is in itself unlawful and is not proved to have been authorized by the master. *Lyons v. Martin*, 8 Ad. & El. 512. As to the right of action by a servant against his master for damage sustained by reason of the master's van being out of repair, &c. see *Priestley v. Fowler*, 3 M. & W. 1. A. borrowed of B. a horse and chaise, and went in it accompanied by C. on an excursion of pleasure, C. driving; by C.'s mismanagement the horse and chaise were driven against and injured the plaintiff's horse, and it was held, that an action on the case might be maintained for the injury against A. on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned. *Wheatley v. Patrick*, 2 M. & W. 650. See, also, *Chandler v. Broughton*, 1 Cr. & M. 29.

(g) *Heath J. in Bush v. Steinman*, 1 B. & P. 409.

(h) *Parsons v. Lloyd*, 2 Bl. Rep. 845; 3 Wils. 341; *Barker v. Braham*, 3 Wils. 368.

(i) *Bates v. Pilling*, 6 B. & C. 38; 9 D. & R. 44, S. C.

(k) *Bush v. Steinman*, 1 B. & P. 404; *Stone v. Cartwright*, 6 T. R. 411; *Harris v. Baker*, 4 M. & S. 27; [2 Chitty Contr. (11th Am. ed.) § 861 *et seq.* and notes. A servant intrusted the reins to a stranger who was riding with him; the master was held liable. *Booth v. Mister*, 7 C. & P. 66.]

(l) *Matthews v. West London Waterworks Company*, 3 Campb. 403. When not, see *Harris v. Baker*, 4 M. & S. 27; *ante*, 87, and notes.

(m) *M'Manus v. Crickett*, 1 East, 106; *Boucher v. Lawson*, Rep. temp. Hardw. 87;

therefore a person who hires a post-chaise is not liable for the negligence of the driver, but the action must be against the driver or the owner of the chaise and horses. (n) Where the owner of a carriage *hired of a stable-keeper a pair of horses, to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person, the court were equally divided in opinion upon the question, whether the owner of the carriage was liable to be sued for such injury. (o) If a servant or agent *wilfully* commit an injury to another, though he be at the time engaged in the business of the principal, yet the principal is not in general liable; as if a servant *wilfully* drive his master's carriage against another's, (o¹) or ride or beat a distress taken *damage feasant*. (p) The rule was thus explained: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, his master will not be liable. But if in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a supposed difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." (q) So if a servant take out his master's cart at a time when it is not wanted for the purposes of his master's business, and drive it about for his own purposes, the master will not be responsible for any injury arising whilst so doing. (r) Though if a servant, driving his master's cart on his master's business, make a de-

Rapson v. Cubitt, 9 M. & W. 710; [2 Chitty Contr. (11th Am. ed.) 863, note (k⁴), and cases.]

(n) *Dean v. Branthwaite*, 5 Esp. Rep. 35; [Bishop v. Ely, 9 John. 294.] See next note.

(o) *Laugher v. Pointer*, 5 B. & C. 547; 8 D. & R. 566, S. C.; *Abbott C. J.* and *Littledale J.* holding that the defendant was not liable, and *Bayley J.* and *Holroyd* being in favor of the liability; but the opinion of the two former judges has now been adhered to in several cases. *Quarman v. Burnett*, 6 M. & W. 499; *Randleson v. Murray*, 3 N. & P. 239; 8 Ad. & El. 109; *Fenton v. The City of Dublin Steam Packet Company*, 8 Ad. & El. 835; 1 P. & D. 103, S. C.; *Bundy v. Giles*, 1 M. & Rob. 495; *Smith v. Lawrence*, 2 Man. & R. 1; [2 Chitty Contr. (11th Am. ed.) 863, note (k⁵).]

(o¹) [*Wright v. Wilcox*, 19 Wend. 345.]

(p) *M'Manus v. Crickett*, 1 East, 106; *Bocher v. Lawson*, Rep. temp. Hardw. 87; *Middleton v. Fowler*, 1 Salk. 282; 2 Rol. Abr. 553; 1 Bl. Com. 431; [2 Chitty Contr. (11th Am. ed.) 865, and note (k¹¹).]

(q) *Croft v. Allison*, 4 B. & Ald. 590. See *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500, S. C. [If the servant be acting in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will

be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. *Hoar J.* in *Howe v. Newmarch*, 12 Allen, 57; *Wilton v. Middlesex R. R. Co.* 107 Mass. 110. See 2 Chitty Contr. (11th Am. ed.) 865, and note (k¹¹) and cases cited, 866, and note (k¹²) and cases cited; *Thames Steamboat Co. v. The Housatonic R. R. Co.* 24 Conn. 40; *Ramsden v. Boston & Albany R. Co.* 104 Mass. 117; *Yerger v. Warren*, 31 Penn. St. 319. Carriers of passengers, railroad companies and others, are responsible, by force of their contract and duty as carriers, for assaults and batteries committed by their servants and employees upon the passengers. *Bryant v. Rich*, 106 Mass. 180, 188, 189, and the cases there cited; *Goddard v. Grand Trunk Railway*, 57 Maine, 202; *Chamberlain v. Chandler*, 3 Mason, 242; *Hanson v. European & North American Railway Co.* 62 Maine, 88.]

(r) *Joel v. Morrison*, 6 Car. & P. 501; [2 Kent, 259; *Moore v. Sanborne*, 2 Mich. 519; *Southwick v. Estes*, 7 Cush. 385, 386; *Kerns v. Piper*, 4 Watts, 222; *Howe v. Newmarch*, 12 Allen, 49; *Fuller v. Voyt*, 13 Ill. 277; *Purvey v. Thompson*, 5 Gilman, 397; *Brown v. Purviance*, 2 H. & Gill, 316; *Foster v. Essex Bank*, 17 Mass. 508; *McClen-*

tour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving whilst so out of his road. (r)

On principles of public policy a *sheriff* is liable civilly for the tortious act, default, extortion, or other misconduct, whether it be wilful or inadvertent, of his under-sheriff or bailiff, in the course of the execution of his duties. (s) But if the wrong complained of be neither expressly sanctioned by the sheriff, nor impliedly committed by his authority; if it be an act not within the scope of the authority given; the sheriff is not responsible. (t) And if the plaintiff in an *action, or an execution creditor, induce the bailiff to depart from the ordinary course of his duty without the sheriff's knowledge, it is not competent to such plaintiff or execution creditor to fix the sheriff for the consequences. (u)

The distinctions with regard to the liabilities of the owners of *animals* are important, particularly as they affect the form of the action. The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, (u¹) horses,

aghan v. Brock, 5 Rich. 17; Bryant v. Rich, 106 Mass. 188; Aldrich v. Boston & Worcester R. R. Co. 100 Mass. 31. Where the servant, without his master's knowledge, takes his master's carriage and drives it about solely for his own purposes, the master will not be responsible for injury done by his management of it. Sleath v. Wilson, 9 C. & P. 607; Mitchell v. Crassweller, 13 C. B. 237. The question is as to the employment. Keating J. in Williams v. Jones, 3 H. & C. 602, 613. Maule J. in Mitchell v. Crassweller, 13 C. B. 243. This whole subject, of the liability of a master for the acts of his servant, is very fully discussed in 2 Chitty Contr. (11th Am. ed.) 861 *et seq.* and notes.]

(s) Woodgate v. Knatchbull, 2 T. R. 151; Peshall v. Layton, 2 T. R. 712; Tyte v. Globe, 7 T. R. 267; Ackworth v. Kempe, Doug. 40; Sturmy v. Smith, 11 East, 25; Crowder v. Long, 8 B. & C. 602; 3 M. & R. 20, S. C.; [Grinnell v. Phillips, 1 Mass. 530; Campbell v. Phelps, 17 Mass. 245; Blake v. Shaw, 7 Mass. 505; Hazard v. Israel, 1 Binn. 240; M'Intyre v. Trumbull, 7 John. 35; White v. Johnson, 1 Wash. 159; Gorham v. Gale, 7 Cowen, 739; Moore v. Downey, 3 Hen. & M. 127.]

(t) Cook v. Palmer, 6 B. & C. 739; 9 D. & R. 723, S. C.; Crowder v. Long, 8 B. & C. 598; 3 M. & R. 7, S. C.; and see, further, *post*, 94, 95; Tomkinson v. Russell, 9 Price, 287; Bowden v. Waithman, 5 Moore, 183; Stuart v. Whittaker, 1 R. & M. 310. No action lies against the sheriff for a false return of *nulla bona* by his bailiff to a writ of *f. fa.* issued out of his county court. Pilcher v. King, 9 Ad. & El. 288. And the marshal of the queen's bench prison is not

liable for a tortious act committed by the deputy-marshal in ill-treating a prisoner in the exercise of his office, unless the appointment of the deputy is proved, or the facts show that the marshal was cognizant of the act done. York v. Chapman, 3 P. & D. 496.

(u) Cook v. Palmer, 6 B. & C. 739; 9 D. & R. 723, S. C.; Crowder v. Long, 8 B. & C. 598; 3 M. & R. 7, S. C.; and see, further, *post*, 94, 95.

(u¹) [Where in an action of trespass, upon Massachusetts Rev. Sta. c. 58, § 13 (Genl. Sta. c. 88, § 59), it appeared that the injury was done by two dogs together, belonging to several owners, it was held, that each owner was liable only for damages done by his own dog, and not for the whole damage done by the two dogs. Buddington v. Shearer, 20 Pick. 477; S. C. 22 Pick. 427; Van Steenburg v. Tobias, 17 Wend. 562; Auchmuty v. Ham, 1 Denio, 495; Denny v. Correll, 9 Ind. 72; Partenheimer v. Van Order, 20 Barb. 479; *post*, 97, note. In the absence of proof as to how much damage was done by each of the several animals implicated in an injury, the presumption is that each did equal damage. Partenheimer v. Van Order, 20 Barb. 479. But where two dogs of different sizes kill sheep in the dark, it is competent for the jury to determine, in the absence of proof, that the largest dog killed the most sheep. Wilbur v. Hubbard, 35 Barb. 303. In Pennsylvania, under the act of 1851, which provides that it is not necessary for the plaintiff to prove the *scienter*, a joint action may be maintained against all owners of dogs which have at the same time been together engaged in killing sheep. Kerr v. O'Connor, 63 Penn. St. 341.]

and oxen, is not liable for any injury committed by them to the person or personal property; unless it can be shown that he previously had notice of the animal's mischievous propensity, (*u*²) or that the injury was attributable to some other neglect on his part, (*u*³) it being in general necessary in an action for an injury committed by *such* animals to allege and prove the *scienter*; (*u*⁴) and though notice can be proved, yet the action must be *case*, and not *trespass*; (*v*) But if the owner himself acted illegally, he may be liable even as a trespasser; as where a person in company with his dog trespassed in a close through which there was no footpath, and the dog, without his concurrence, killed the plaintiff's deer; (*x*) and if a person let loose or permit a dangerous animal to go at large, and mischief ensue, he is liable as a trespasser; the law in such cases presuming notice to the defendant of the mischievous propensity of such animals. (*y*) With respect to animals *mansuetæ naturæ*, as cows and sheep, as their propensity to rove is notorious, the owner is bound at all events to confine them on his land; and if they escape, and commit a trespass on

(*u*²) [Vrooman v. Lawyer, 13 John. 339; Dearth v. Baker, 22 Wisc. 73; Van Leuven v. Lyke, 1 Comst. 515; S. C. 4 Denio, 127; Anchemuty v. Ham, 1 Denio, 495; Steel v. Smith, 3 E. D. Smith, 321; Fairchild v. Bentley, 30 Barb. 147. One who keeps an animal after he has notice that it is individually of a vicious disposition, is bound to confine it safely, although it is not of a savage or pernicious species; and if he does not do so, and it strays away and does injury, he is liable in damages, irrespective of any specific negligence in the custody of the animal. Woolf v. Chalker, 31 Conn. 121; Stamps v. Kelly, 23 Ill. 140; Marsh v. Jones, 21 Vt. 378; Popplewell v. Pierce, 10 Cosh. 509; Kittredge v. Elliott, 16 N. H. 77; Wheeler v. Brant, 23 Barb. 324; Koney v. Ward, 36 How. Pr. 255. The owner of a cow accustomed to hook, the vicious propensity being known to her owner, is liable for damage done by her, although it was done in the highway against the land of her owner, and while going to her usual watering place. Coggsell v. Baldwin, 15 Vt. 404. There is no rule, as to the number of instances of pernicious mischief done by the animal, of which the defendant must have had notice, in order to charge him with knowledge of its mischievous disposition. Knowledge of a single instance may be sufficient to justify the jury in finding for the plaintiff. The question is for the jury. Arnold v. Norton, 25 Conn. 92; Kittredge v. Elliott, 16 N. H. 97; Woolf v. Chalker, 31 Conn. 121; Cockerham v. Nixan, 11 Ired. (N. Car.) Law, 269.]

(*u*³) [Meredith v. Reed, 26 Ind. 334. Bees belong to the class of domesticated animals, rather than to that of ferocious ones, as respects the owner's liability; hence some proof of negligence in the custody of them

is necessary to sustain an action for injury done by them. Earl v. Van Alstyne, 8 Barb. 630.]

(*u*⁴) [Smith v. Causey, 22 Ala. 568.]

(*v*) Mason v. Keeling, 12 Mod. 333; Lord Raym. 608; Jenkins v. Turner, Lord Raym. 109; Dyer, 25, pl. 162; Boulton v. Banks, Cro. Car. 254; Buxendin v. Sharp, 2 Salk. 662; Jenkins v. Turner, 2 Salk. 662; Bac. Abr. Action, Case, F.; Lutw. 90; Peake's Law of Evid. 291, 292; [Dilts v. Kinney, 15 N. J. (Law) 130.] Evidence of *scienter*, Jones v. Perry, 2 Esp. 482; Beck v. Dyson, 4 Campb. 198. The omission of the averment in the declaration renders it bad in arrest of judgment. Buxendin v. Sharp, 2 Salk. 662.

(*z*) Beckwith v. Shordike, Burr. 2092; Michael v. Alestree, 2 Lev. 172; Brown v. Giles, 1 C. & P. 119, S. P.; [Dilts v. Kinney, 15 N. J. (Law) 130.]

(*y*) Leame v. Bray, 3 East, 595, 596; Mason v. Kneeling, 12 Mod. 333; Rex v. Hugins, 3 Lord Raym. 1583; Bac. Abr. Action, Case, F.; [McCaskill v. Elliott, 5 Strobb. (S. Car.) 196; Pickering v. Orange, 2 Ill. (1 Scam.) 492; Wilkinson v. Parrott, 32 Cal. 102; Frammell v. Little, 16 Ind. 251; McManus v. Finan, 4 Iowa, 283; Van Leuven v. Lyke, 1 Comst. 515; S. C. 4 Denio, 127; Wells v. Howell, 19 John. 385; Stafford v. Ingersoll, 3 Hill (N. Y.), 38. As to injury done by an animal, to a person at the time trespassing upon the land of the owner of the animal, see Loomis v. Terry, 17 Wend. 496; Sherrey v. Bartley, 4 Sneed (Tenn.), 58. As to cases of injury done by the defendant's dog to the plaintiff's dog, see Wiley v. Slater, 22 Barb. 506. As to damage caused by diseased cattle or horses spreading the disease, see Fisher v. Clark, 4 Barb. 329; Hite v. Blandford, 45 Ill. 9.]

the land of another, unless through the defect of fences which the latter ought to repair, (*y*¹) the owner is liable to an action of trespass, though he had no notice in fact of such propensity. (*z*) But for damage by animals, &c. *feræ naturæ*, escaping from the land of one person to that of another, as by rabbits, pigeons, &c. no action can in general be supported; because the instant they escaped from the land of the owner his property in them was determined. (*a*) And a person cannot be liable for the act of cattle, unless he were the general owner, or he actually put them into the place where the injury * was committed; (*b*) nor is he liable for trespass committed by his dog; (*c*) and if a servant or a stranger, without the concurrence of the owner, chase or put his cattle into another's land, such owner is not liable; but the action must be against the servant or stranger, who, as it has been said, gains a special property in the cattle for the time. (*d*)

The liability to an action in respect of *real* property may be for *injuries to land*. *misfeasance* or *malfeasance*, as for obstructing ancient lights; or for *nonfeasance*, as for not taking care of premises, so as to prevent the consequences of a public nuisance, as for leaving open an area door, or coal plate; (*e*) or for not repairing fences, (*f*) private ways, (*g*) or water-courses, &c. (*h*) In these cases the action should in general be against the party who did the act complained of, or against the occupier; (*i*) and not against the owner, if the premises were in the possession of his tenant. (*k*) But if the owner of the land, having erected a nuisance thereon, demise the land, an action may be supported against him, though out of possession, for the continuance of it; for by the demise he affirmed such continuance; (*l*)

(*y*¹) [Shepherd v. Hees, 12 John. 433; Cowles v. Balzer, 47 Barb. 562; McDonnell v. Pittsfield & North Adams Railroad, 115 Mass. 564; Keliber v. Connecticut River R. R. 107 Mass. 411; Rust v. Low, 6 Mass. 90.]

(*z*) Mason v. Keeling, 12 Mod. 335; Lord Raym. 606; Rex v. Huggins, 3 Lord Raym. 1583; Dyer, 25, pl. 162; Vin. Abr. Fences, Trespass, B. vol. xx. MS. 424; Millen v. Fandrye, Poph. 161; Sir W. Jones, 131; Latch, 119; Jenkins v. Turner, 2 Salk. 662; [Decker v. Gammon, 44 Maine, 322; Goodman v. Gay, 15 Penn. St. 188; Dickson v. McCoy, 39 N. Y. 401. The owner of an animal is liable for injuries done by it, only upon the ground of negligence, either actual, or presumed in view of the owner's having had express notice that the animal was individually of a mischievous disposition, or in view of the fact that it was of a savage or ferocious species. Earl v. Van Alstyne, 8 Barb. 630. He who has the care and custody of sheep, for the purpose of depasturing them, is liable for damage done by them in the same manner and to the same extent as the owner. Barnum v. Vanduser, 16 Conn. 200; Sheridan v. Bean, 18

Met. 284. See Brill v. Flagler, 23 Wend. 254.]

(*a*) 5 Co. 104 b; Hinsley v. Wilkinson, Cro. Car. 387; Cooper v. Marshall, 1 Burr. 259; Bac. Abr. Game; Bowliston v. Hardy, Cro. Eliz. 547.

(*b*) 1 Saund. 27; Brown v. Giles, 1 Car. & P. 119.

(*c*) Brown v. Giles, 1 Car. & P. 119.

(*d*) Bro. Abr. Trespass, pl. 435; 2 Rol. Abr. 553; McManus v. Crickett, 1 East, 107.

(*e*) Coupland v. Hardingham, 3 Campb. 398; Matthews v. West London Waterworks Company, 3 Campb. 403; Pilcher v. King, 9 Ad. & El. 288. When not, see Harris v. Baker, 4 M. & Sel. 27.

(*f*) Cheetham v. Hampson, 4 T. R. 318.

(*g*) Rider v. Smith, 3 T. R. 766.

(*h*) Sutton v. Clarke, 6 Taunt. 44.

(*i*) Cheetham v. Hampson, 4 T. R. 318.

(*k*) Burne v. Richardson, 4 Taunt. 790.

(*l*) Rosewell v. Prior, 1 Salk. 460; Cheetham v. Hampson, 4 T. R. 320; Heath J. in Bush v. Steinman, 1 B. & P. 409. [The continuance of that which was originally a nuisance, is in fact a new nuisance. Sewall J. in Staple v. Spring, 10 Mass. 74; Hodges

and every occupier is liable for the continuance of the nuisance on his land, &c. though erected by another, if he refuse to remove the same after notice. (m) When there are several owners or persons chargeable as joint tenants or tenants in common in respect of their real property, though the action be in form *ex delicto*, they should all be made defendants, or the party who is sued alone may plead in abatement. (n)

An agent or servant, though acting *bond fide* under the directions and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received. (o) If the master has not the right or power to do the act complained of, he cannot delegate an authority to the servant, which will protect the latter from responsibility. Therefore a servant may be charged in trover, although the act of conversion be done by him for his master's benefit. (p) And a bailiff who distrains is liable, if the principal has no right of distress. (q) And a custom-house officer may be sued for a wrongful seizure made by him in that character. (r) There is no injustice in this doctrine as regards the servant; for if the act were not manifestly illegal, the indemnity of the * principal to the servant against the consequences is not illegal, and will, in many instances, be implied. (s) And where a servant received a bill of exchange, which he promised to the deliverer that his master should discount, but which the latter refused to do, and insisted on retaining the same as a security for a previous debt from the deliverer, it was held that such deliverer might support trover against the servant. (t)

Liability
of agents,
servants,
and attor-
neys.

But, in order to sue a servant in trover, an actual, not a construct-

v. Hodges, 5 Met. 205. See 3 Dane Abr. 57; Curcio v. Thompson, 19 N. H. 471; Eastman v. Amoskeag Manuf. Co. 44 N. H. 143, 156; Waggoner v. Jermaine, 3 Denio, 206.]

(m) Com. Dig. Action, Case, Nuisance, B.; [Staple v. Spring, 10 Mass. 72; Baldwin v. Calkins, 10 Wend. 167; Beidelman v. Foulke, 5 Watts, 308; Pillsbury v. Moore, 44 N. H. 156; Wendell v. Pratt, 12 Allen, 464. Where the defendant was not the original creator of the nuisance, he must have notice of it, and a request must be made to remove it, before an action can be brought. Brent v. Hodges, Cro. Jac. 555; Pierson v. Glean, 2 Green (N. J.), 36; Plummer v. Harper, 3 N. H. 88; Johnson v. Lewis, 13 Conn. 303; Eastman v. Amoskeag Manuf. Co. 44 N. H. 143; Noyes v. Stillman, 24 Conn. 15; Branch v. Doane, 17 Conn. 402, 418; Pillsbury v. Moore, 44 Maine, 156, 157; Woodman v. Tufts, 9 N. H. 88. See Carleton v. Reddington, 21 N. H. 291; Brown v. Carvaga & Snaq. R. R. Co. 2 Kernan, 492.]

(n) 1 Saund. 291; Mitchell v. Tarbutt, 5 T. R. 651; post, 97.

(o) Stephens v. Elwall, 4 M. & Sel. 259.

See also 1 Bing. N. C. 418. What is considered an interference, which will subject the party to an action, ante, 87, 88. [But case, for deceit in the nature of conspiracy, cannot be sustained against a principal and his agent jointly, for the unauthorized fraudulent acts and representations of the agent alone. Such action can be sustained only where some affirmation or representation wilfully false, or some designed and positively fraudulent artifice is directly proved, or necessarily to be presumed from the circumstances attending the transaction itself, to have been made or perpetrated by the defendants jointly, by means whereof a damage resulted to the plaintiff. Page v. Parker, 40 N. H. 47. See Wright v. Wilcox, 19 Wend. 345.]

(p) Ib.

(q) 2 Rol. Abr. 431.

(r) Tinkler v. Poole, 3 Wils. 146; [Hoyt v. Gelston, 13 John. 141.]

(s) Merryweather v. Nixan, 8 T. R. 186; Bul. N. P. 146.

(t) Cranch v. White, 1 Hodges Rep. 61; 1 Bing. N. C. 414, S. C.

ive, conversion should be shown; and the servant's reasonable and qualified refusal to deliver up the goods until he had consulted his master, and obtained his sanction, does not amount to a conversion. (u) And in cases in which a *contract*, express or implied, with the master, is the ground of action, the servant seems not to be liable for any mere neglect or nonfeasance, which as such servant, he is guilty of in the execution of, or with relation to, the contract. (x) If a coachman lose a parcel, the master, not the coachman, should be sued; and it seems that a servant is not liable for his false warranty, or deceit, on the sale of goods by his master's orders. (y)

An attorney acting *bond fide*, and professionally, may not be personally liable in cases where he does not exceed the line of his duty. Thus, it seems that he is not liable in case for a malicious and unfounded arrest (regular in form), which may be considered the tort of his client only. (z) But if an attorney, by himself or his agent, issue any illegal or irregular process or execution in a cause, he, equally with the client, is liable as a trespasser. (a)

In general, an action for the breach of a duty in execution of the office of sheriff must be brought against the high sheriff, although the under-sheriff or the bailiff of the sheriff were the party actually in default. (b) The under-sheriff or bailiff, cannot in general be sued; but there are some instances of *misfeasance* and *malfeasance* in which he may be liable to the party aggrieved; as if he *voluntarily* permit an escape, or is personally guilty of extortion, or any act of trespass in executing process, for in such cases the under-sheriff or officer becomes an active personal wrong-doer. (c) So a sheriff is liable in trover if he seize and sell goods after an act of bankruptcy although unknown to him and before fiat. (d) But an action

(u) *Alexander v. Southey*, 5 B. & Ald. 247; *Cranch v. White*, 1 Hodges, 61; 1 Bing. N. C. 414, S. C.

(x) See *ante*, 40; *Lane v. Sir Robert Cotton*, 12 Mod. 438; *Perkins v. Smith*, Say. 41; Bac. Abr. Action on the Case, B.

(y) *Ibid.*; Rol. Abr. 95, T.; Com. Dig. Action on the Case for Deceit, B.; *Williams v. Cranston*, 2 Stark. 82; but a coachman is responsible for the loss of a parcel which he receives to carry without reward, if it be lost through gross negligence on his part; *Beauchamp v. Powely*, 1 M. & Rob. 38.

(z) Anonymous, 1 Mod. 209, cited per Cur. *Barker v. Braham*, 3 Wils. 378, 379. It was there said the attorney was not liable, although he knew the demand was unfounded. *Sed quere*. See *Codington v. Lloyd*, 3 N. & P. 444.

(a) *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38. In *Sedley v. Sutherland*, 3 Esp. 202, 203, Lord Kenyon is stated to have been of opinion, that an attorney acting *bond fide*, and professionally, was not liable in trespass for causing a sus-

pected party to be taken on a warrant; and in the case of *Codington v. Lloyd*, 3 N. & P. 442, Mr. Justice Patteson drew a distinction between the case in which the proceedings were void *ab initio*, but in which the attorney had acted according to his retainer and within the line of his duty, and the case of an irregularity in the proceedings.

(b) *Ante*, 92; Cowp. 402; [White v. Johnson, 1 Wash. 160, 161; *Armistead v. Marks*, 1 Wash. 325. A sheriff and his deputy cannot be joined in an action for the act of the deputy alone, though both are severally liable for the act. *Campbell v. Phelps*, 1 Pick. 62; *Parsons v. Winchell*, 5 Cush. 594. The action must be the same whether brought against the sheriff or his deputy. *Campbell v. Phelps*, 17 Mass. 246.]

(c) See *Lane v. Sir Robert Cotton*, 12 Mod. 488; 1 Salk. 18; 1 Lord Raym. 655; Anonymous, 1 Mod. 209.

(d) *Garland v. Carlisle*, 2 Cr. & M. 31; but see 2 & 3 Vict. c. 29, which has made an important alteration of the law in this respect.

is not sustainable against the *sheriff* for the act of a bailiff in taking the goods of a party under an execution of the county court against a third person, because there the sheriff as *judge* of that court acted judicially, (e) and a steward of a court baron has the same privilege and protection. (f)

It is a general rule that an action does not lie against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal, or those actually employed, alone can be sued. This was decided in *Stone v. Cartwright*, (g) and Lord Kenyon observed, "that the action must in these cases, be brought against the hand committing the injury, or against the owner, for whom the act was done." The first principal is liable on the ground that the original authority flows from him, and the tort occurs in the course of the execution of work done for his benefit. (h) But in these cases, if the intermediate agent personally interfere, and particularly order those acts to be done from whence the damage ensues, he is responsible; (i) and it was therefore held, in an action on the case for obstructing the plaintiff's lights, that a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workmen, might be joined as a co-defendant with the original contractor, by whom he was employed. (j)

Intermediate agents.

The liability of *government* and other public officers has been before adverted to. (k)

There are some torts which in legal consideration *may* be committed by several, and for which a *joint* action may be supported against all the parties. (k¹) Thus, a *joint* action may be brought against several for a malicious prosecution, or an assault and battery; or for composing, publishing, or singing a libel; (l) or for not setting out tithe; (m) or keeping a dog to kill game, not being qualified. (n) But if in legal consideration the act complained of *could not have been committed by several persons*, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrong-doer only, or

2dly. With reference to the number of the defendants.

(e) *Tinsley v. Nassau*, 1 Mood. & Malk. 52; and see *Re Flint*, 1 B. & C. 256; 2 D. & R. 407, S. C.; and *Holroyde v. Breare*, 2 B. & Ald. 473. See, also, *Tunno v. Morris*, 2 Cr., M. & R. 298; *Pitcher v. King*, 1 P. & D. 297.

(f) *Holroyde v. Breare*, 2 B. & Ald. 473.

(g) 6 T. R. 411.

(h) *Bush v. Steinman*, 1 B. & P. 404; *Mathews v. West London Water Works Company*, 3 Campb. 403.

(i) Per Lawrence J. *Stone v. Cartwright*, 6 T. R. 413.

(j) *Wilson v. Peto*, 6 Moore, 47; *Witte v. Hague*, 2 D. & R. 33.

(k) *Ante*, 43.

(k¹) [Two towns may be sued jointly for damages sustained by the inefficiency of a bridge between them. *Peckham v. Burlington*, Brayt. 134.]

(l) 2 Saund. 117 a; *Pencavin v. Trapping, Latch*, 262; *Rex v. Benfield*, 2 Burr. 985; Bac. Abr. Actions in General, C.; [*Harris v. Harrington*, 2 Tyler, 129; *Thomas v. Rummy*, 6 John. 26.]

(m) *Bastard v. Hancock*, Carth. 361; 2 Vin. Abr. 70, pl. 21.

(n) *Hardyman v. Whitaker*, in note to *Barnard v. Gostling*, 2 East, 573.

against each, must be brought. Therefore a joint action cannot be supported against two for verbal slander; (*o*) nor will debt on a penal statute lie against several for what in law is a separate offence in each; (*p*) as against two proctors for not obtaining and entering their certificates; (*p*¹) or against several persons for bribery. (*q*) In an action of debt to recover money lost at play, the defendant cannot plead a non-joinder in abatement. (*r*) And if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others, because these trespasses are of several natures. (*s*) And in trover against several defendants, all cannot be found guilty on the same count, without proof of a *joint* conversion by all. (*t*) These rules, however, do not prevail in *criminal* proceedings, so as necessarily to defeat an indictment against several for distinct offences in separate counts, though the court have a discretionary power to quash the indictment, where inconvenience might arise from the joinder of many persons for different offences. (*u*)

If several persons be made defendants jointly, where the tort *could* *not* in point of law be joint, they may demur, and if a verdict be taken against all, the judgment may be arrested or reversed on a writ of error; (*v*) but the objection may be aided by the plaintiff's taking a verdict against one only; (*x*) or if several damages be assessed against each by entering a *nolle prosequi* as to one after the verdict and before judgment. (*y*) In other cases, where in point of fact and of law several persons *might have been jointly guilty of the same offence*, the joinder of more persons than were liable in a personal or mixed action in *form ex delicto*, constitutes no objection to a partial recovery, and one of them may be acquitted, and a verdict taken against the others. (*z*) On the other

(*o*) *Ib. Ibid.*; *Swithin v. Vincent*, 2 Wils. 227; *Dyer*, 19 (112); *Chamberlaine v. Willmore*, Palm. 313; *Chamberlain v. White*, Cro. Jac. 647; *Stroud v. Roper*, 1 Bulst. 15; 1 Rol. Abr. 781; 2 Vin. Abr. 64, pl. 27; [*Patten v. Gurney*, 17 Mass. 186; *Thomas v. Rumsey*, 6 John. 32.]

(*p*) *Barnard v. Gostling*, 1 New Rep. 245; *Hardyman v. Whitaker*, 2 East, 574.

(*p*¹) [*Burnham v. Webster*, 5 Mass. 270; *Hill v. Davis*, 4 Mass. 137; *Boutelle v. Nourse*, 4 Mass. 431.]

(*q*) *Griffiths v. Stratton*, judgment in error in the House of Lords from the exchequer in Ireland, 17th April, A. D. 1806.

(*r*) 28 MSS. Ashhurst Paper Books, 233. *Sed vide Bristow v. James*, 7 T. R. 257.

(*s*) 2 Saund. 117 a; *Cutsworth*, Sty. 153, 154; *Sedley v. Sutherland*, 3 Esp. Rep. 202, 204.

(*t*) *Nicoll v. Glennie*, 1 M. & S. 588.

(*u*) *The King v. Kingston*, 8 East, 46, 47; 1 Chitty on Crim. Law, 270, 271, 1st ed.

(*v*) *Barnard v. Gostling*, 1 New Rep. 245; 2 Saund. 117 b, note; Bac. Abr. Actions in General, C.; 1 Roll. Abr. 781; *Burcher and Orchard*, Sty. 349; [*Russell v. Tomlinson*, 2 Conn. 206; *Peters v. England*, 1 McCord, 14; *M'Keown v. Johnson*, 1 McCord, 578; *Orr v. Bank of United States*, 1 Ham. 45; *Franklin Fire Ins. Co. v. Jenkins*, 3 Wend. 130.]

(*x*) *Ib. Ibid.*

(*y*) 1 Saund. 207 a.

(*z*) *Govett v. Radnidge*, 3 East, 62; *Nicoll v. Glennie*, 1 M. & S. 589. Cannot after judgment, *Tidd's Prac.* 9th ed. 895; *Hardyman v. Whitaker*, 2 East, 574; *Nicoll v. Glennie*, 1 M. & S. 583; Bac. Abr. Action of *Qui Tam*, D.; 2 Roll. Abr. 707. Information against *Page*, Lane, 19; *Voux v. Austin*, Lane, 59; *Rex v. Clarke*, Cowp. 610; [*Lansing v. Montgomery*, 2 John. 382; *Jackson v. Woods*, 5 John. 280, 281; *Cunningham v. Dyer*, 2 Monroe, 51; *Wright v. Cooper*, 1 Tyler, 425; *Lockwood v. Bull*, 1

hand, if several persons jointly commit a tort, the plaintiff in general has his election to sue all or some of the parties jointly, or one of them separately, (*z*¹) because a tort is in its nature a separate act of each individual. (*a*) Therefore in actions in **form ex delicto*, as trespass, trover, or case for malfeasance, against one only for a tort committed by several, he cannot plead the non-joinder of the others in abatement or in bar, or give it in evidence under the general issue; for a plea in abatement can only be adopted in those cases where regularly all the parties *must* be joined, and not where the plaintiff *may* join them all, or not, at his election. (*b*) And even if it appear from the declaration or other pleadings that the tort was jointly committed by the defendant and another person, no objection can be taken. (*c*) This rule applies only in actions for torts strictly unconnected with contract; for where an action on the case is brought merely for the nonfeasance of a contract, and in order to support the action a contract must be proved, and is the basis of the suit (as in case for a breach of a warranty on a sale, &c.), the joinder of too many defendants will be a ground of nonsuit; and it should seem, that if a joint contractor be not included, the defendant may plead his non-joinder in abatement; for it is not competent to the plaintiff in such an instance to alter or obviate the rules of law with regard to the parties to be sued upon the contract, merely by varying the *form* of his action where in substance it is founded on the agreement. (*d*) But it must appear from the declaration, that the gist of the action is for a breach of contract. (*e*) And with regard to carriers and innkeepers, as their liability is founded on the breach of an *implied* common law *duty* in respect of their particular capacities, if they be sued in case for neg-

Cowen, 322; Hayden v. Nott, 9 Conn. 367; Pearson v. Stroman, 1 Nott & McC. 354.]

(*z*¹) [North Pennsylv. R. R. Co. v. Mahony, 57 Penn. St. 152; Creed v. Hartmann, 29 N. Y. 591; Buckles v. Lambert, 4 Met. (Ky.) 330; Thomas v. Rumsey, 6 John. 31; Barnham v. Webster, 5 Mass. 269, 270; Johnson v. Brown, 1 Wash. 187. Where the trains of two railroad companies using the same track came in collision, an action was held maintainable against them jointly for injuries incurred thereby, in Colegrave v. N. York &c. R. R. Co. 20 N. Y. 492.]

(*a*) Sutton v. Clarke, 6 Taunt. 29, 35, 42. [A joint action does not lie against separate owners of dogs, by which dogs the sheep of a third person have been worried and killed. Van Steenburgh v. Tobias, 17 Wend. 562; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; *ante*, 93, note (*u*¹).]

(*b*) Sutton v. Clarke, 6 Taunt. 29, 35, 42; 1 Saund. 291 *d*, *e*; Mitchell v. Tarbutt, 5 T. R. 649; [Wheeler v. Worcester, 10 Allen, 600, 601. Where an injury is the result of two concurring causes, one party in fault is not exempted from full liability for the injury, although another party may be equally

culpable. Ricker v. Freeman, 50 N. H. 420; Peck v. Neal, 3 McLean, 22; Mott v. The Hudson River R. R. 8 Bosw. 345; Chapman v. The New Haven R. R. Co. 19 N. Y. 341.]

(*c*) 1 Saund. 291; [Rose v. Oliver, 2 John. 365.]

(*d*) Weall v. King, 12 East, 454; Max v. Roberts, 2 New Rep. 454; 12 East, 89, S. C.; and see Powell v. Layton, 2 New Rep. 365; Brotherton v. Wood, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408, S. C.; 1 Saund. 291 *e*, and note (*e*). See the conflicting decisions on this subject, referred to in Pozzi v. Shipton, 8 Ad. & El. 963; Selw. N. P. 10th ed. 410, 411. [In an action of tort against two for misfeasance in the performance of a joint contract, the plaintiff cannot recover against either defendant without proving a joint contract. Wright v. Gear, 6 Vt. 151. Where the duty is one imposed by law, and a contract is not necessary to be stated, and the declaration is in tort, and the *gravamen* a misfeasance, it *seems* the plaintiff may recover against one defendant without the other. Wright v. Gear, *supra*.]

(*e*) *Ib.* *Ibid.*

ligence, no valid objection can be made in respect to the non-joinder of a party; although they may be sued in assumpsit, in which event the objection would be tenable. (f) There is a settled distinction in this respect between mere personal actions of tort, and such as concern *real* property; for if only one tenant in common of *realty* be sued in trespass, trover, or case, for anything respecting the land held in common, as for not setting out tithe, &c. he may plead the tenancy in common in abatement. (g) And in an action of debt for money lost at play, the defendant may plead in abatement, that the money was due from others as well as from himself, such action, though given by statute, being founded on contract. (h) These distinctions between the effect of too many or too few persons being made defendants in actions in form * *ex contractu* and in those *ex delicto*, may in some cases render it advisable to adopt, if practicable, the latter form of action, when it is doubtful who should be made the defendants.

In an action on the *case*, and in *trover* or *replevin*, if one of the defendants was acquitted, he was not entitled to costs, (i) but in *trespass* it was otherwise, unless the judge certified that there was reasonable cause for making the acquitted person a defendant. (j) And now, by 3 & 4 W. 4, c. 42, s. 32, one of several defendants acquitted in an action on the *case*, or for a tort, may recover his costs; (k) and this constitutes a very important consideration in commencing an action; and although it might be desirable to include a party as a defendant in order to exclude his evidence, yet unless it be certain that a verdict will be obtained against him, it will be imprudent to join him; because, if acquitted, he would probably recover his costs, and they may be set off or deducted from the damages and costs recovered by the plaintiff against another defendant or defendants, and may be nearly equal to, if not exceed, the sum payable to the plaintiff. (l) And it is now the course, in an action on the *case* or

(f) *Govett v. Radnidge*, 3 East, 62; *Ansell v. Waterhouse*, 2 Chitty's Rep. 1; *Leslie v. Wilson*, 3 B. & B. 171; *Bretherton v. Wood*, 3 B. & B. 54; 6 Moore, 141, 154, 158; 9 Price, 408, S. C. But the declaration must be framed accordingly. *Ib.*; 6 Moore, 154; 9 Price, 408; *Ansell v. Waterhouse*, 2 Chitty's Rep. 1. As against common carriers the non-joinder of a copartner cannot even in assumpsit be now pleaded in abatement. 11 Geo. 4 and 1 W. 4, c. 68, s. 5.

(g) 1 Saund. 291 e; *Mitchell v. Tarbutt*, 5 T. R. 651. See *Bristow v. James*, 7 T. R. 257; *Bac. Abr. Joint Tenants*, K; *Hardyman v. Whittaker*, 2 East, 574. [See *Sumner v. Tileston*, 4 Pick. 308.]

(h) *Bristow v. James*, 7 T. R. 257. *Sed quere*, see 28 Ashhurst J.'s MS. Paper Books, 233; [Hill v. Davis, 4 Mass. 137; *Burnham v. Webster*, 5 Mass. 270.]

(i) *Dibben v. Cooke*, 2 Stra. 1005; *Tidd*, 9th ed. 986.

(j) 3 & 4 W. 3, c. 11; *Tidd's Prac.* 9th ed. 986. If, however, all the defendants joined in pleading, the acquitted defendant was only entitled to forty shillings costs. *Ib.* *Ibid.*; *Hughes v. Chitty*, 2 M. & Sel. 172; *Holroyd v. Breare*, 4 B. & Ald. 47, 700.

(k) The 3 & 4 W. 4, c. 42, s. 32, enacts that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom such cause shall be tried shall certify upon the record under his hand that there was a reasonable cause for making such person a defendant in such action.

(l) *George v. Elston*, 1 Bing. N. C. 513; 1 Hodges, 63; 3 Dowl. 419, S. C. where, in an action against three for an irregular dis-

trover against several persons, at the close of the *plaintiff's case and evidence*, if there be no proof against one of the defendants, immediately to acquit him, so that he may thereupon instantly be enabled to give evidence for the remaining defendants. (*m*) And as well before as since the 3 & 4 W. 4, c. 42, s. 32, it was and is considered improper to join all the parties present at the time of an irregular distress or other tort, with a view merely to exclude evidence; (*n*) and the fair way is to bring the action against the landlord, or at most against the landlord and broker, and not to include the appraisers or the man in possession; (*o*) and where a policeman joined as a defendant with others obtained a verdict, it was held that he was absolutely entitled to costs under 10 Geo. 4, c. 44, independently of the enactment in 3 & 4 W. 4, c. 42, s. 32. (*p*)

Where separate actions have been brought against several defendants for the same act of trespass committed by them concurrently, the party against whom the last action was commenced may plead the pendency of the first in abatement. (*q*) A recovery against one of several parties who jointly committed a tort, precludes the plaintiff from proceeding against any other party not included in such action. (*r*) Thus in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in a field where several persons are concerned, the recovery against one will be a bar to an action against the others; (*s*) and where the plaintiff had previously recovered in an action against his servant for quitting his service, it was decided that he could not also support an action against the person for seducing away such servant. (*t*) In these cases the court will in general on a summary application stay the proceedings in the second action, where it is manifest that the entire damages have been recovered in the first. (*u*) But where the evidence and the damages in the two actions might be different, as where two persons on different occasions have published the same libel, separate actions may be supported against each. (*x*) So the recovery against one party in an action for criminal conversation, is no bar to an action against another party for a similar injury. (*y*)

As in the case of a breach of covenant, so in that of torts, the

tres, plaintiff recovered damages and costs, £43 against one, but the other two defendants obtained verdicts, and their costs were £37, and were set off against the plaintiff's claim. See *Chitty's Arch. Pr.* 7th ed. 457, as to setting off judgments and costs.

(*m*) *Child v. Chamberlain*, 6 C. & P. 215; 1 Mood. & Rob. 318, S. C.

(*n*) *Ib.*

(*o*) *Per Parke J. Ib.*

(*p*) *Humphrey v. Wodehouse*, 1 Bing. N. C. 206.

(*q*) *Boyce v. Bayliffe*, 1 Camph. 60, 61.

[But see *Livingston v. Bishop*, 1 John. 290; *Thomas v. Rumsey*, 6 John. 26.]

(*r*) *Brown v. Wootton*, Cro. Jac. 73, 74; Com. Dig. Action, K. 4, Z; *Martin v. Kennedy*, 2 B. & P. 70, 71; 1 Saund. 207 a; *Warden v. Bailey*, 4 Taunt. 88.

(*s*) *Broome v. Wootton*, Yelv. 68; *Martin v. Kennedy*, 2 B. & P. 71; Bul. N. P. 20.

(*t*) *Bird v. Randall*, 3 Burr. 1345; 1 Bl. Rep. 373, 387, S. C.

(*u*) *Martin v. Kennedy*, 2 B. & P. 71.

(*x*) *Martin v. Kennedy*, 2 B. & P. 69.

(*y*) *Gregson v. M'Taggart*, 1 Camph. 415

assignee of an estate is not liable for an injury resulting from any nuisance, or wrongful act, committed thereon before he came to the estate; but if he *continue* the nuisance, he may be sued for such continuance. (z) In some cases it is necessary, and in all cases it is judicious, prior to the commencement of the action, to require the defendant to abate the nuisance. (a) If a tenant for years erect a nuisance, and make an underlease to B., an action lies against either; (b) and if A. take the goods of C., and B. take them from A., C. may have his action against A. or B. at his election. (c)

8dly. Where the interest has been assigned, &c.

At common law, upon the death of the wrong-doer, the remedy for torts unconnected with contract in general determines; and as the statute 4 Edw. 3, c. 7, before referred to, (e) does not give any remedy against personal representatives, we shall find that few actions in form *ex delicto*, and in which the plea would be not guilty, could before the 3 & 4 W. 4, c. 42, s. 2, be supported against the executor * or administrator of the party who committed the injury. (f) Many of the preceding observations on the rule *actio personalis moritur cum persona*, in its relation to the death of plaintiffs, are equally applicable to the case of the death of the wrong-doer. (g)

4thly. In case of the death of the wrong-doer.

For injuries to the *person*, if the wrong-doer die before judgment, the remedy determines, and there is no instance of an action having been supported for such injuries against his personal representatives; (h) and certainly neither of the statutes afford any remedy.

In general also no action in form *ex delicto*, as trover, (h¹) case, (h²) or trespass, (h³) could, before the 3 & 4 W. 4, c. 42, s. 2, be supported against an executor, for any injury to *personal property*, committed by his testator. (k) If, however, the testator converted the property into money, assumpsit was sustainable against his executor, (k¹) or if

(z) Com. Dig. Action on the Case, Nuisance, B.; Dyer, 320; Rosewell v. Prior, 2 Salk. 460; Bush v. Steinman, 1 B. & P. 409; ante, 54, 55.

(a) Winemore v. Greenbank, Willes, 583; Brent v. Haddon, Cro. Jac. 555; 5 Co. 100, 101.

(b) Rosewell v. Prior, 2 Salk. 460; Bush v. Steinman, 1 B. & P. 409.

(c) Bac. Abr. Actions, B.

(e) Ante, 77.

(f) Cowp. 374, 377; 1 Saund. 216, note (1); [Franklin v. Low, 1 John. 396.]

(g) See ante, 77, 78, 80, and notes.

(h) Cowp. 375; 1 Saund. 216, note; Com. Dig. Administration, B. 15; Chamberlain v. Williamson, 2 M. & S. 408.

(h¹) [Hench v. Metzger, 6 Serg. & R. 272; Jarvis v. Rogers, 15 Mass. 398; Barnard v. Harrington, 3 Mass. 288. Trover survives against an executor or administrator, by

statute in Alabama. Nations v. Hawkins, 11 Ala. 659. So in Massachusetts and other states. See ante, 80, note (d¹).]

(h²) [As to slander, Long v. Hitchcock, 3 Ham. 274. An action for libel does not survive the death of the defendant. More v. Bennett, 65 Barb. 338.]

(h³) [Nicholson v. Elton, 13 Serg. & R. 415; Harris v. Creashaw, 3 Rand. 14; Perry v. Wilson, 7 Mass. 395.]

(k) Hambly v. Trott, Cowp. 371; 1 Saund. 216 a; Com. Dig. Administration, B. 15. [As to replevin, Mellen v. Baldwin, 4 Mass. 480; Merritt v. Lambert, 8 Greenl. 128. As to debt, Benson v. Egerton, Brayt. 21; Smith v. Walker, 2 Car. Law Rep. 245; Tompkins v. Walters, 6 Call, 44; Turner v. Booker, 2 Dana, 300.]

(k¹) [United States v. Daniel, 6 How. (U. S.) 11; Cravath v. Plympton, 13 Mass. 454.]

the property came in specie to the possession of the latter, trover would be sustainable against him ; (*k*²) but then he was not to be sued in the character of executor, but as for his own tortious conversion. (*l*) It was said that an action was sustainable against the executor of a carrier for the loss of goods, but then the action should have been *framed in assumpsit*. (*m*) And an action of assumpsit might at common law be maintained against the executor of an attorney for unskillfulness or carelessness in the conduct of a cause, or rather professional business in which the testator was employed, being a breach of an express or *implied contract*. (*n*) Before the late statute abolishing that form of action in such a case, *debt* might have been supported by an executor for an escape on final process, but it could not have been maintained *against* the executor of a sheriff or gaoler ; for though the action is not in form *ex delicto*, it was considered founded on a tort, namely, the negligence and breach of duty of the deceased sheriff or gaoler ; (*o*) but where a sheriff had levied money under an execution, and died before he had paid^{*} it over, his executors might have been sued either in debt or *scire facias*, upon his return of *feri feci*, or by action of assumpsit, as for money had and received. (*p*) It was held, that an action could not be supported against an executor for a penalty forfeited by the testator under a penal statute ; (*q*) and that debt was not sustainable against an executor for treble the value of tithes which his testator ought to have set out. (*r*) At common law no executor ^{*} was answerable for a devastavit by his testator, on the principle that it is a personal tort, which dies with the person ; but by the statute 80 Car. 2, c. 7 (explained and made perpetual by 4 & 5 W. & M. c. 24, s. 12), " the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living." (*r*¹) So that since these statutes, if a judgment be obtained against an executor who afterwards dies, an action may be brought against *his* executor or administrator upon the judgment, suggesting a devastavit by the first executor. (*s*)

(*k*²) [See *Allen v. Harlan*, 6 Leigh, 42 ; *Catlett v. Russell*, 6 Leigh, 344.]

(*l*) *Hamblly v. Trott*, Cowp. 371, 374 ; 1 Saund. 216 a.

(*m*) *Powell v. Layton*, 2 New Rep. 370.

(*n*) *Wilson v. Tucker*, 3 Stark. Rep. 154.

(*o*) *Ante*, 77, 78 ; *Dyer*, 322 a ; *Berwick v. Andrews*, Lord Raym. 973 ; *Com. Dig. Administration*, B. 15 ; *Vin. Abr. Executor*, H. a. pl. 1, 7, 20. Debt cannot now be supported for an escape on final process. See 5 & 6 Vict. c. 98, s. 31 ; [Martin v. Bradley, 1 Caines, 124 ; *Logan v. Barclay*, 3 Ala. 361 ; *Cunningham v. Jaques*, 4 Harr. 42 ; *People*

v. Gibbs, 9 Wend. 29 ; *Cravath v. Plympton*, 13 Mass. 454.]

(*p*) *Perkinson v. Gilford*, Cro. Car. 539 ; *Cockram v. Welby*, 2 Show. 79 ; *Speake v. Richards*, 2 Show. 281 ; *Gilb. Executor*, 25 ; 2 Saund. 343.

(*q*) *Com. Dig. Administration*, B. 15.

(*r*) *Holl v. Bradford*, 1 Sid. 88 ; 1 E. & Y. 437 ; *Weekes v. Trussell*, 1 Sid. 181 ; 1 E. & Y. 440 ; *Morton v. Hopkins*, 1 Sid. 407 ; 1 E. & Y. 480 ; 2 Keb. 502 ; S. C. 2 Eagle on Tithes, 308.

(*r*¹) [Roberts's Penn. Dig. 258.

(*s*) 1 Saund. 219 d ; 2 Williams Exors. 3d ed. 1358.

But it would seem that an executor *de son tort* of an executor *de son tort* cannot be declared against *as such* upon the statutes. (*t*)

For injuries to *real* property no action in form *ex delicto* could in general be supported against the personal representatives of the wrong-doer. (*u*) If, however, trees, &c. were taken away and sold by the testator, assumpsit for money had and received lies against his executor; (*x*) and the latter is personally liable in trover if the trees, &c. remain in specie, and the executor refuse to restore them. (*y*) A court of equity will frequently afford relief against the executor of the wrong-doer, though at law the action *moritur cum persona*; (*z*) and, therefore, where a tenant for life cut down timber and died, relief was decreed against his executors in favor of the remainder-man. (*a*) There is an exception to the common law rule in the case of the executors of a deceased rector or vicar, &c. against whom, upon the custom of the realm, the successor may support an action on the case for waste and dilapidations permitted or committed by the deceased. (*b*)

By the 3 & 4 W. 4, c. 42, s. 2, before particularly referred to, it is enacted that an action of trespass, or trespass on the case, as the case may be, may be maintained against the personal representatives of a deceased wrong-doer, if the action be brought within a certain period therein mentioned; and in many cases of injury to *personal* or *real* property, in the event of the death of the *wrong-doer*, it will be essential well to consider whether this statute does not afford redress against his *personal representative*. (*c*)

* The bankrupt acts (*d*) do not contain any provisions enabling a person injured by any personal tort, committed by the bankrupt before his bankruptcy; as an assault or battery, (*e*) false imprisonment, slander, (*f*) libel, seduction, criminal conversation, and the like; or by any trespass or wrong to real (*g*) or personal property, (*h*) of which the bankrupt may be guilty; to ob-

5thly. In the case of bankruptcy.

(*t*) *Hammond v. Gatcliffe*, Andr. 252, 254; *Hodges v. Waddington*, 2 Vent. 360. See *Wells v. Tydell*, 10 East, 315.

(*u*) *Compere v. Hicks*, 7 T. R. 732; 1 Saund. 216, note (1); 2 Saund. 252 *a*, note (7).

(*x*) Per Lord Kenyon in *Utterson v. Vernon*, 3 T. R. 549; *Hambly v. Trott*, Cowp. 373, 374.

(*y*) *Hambly v. Trott*, Cowp. 373, 374; *Gordon v. Harper*, 7 T. R. 13; 1 Saund. 216 *a*.

(*z*) *Garth v. Cotton*, 3 Atk. 757; *Hodges v. Waddington*, 2 Vent. 360; *Landsdown v. Landsdown*, 1 Madd. 146; *Marquis of Ormonde v. Kynersley*, 5 Madd. 369.

(*a*) *Compere v. Hicks*, 7 T. R. 732; *Landsdown v. Landsdown*, 1 Jac. & W. 522; *Chit. Eq. Dig. Waste*.

(*b*) *Young v. Munby*, 4 M. & S. 183; *Sotters v. Lawrence*, Willes, 421; *Wise v. Met-*

calfe, 10 B. & C. 299; *Bird v. Ralph*, 4 B. & Ad. 830; 2 Ad. & El. 773.

(*c*) See the enactment verbatim, *ante*, 79, 80, and see cases there referred to. [Statutes greatly enlarging the number of causes of action, which survive, have been passed in many of the American states, and to these the reader is referred. See *ante*, 80, note (*d*¹); *Heinmuller v. Gray*, 44 How. Pr. 260; 13 Abb. Pr. 299; *Arundel v. Springer*, 71 Penn. St. 398; *Aldrich v. Howard*, 8 R. L. 125; *Prescott v. Knowles*, 62 Maine, 277.]

(*d*) 6 Geo. 4, c. 16; 1 & 2 W. 4, c. 56; 5 & 6 Vict. c. 123.

(*e*) *Walter v. Sherlock*, Hil. 23 Geo. 2, cited in *Goddard v. Vanderheyden*, 3 Wils. 272.

(*f*) *Lewis v. Piercy*, 1 H. Bl. 29, and note.

(*g*) *Gulliver v. Drinkwater*, 2 T. R. 261.

(*h*) *Parker v. Norton*, 6 T. R. 695; note

tain remuneration from the funds of the bankrupt, which become vested in the assignees for the benefit of the creditors. As a party thus injured cannot prove the damages he has sustained against the estate of the bankrupt, the only redress which is left to him is an action against the bankrupt; and this remedy is not therefore affected by the certificate of the latter. (i)

There are many instances in which the law reserves to a party the election to sue upon a contract, or in tort, for some wrong having relation to a contract express or implied between the parties. (k) It is evident that by selecting the latter form of proceeding, the advantage which the defendant might otherwise derive from his certificate may be obviated. Thus, if the plaintiff has an election to sue for money had and received, or in trover, he may maintain the latter, notwithstanding the bankruptcy of the debtor after the debt accrued. (l) And bankruptcy and certificate are no bar to an action in tort against a broker for selling out stock contrary to orders. (m)

The same rules hold in the case of an insolvent as in the instance of a bankrupt, with regard to a claim to damages for a tort ethly. In- committed by the insolvent. The insolvent act, (n) as be- solvency. fore observed, (o) only discharges the party as against those who are creditors, and who are described as such in his schedule. He remains liable for torts; and the discharge has no operation even against a claim for mesne profits accruing before, if unliquidated at the time of, the discharge. (p) And even where there has been, prior to the petition, a judgment in an action for damages, the court may remand the insolvent for a period not exceeding two years in the whole, at the suit of the plaintiff in such action, provided the damages were recovered for criminal conversation, seduction, breach of promise of marriage, malicious prosecution, libel or slander, or for any malicious injury, or "in any * action of trespass or tort to the person or property of the plaintiff therein, where it shall appear to the satisfaction of the said court that the injury complained of was malicious. (q)

Actions for torts committed by a woman before her marriage, must be brought against the husband and wife jointly. (r) For torts com-

to Alsop v. Price, Dougl. 167; Parker v. Crole, 5 Bing. 63. [See Bird v. Clark, 3 Day, 272; Shoemaker v. Keely, 2 Dall. 213; 8 C. 1 Yeates, 245; Sommer v. Wilt, 4 Serg. & R. 23; Kennedy v. Strong, 10 John. 269; Dussar v. Margatroyd, 1 Wash. C. C. 12.]

(i) As to proof of damages in general, Eden, 2d ed. 129. As to proof of damages where there has been a verdict or judgment, Eden, 2d ed. 131, 132, 135, 136; Greenway v. Fisher, 7 B. & C. 436; Haswell v. Thorngood, Eden, 2d ed. 709.

(k) See ante, 61; post; Russell v. Bell, 10 M. & W. 340.

(l) Parker v. Norton, 6 T. R. 695.

(m) Parker v. Crole, 5 Bing. 63. See Eden, 2d ed. 130.

(n) 7 Geo. 4, c. 57; 1 & 2 Vict. c. 110.

(o) Ante, 63, 64.

(p) Lloyd v. Peel, 3 B. & Ald. 407; Lloyd v. Neele, 2 Chit. Rep. 222.

(q) 7 Geo. 4, c. 57, s. 49; 1 & 2 Vict. c. 110, s. 78.

(r) Bac. Abr. Baron & Feme, Z.; Co. Litt. 351 b; Com. Dig. Baron & Feme, Y.;

mitted by the wife *during* coverture, as for slander, assaults, &c. or for any forfeiture under a penal statute, they must also be jointly sued; ^{7thly. In the case of marriage.} (s) and the plaintiff cannot in the same action proceed also for slander, assault, or other tort committed by the husband alone; (t) nor can the husband and wife be sued jointly for slander by both. (u) For assaults or trespasses, which may in legal contemplation be committed by two persons conjointly, and for which several persons may be jointly sued, (x) the husband and wife may be sued jointly for the joint act of both. (y) Detinue, it seems, can only be supported against the husband, if the detention be of goods delivered to the husband and wife during the coverture. (z) If a woman convert goods before her marriage, or during it, without her husband, trover may be supported against her and her husband. (a) For a conversion by husband and wife jointly, during coverture, the action of trover should perhaps in strictness be against him alone; but a declaration in trover against husband and wife, charging that "they converted the property to *their own use*" is at all events good after verdict. (b) A *feme covert* can only be sued for her own actual wrong or trespass, and cannot become a trespasser merely by her previous or subsequent assent during coverture; (c) but she may be jointly sued with her husband for her enticing away or harboring the servant of another. (d) A person may sue husband and wife jointly for her libel or slander, although she have committed adultery, and they live separate, but have not been divorced *a vinculo matrimonii*. (e) In an

[Jillson v. Wilbur, 41 N. H. 106, 110; Head v. Burton, 5 C. & P. 484; Sargent v. Gile, 8 N. H. 325; Whitmore v. Delano, 6 N. H. 545; Hawk v. Harman, 5 Binn. 43.]

(s) *Ib.* Ibid.; 1 Hawk. P. C. 3, 4; Bac. Abr. Baron & Feme, L.; [Carleton v. Haywood, 49 N. H. 314, 318; Horton v. Payne, 27 How. Pr. 374; Matthews v. Fiestel, 2 E. D. Smith, 90; Malone v. Stillwell, 15 Abb. Pr. 421; Hasbrouck v. Weaver, 10 John. 247. This applies to cases of pure and simple tort, and not where the substantive basis of the tort is the contract of the wife. Keene v. Hartman, 28 Penn. St. 497; Carleton v. Haywood, 49 N. H. 320. If the wrongful act of the wife is committed in the actual presence of the husband and by his direction, he alone is liable to be sued. Carleton v. Haywood, 49 N. H. 314. Under the law of New York (Code, § 114, *ante*, 32, note (v¹)), where a married woman carries on business in her own name, her husband should not be joined in an action for damages caused by a servant employed by her in such business. Gillies v. Lent, 2 Abb. Pr. (N. S.) 455. So, where the cattle of a married woman trespassed on the lands of another. Rowe v. Smith, 55 Barb. 417; S. C. 38 How. Pr. 37. See Eagle v. Swayze, 2 Daly, 140.]

(t) Swithin v. Vincent, 2 Wils. 227; Dyer, 19 a, pl. 112; Com. Dig. Baron & Feme, Y.

(u) *Ib.* Ibid.; Bac. Abr. Baron & Feme, L.

(x) See *ante*, 92.

(y) Anonymus, 1 Vent. 93; Keyworth v. Hill, 3 B. & Ald. 685, 687; Com. Dig. Pleader, 2 A. 2; Vine v. Saunders, 4 Bing. N. C. 102; 6 Dowl. 233; [Roadcap v. Sipe, 6 Grattan, 213; Carleton v. Haywood, 49 N. H. 320.]

(z) *Marsh's case*, 1 Leon. 312; Bac. Abr. Detinue; Isaac v. Clark, 2 Bulst. 308; Keyworth v. Hill, 3 B. & Ald. 689; Com. Dig. Baron & Feme, Y.

(a) *Marsh's case*, 1 Leon. 312; Draper v. Fulkes, Yelv. 165; Selw. N. P. 10th ed. Baron & Feme; [Kowing v. Manly, 49 N. Y. 192.]

(b) Keyworth v. Hill, 3 B. & Ald. 685. See Com. Dig. Baron & Feme, Y.; and Pleader, 2 A. 2; Catterall v. Kenyon, 2 G. & D. 545; Selw. N. P. 10th ed. 298; [Carleton v. Haywood, 49 N. H. 319, 320, 321.]

(c) Swithin v. Vincent, 2 Wils. 227; Co. Litt. 180 b, note (4); 357 b.

(d) Fawcett v. Beavres, 2 Lev. 63.

(e) Head v. Briscoe, 5 C. & P. 484. [This rule of the common law is not changed by any statute in New York (1869). Tait v. Culbertson, 57 Barb. 9; Matthews v. Fiestel, 2 E. D. Smith, 90; Malone v. Stillwell, 15 Abb. Pr. 421.]

action of trespass against husband and wife for her tort before coverture, or a wrong committed by her alone during the coverture, if she die before judgment, the suit will abate ; but if the husband die or become bankrupt, her liability will continue. (f)

* If the wife be sued alone for her tort before or after marriage, she must plead her coverture in abatement, and cannot otherwise take advantage of it ; (g) but if the husband and wife be sued jointly for torts of which they could not in law be jointly guilty, as for slander by both, if the objection appear on the face of the declaration the defendant may demur, move in arrest of judgment, or support a writ of error. (h)

(f) *Middleton v. Croft*, Rep. temp. Hardw. 399 ; Cullen, 392.
(g) *Ante*, 67.

(h) *Swithin v. Vincent*, 2 Wils. 227 ; Dyer, 19 a ; [*Carleton v. Haywood*, 49 N. H. 314.]

* CHAPTER II.

OF THE FORMS OF ACTIONS.

It was a general rule or maxim of law, that the sanction of the king's original writ, issued out of chancery, was an essential preliminary form to the institution of a suit in the common law courts. *Non potest quis sine brevi agere*; (a) this was the prevailing doctrine. The practice of proceeding by *bill* without the original writ from chancery, in personal actions and in ejectment, formed an exception to the rule. The practice of commencing an action by bill only obtained in each of the superior courts in the case of certain persons, privileged in regard to their official characters, or as officers of the courts, to be sued as being already present in court. And in the king's bench and exchequer the proceedings by bill in other cases was introduced by fictions, and afterwards sanctioned and legalized by usage. But the great variety of writs and bills led to so much intricacy and confusion, that, as regards *personal* actions, the former writs, bills, and proceeding were abolished, and the writs of summons, *capias*, and detainer were introduced by 2 W. 4, c. 39, and which writs do not, as formerly, set out the whole form and cause of action, but are only adopted as *modes* of bringing the defendant into court, and then, and not before, the *declaration*, stating the full form and cause of action, is delivered.

But although it is no longer necessary, as formerly, to state the *whole* cause of action and form of complaint in the writ, yet it is still necessary for the practitioner, before he issues any process under the uniformity of process act, 2 W. 4, c. 39, to decide on the *proper form of action* to be adopted, and to state it, though very concisely, in the writ, as by requiring the defendant to answer, "*in an action upon promises*," or "*in an action of debt*," or "*in an action of covenant*," or "*in an action on the case*," &c., and which form of action must afterwards be adhered to in the declaration, or the latter may be set aside for irregularity. Hence it is necessary for every practitioner to have a *competent knowledge of every form of action*, and its application, before he even commences the action. In this chapter we will give the forms of action full consideration.

(a) Bract. 413 b; 3 Bl. Com. 273; Gilb. foundation of a suit, see Stephen, 5th ed. Hist. C. P. 2; Steph. on Pl. 5th ed. 5, 8. As Appendix II. note (2).
to the origin of the issuing of writs as the

In considering the *forms of action*, it was always important to advert to the general principle, that the original writ, issued from the chancery, was the foundation of the suit, and essential to give * the court of common law authority to entertain it. The writ, whether actually or presumptively issued, had a double purpose and object. It gave the court in which the defendant was directed to appear cognizance of the suit, and it enjoined or enforced his appearance. With these views, the form and nature of the intended suit, and the ground of complaint, were formerly *fully or specifically* shown in the writ. The original writ, from the most ancient times, *defined and determined concisely the form of the action.* (b) At a very early period, specific forms of action were provided for such injuries as had then most usually occurred; and Bracton, observing on the original writs on which our actions were founded, declared them to be fixed and immutable, unless by authority of parliament. (c) These ancient forms, which had from time to time been collected and preserved in chancery, in a book called *The Register of Writs*, were, in the reign of Henry the Eighth, first printed and published in the book termed *Registrum Brevium.* (d)

Origin of the different forms of action.

At common law, also, though no form could be found in the Register adapted to the nature of the plaintiff's case, yet he was at liberty to bring a *special action on his own case*, and writs were framed accordingly, which were termed *magistralia*; (e) but as the officers of the court of chancery, whose duty it was to frame the writs for the solicitor, were found reluctant in new cases to frame the proper remedy, or doubted their authority to do so, (f) the legislature thought fit to enforce the duty to issue a proper writ; and it was enacted by statute Westminster 2d, (g) "that if it shall fortune in the chancery, that in one case a writ is found, and *in like case (consimili casu)* falling under like law (*i. e.* principle), and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ, or adjourn the plaintiffs until the next parliament, and that the cases be written in which they cannot agree, and that they shall refer such cases, (h) (or complaint) until the next parliament; and by consent of men learned in the law,

Enactments of stat. West. 2, that as new injuries arise, new writs to be framed.

(b) It may also be observed of the bill actually filed or exhibited, or presumed to be so, instead of the proceeding by original, that it always disclosed and gave fully the form and nature of the action, and in that respect was parallel with the declaration upon the original writ, and which declaration was confined to the form of action prescribed by the writ.

(c) 3 Bl. Com. 117. [See *Richardson v. Johnson*, 1 La. An. 389.]

(d) 4 Reeves, 426, 432; 2 Bl. Com. 183; Gilb. C. P. 4. Fitzherbert's *Natura Brevium* is a comment upon these ancient forms, which were called *brevia formata*.

(e) 8 Co. 47 b, 48 a; *Kinlyside v. Thornton*, 2 Bl. Rep. 1113; 3 Woodd. 168. It has been observed that there are many writs in the Register not according to law, B. 103, as trespass per baron and feme, for assaulting the wife and taking the goods of the husband. *Russell v. Corne*, 1 Salk. 119.

(f) 2 Reeves, 203; 2 Bl. Com. 50.

(g) 13 Edw. 1, stat. 1, c. 24. See observations on this statute, 3 Bl. Com. 123, 183, 184; 3 Woodd. 168; and Webb's case, 8 Co. 45 b to 49 b; 4 Reeves, 430.

(h) There appears a mistake in the statute book in the translation, which is here corrected.

a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants. (*h*¹) To this statute the copious production of new forms of writs, and the great encouragement and frequency of actions *on the case so infinitely various*, is to be attributed. (*i*)

* Notwithstanding these provisions, it was once thought that the circumstance of an action being of the first impression, and unprecedented, constituted a conclusive objection against it; and it is observable, that the statute Westminster 2d does not recognize or confer any right to frame writs in cases *entirely new*; (*k*) it merely gives or enforces the power to frame new writs by analogy to and upon the principle of such as had previously existed (*i. e. in consimili casu*). It has, however, been observed, that it by no means follows, that because in cases unprovided for by the Register the statute directs an action upon the case to be framed, that the action upon the case or a remedy for every new injury in general did not subsist at common law. (*l*) There is also the authority of Lord Kenyon for the doctrine, that whenever the common law recognizes or creates a legal right, it will also confer a remedy by action; (*m*) and Lord Chief Justice Pratt, in answer to the objection of novelty, said, that he wished never to hear it urged again, for torts are infinitely various, not limited or confined, and there is nothing in nature that may not be an instrument of mischief, and the special action on the case was introduced, because the law will not suffer an injury without affording a remedy, and there must be new facts in every special action on the case. (*n*) In the case of *Pasley v. Freeman*, (*o*) Mr. J. Ashhurst observed, that where cases are new in their *principle*, it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized by law to such new case, it will be just as competent to courts of justice to apply the acknowledged principle to any case which may arise two centuries hence as it was two centuries ago. However, the novelty of an action may frequently be fairly urged as a strong *presumptive* argument against it. (*p*)

When the prescribed form of action is to be found in the Register,

(*h*¹) [As to the origin and history of the action on the case, see, further, 3 Reeves's Hist. E. L. 89, 93, 243, 244, 391, 397.]

(*i*) 4 Reeves, 430; 3 Bl. Com. 51; 3 Woodd. 168.

(*k*) Stephen on Plead. 2d ed. 7, 8.

(*l*) Per Blackstone J. *Kinlyside v. Thornton*, 2 Bl. Rep. 1113; and per Dallas C. J. *Bretherton v. Wood*, 3 B. & B. 62, 63.

(*m*) *Birkley v. Presgrave*, 1 East, 226; [*Yates v. Joice*, 11 John. 140.]

(*n*) *Winsmore v. Greenbank*, Willes, 581; Bul. N. F. 79.

(*o*) 3 T. R. 63.

(*p*) Co. Litt. 81 *b*; *Russell v. The Men of Devon*, 2 T. R. 673; *Johnstone v. Sutton*, in error, 1 T. R. 517; *Le Caux v. Eden*, Doug. 602; *Barham v. Dennis*, Cro. Eliz. 770; *Sheriff v. James*, 1 Bing. 343; *The Duke of Newcastle v. Clark*, 8 Taunt. 620, 621; *Rennell v. Bishop of Lincoln*, 3 Bing. 256; [*Costigan v. Mohawk &c. R. R. Co.* 2 Denio, 609; *Farwell v. Boston & Worcester R. R. Co.* 4 Met. 55; *Williams v. County of Middlesex*, 4 Met. 78; *Hayden v. Cabot*, 17 Mass. 169, 172.]

the proceeding should not materially vary from it, (*q*) unless in those cases where another form of action has long been sanctioned by usage; (*r*) and the courts will not permit parties, even by agreement, to depart from the appropriate remedy; (*s*) for it has been considered to be of the greatest importance to observe the boundaries of the different actions, (*s*¹) not only in respect of their being most logically * framed, and best adapted to the nature of each particular case, but also in order that causes may not be brought into court confusedly and immethodically, and that the record may at once clearly ascertain the matter in dispute; a regulation which, since the different legislative provisions respecting costs (the right to which varies in different forms of action), has become of still greater importance. (*t*) Hence we find that even the slightest alterations in the form of action or of plea are usually introduced by express *enactment*, and not by mere rule of court, as in 3 & 4 W. 4, c. 42, s. 14, which declares, that an action of *debt on simple contract* shall be maintainable in any court of common law against an executor or administrator. (*t*¹)

Ancient prescribed forms not to be departed from.

Actions are, from their subject-matter, distinguished into *real*, *personal*, and *mixed*. *Real* actions are for the specific recovery of real property only, and in which the plaintiff, then called the demandant, claims title to lands, tenements, or heredit-

Actions are real, personal, or mixed.

(*q*) Bac. Abr. Abatement, H.; and this because *nihil simul incertum est et perfectum*, and the long adoption and use of a form is a strong argument in its favor.

(*r*) *Ib.* *Ibid.*; 4 Co. 94 b; 3 Woodd. 169; 4 Reeves, 432.

(*s*) Ker v. Osborne, 9 East, 381; Marshall v. Hopkins, 15 East, 309; *Shapcott v. Mugford*, 1 Lord Raym. 166. See, also, Peake's N. P. C. 128.

(*s*¹) [Vail v. Lewis, 4 John. 457, 458.]

(*t*) *Shapcott v. Mugford*, 1 Lord Raym. 168. Thus in *Savignac v. Roome*, 6 T. R. 129, 130, Lord Kenyon C. J. said, "It is of importance that the boundaries between the different actions should be preserved, and particularly in cases of this kind; for if in an action of trespass the plaintiff recover less than 40s., he is entitled to no more costs than damages, whereas a verdict with nominal damages only, in an action on the case, carries full costs." And in *Israel v. Douglas*, 1 H. Bl. 243, Mr. J. Wilson said, "It is highly necessary that the forms of actions should be kept distinct." And in *Turner v. Hawkins*, 1 B. & P. 476, Eyre C. J. observed, that, "undoubtedly we ought to endeavor to preserve the distinction of actions; and if it appear upon the pleadings that actions of a different nature have been mixed, that is a sufficient ground for arresting the judgment." And in *Reynolds v. Clarke*, 1 Stra. 635, the chief justice ob-

served, "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." So in *Orton v. Butler*, 5 B. & Ald. 654; 1 D. & R. 286, S. C., Abbott C. J. observes, "The law has provided certain specific forms of action for particular cases, and it is of importance that they should be preserved." See, also, *Bourden v. Alloway*, 11 Mod. 180; *Hayward v. Banks*, 2 Burr. 1114; 2 Saund. 47 b; 2 Inst. 434; *Lyne v. Moody*; *Fitzg.* 85; and see the observations of Park J. in *Deane v. Clayton*, 1 Moore Rep. 228.

(*t*¹) [If a party has a remedy at common law, and a remedy is given in the affirmative by statute without a negative express or implied of the action at common law, he may avail himself of either. *Almy v. Harris*, 5 John. 175; *Farmers' Turnp. Co. v. Coventry*, 10 John. 390; *Coxe v. Robbins*, 4 Halst. 384; *Colden v. Eldred*, 16 John. 220; *Bearcamp River Co. v. Woodman*, 2 Greenl. 404; *Fryeburg Canal Co. v. Frye*, 5 Greenl. 338; *Edwards v. Nichols*, 3 Day, 16; *Booker v. M'Robert*, 1 Call, 243; *Baltimore v. Howard*, 6 Harr. & J. 383; *Miles v. O'Hara*, 1 Serg. & R. 32; *Boar v. Heister*, 6 Serg. & R. 20. But where the remedy in the case is given by statute, and does not exist at common law, the declaration must be special on the statute. *Smith v. Woodman*, 28 N. H. 520.]

aments, in fee-simple, fee-tail, or for term of life, such as writs of right, formedon, dower, &c. *Personal* actions are for the recovery of a debt or damages for the breach of a contract, or a specific personal chattel, or a satisfaction in damages for some injury to the person, personal, or real property. In *mixed* actions, which partake of the nature of the other two, the plaintiff proceeds for the specific recovery of some real property, and also for damages for an injury thereto, as in the instance of an action of ejectment or of waste, or *quare impedit*. (u) We will confine our observations to such *personal* and *mixed* actions as most frequently occur in practice.

Personal actions are in form *ex contractu* or *ex delicto*, or, in other words, are for breach of *contract*, or for *wrongs* unconnected with contract. (u¹) Those upon *contracts* are principally assumpsit, debt, covenant, * and detinue; (x) and those for *wrongs* are case, trover, replevin, and trespass *vi et armis*. (x¹) We will take a concise view of the nature and particular applicability of each of these respective remedies, and of the action of ejectment, and of that of trespass for mesne profit; in effect a branch of trespass *quare clausum fregit*.

In arranging the law upon the *forms of action*, and their applica-

(u) Bract. 101 b; 3 Bl. Com. 117; Stephen on Pl. (5th ed.) 3. As to the various real actions, see Co. Litt. 239, note (1); 1 Bl. Com. c. 10; Bac. Abr. Actions in General, A. Now in general abolished by 3 & 4 W. 4, c. 27, s. 36. Mr. Serjeant Stephen considers that ejectment should be ranked as a personal rather than a mixed action, Stephen, 5th ed. 13, Appendix vii. note (3). But the statutes relative to writs of error, and the uniformity of process act, 2 W. 4, c. 39, seem to import that ejectment is not a *personal* but a *mixed* action.

(u¹) [In Cooper v. Landon, 102 Mass. 58, 60, Chapman C. J. said: "The distinction that is recognized in legal proceedings between contracts and torts is founded in the nature of things, and is important. The system of special pleading regarded it with great strictness, and our present system adheres to it. Its utility is, that it gives the opposite party notice of what is claimed against him." In New York it is held that although the code of procedure has abolished the distinctions between forms of action, yet the intrinsic difference between actions, in their nature, remains, and the principles by which the different forms of action were previously governed still remain, and control in determining the rights of parties. Eldridge v. Adams, 54 Barb. 417; Goulet v. Asseler, 22 N. Y. 225; Booth v. Farmers' &c. Bank, 65 Barb. 459. So in California, Lubert v. Chauviteau, 3 Cal. 458. So, in North Carolina, Parsley v. Nicholson, 65 N. Car. 207. So, in Wiscon-

sin, Kewanee County v. Decker, 30 Wisc. 624. So, in Missouri, Magwire v. Tyler, 47 Missou. 115. In Texas the distinction of actions, as known to the common law practice, has never been recognized. Towner v. Sayre, 4 Texas, 28; Banton v. Wilson, 4 Texas, 400; Kellers v. Reppien, 9 Texas, 443.]

(x) Detinue may in some respects be considered an action *ex delicto*. As, however, it may be joined with debt, it is classed with actions *ex contractu*; see *post*. The actions of account and annuity, though sometimes adopted, do not often occur in practice, and therefore they are not observed upon.

(x¹) [In Massachusetts, under the practice act, there are only three divisions of personal actions: First. Actions of contract, which include those heretofore known as actions of assumpsit, covenant, and debt, except for penalties. Second. Actions of tort, which include those heretofore known as actions of trespass, trespass on the case, trover, and all actions for penalties. Third. Replevin. Genl. Sts. c. 129, § 1. See Levy v. Gowdy, 2 Allen, 320. And in declaring, the action shall be named in conformity with the above provision. Genl. Sts. c. 129, § 2. The practice act makes no change in the rules of evidence applicable to the various causes of action comprehended under the general designation of actions of tort. Winship v. Neale, 10 Gray, 382; Blake v. Damon, 103 Mass. 199; Genl. Sts. c. 129, § 81; Harrison v. Bailey, 99 Mass. 620.]

bility, care must be observed only to notice such decisions as elucidate the rules or create exceptions or distinctions upon this particular subject, and to avoid crowding the context with an accumulation of instances. Thus, after stating that an *assumpsit* is the proper form of action on all simple contracts, and consequently on a bill of exchange or promissory note, it would be improper to introduce numerous decisions on the requisites of bills of exchange or promissory notes, which would throw no light on the application of the form of action, but extend the inquiry to the whole law respecting bills of exchange. So after stating that *covenant* is the proper remedy on a lease, cases respecting the construction of particular covenants ought not to be introduced. It will be found, that, notwithstanding the very extensive alterations introduced respecting *writs or process* to bring a defendant into court in *personal* actions by the uniformity of process act, 2 W. 4, c. 39, and generally throughout the *practical* mode of conducting an action by numerous modern rules, and in the *pleadings* in an action by Reg. Gen. Hilary Term, 4 W. 4, yet there have been very few alterations respecting the *forms of action*, and which will principally be found in 3 & 4 W. 4, c. 42, such as the enactments authorizing actions of debt on simple contract against executors or administrators, and allowing actions for torts to *personal or real property* to be sustained by and against executors.

Suggestions on the mode of considering and arranging the subject.

I. ASSUMPSIT.

This action is so called from the word *assumpsit*, which, when the pleadings were in Latin, was always inserted in the declaration, as descriptive of the defendant's undertaking. (y) It may be defined to be an action for the recovery of damages for the non-performance of a *parol* or *simple* contract, or, in other words, a contract not under seal nor of record, (z) circumstances which distinguish this remedy from * others; for the action of *debt* is, in legal consideration, for the recovery of a *debt eo nomine* and *in numero*, and is most frequently brought upon a deed; (a) and the action of *covenant*, although in form for the recovery of *damages*, can only be supported upon a contract under *seal*. *Assumpsit*, however, is not sustainable, unless there have been an express *contract*, or unless the law will *imply* a contract. (a¹) Though founded upon *contract*, this action, as

I. ASSUMPSIT.

(y) The word "*undertook*" was always considered proper to be inserted in the declaration, though the promise be founded on a legal liability, and though in evidence it would be implied. Bac. Abr. *Assumpsit*, F. But it is sufficient to aver that the defendant *promised*. And the forms of declaration prescribed by Reg. Gen. Trin. Term, 1 W. 4, adopt only the word "*promise*," and are in other respects more concise than heretofore.

(z) Contracts are, 1, of *Record*; 2, by *Specialty*; or 3, by *Parol*. The term *parol*, or *simple* contract, signifies every contract not under seal nor of record, whether verbal or written. *Mitchinson v. Hewson*, 7 T. R. 351, note (a).

(a) *Rudder v. Price*, 1 H. Bl. 551, 554, 555; Bull. N. P. 167.

(a¹) To maintain *assumpsit* there must be a privity between the parties, but it may be in fact or in law. Between each party to

distinguishable from the *brevia formata*, and falling within the provision of the statute of Westminster, may be termed an action on the case. (b) It is now, however, called an action of assumpsit, and when the term "case" is adopted in a statute, or otherwise, an action for a *tort*, and in form *ex delicto*, is usually intended, and not an action in form *ex contractu*. (c)

A minute inquiry into the *history* of this action would at this time be matter of curiosity, rather than of practical utility. The origin and progress of it may be collected from the reports and works referred to in the note; (d) and from which it appears, that till *Slade's case* (e) a notion prevailed, that on a simple contract for a sum certain, or for any money demand, the action must be in debt; but it was holden in that case, that the plaintiff had his election either to bring assumpsit or debt. From the penning of the statute 3 Jac. 1, (f) it is probable the action of assumpsit was not then much in use; but afterwards it became very general, (g) and it is now more frequently adopted for the recovery of money due on a simple contract than the action of debt. From these cases it also appears, (h) that though before *Slade's case* an action on the case might be supported as well for the nonfeasance of a contract, as for misfeasance or malfeasance in the performance of it, yet from the form of the writ in Fitzherbert, (i) it may be collected that the remedy was not similar to our present action of assumpsit, but rather resembled the present form of a declaration in case for a *tort*. (k)

The breach of all *parol* or *simple* contracts, whether verbal or written, or express or implied, (l) or for the payment of money, or for the performance or omission of any other act, is remediable by action of assumpsit. (l) Thus it lies to recover *money* lent by the plaintiff to the defendant, or paid by the plaintiff on the account of the defendant at * his request, or had and received by the defendant to the use of the plaintiff. In some cases, though money may have been received by the defendant tortiously, or by duress of the person or goods, it may be recovered in this form of action, the law implying a contract in

a bill or negotiable note and every other party there is sufficient privity in law to sustain the action. *Frazer v. Carpenter*, 2 McLean, 237.]

(b) Bac. Abr. Assumpsit; Gilb. C. P. 6; *Mast v. Goodson*, 2 Bl. Rep. 850; [*Carter v. White*, 32 Il. 509.]

(c) *Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

(d) *Rudder v. Price*, 1 H. Bl. 550-555; *Walker v. Witter*, Doug. 6, 7; *Slade's case*, 4 Co. 91-95; 3 Wooddes. 168, 169, note (c); *Reeves*, vols. iii. & iv.; 1 Vin. Abr. 276; Bro. Abr. Action sur le Case, pl. 7, 69, 72; Fitz. N. B. 94, A. note (a), 145, G.; *Barry v. Robinson*, 1 New Rep. 295; *Mast v. Goodson*, 2 Bl. Rep. 850.

(e) 4 Co. 91-95; 44 Eliz.

(f) 3 Jas. 1, c. 8.

(g) Per Buller J. *Walker v. Witter*, Doug. 6.

(h) Bro. Abr. Action sur le Case, pl. 7, 69, 72; Fitz. N. B. 94 A. 145, G.; Bac. Abr. Assumpsit, C.

(i) N. B. 94, A.; 3 Wooddes. 165; *Mast v. Goodson*, 2 Bl. Rep. 850.

(k) *Rudder v. Price*, 1 H. Bl. 550, 551.

(l) *Lamb v. Bunce*, 4 M. & S. 275; *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Coulston*, 1 Taunt. 112.

(l) [This action is founded on a promise express or implied. *Metcalf v. Robinson*, 3 McLean, 364.]

favor of the party entitled (*m*) as against a person who has usurped an office, and received the known and accustomed fees of office, (*m*¹) but mere gratuitous donations cannot be recovered in assumpsit. (*n*) So assumpsit lies for the value of goods which the defendant by fraud induced the plaintiff to sell to an insolvent person, and afterwards obtained for his own benefit. (*o*) And where the goods of a trader, after his act of bankruptcy, are taken in execution, or otherwise tortiously disposed of without the concurrence of the assignees, they may waive the tort, and declare in assumpsit for money had and received, if the goods have been sold, (*p*) but they *must* adopt the latter form of action if they have affirmed and recognized the wrongful sale and waived the original tort. (*q*) Assumpsit also lies to recover money paid or goods delivered by a bankrupt by way of fraudulent preference; (*r*) and there are many other instances in which a party may waive the tort, and sue for money had and received. (*s*) But in these

(*m*) *Kitchin v. Campbell*, 3 Wils. 304; *King v. Leith*, 2 T. R. 144; *Lindon v. Hooper*, Cowp. 419; *Bul. N. P.* 131; *Gill v. Krymer*, 5 Moore, 525; *Edmeads v. Newman*, 1 B. & C. 418; 2 D. & R. 568, S. C.; *Morgan v. Palmer*, 2 B. & C. 729; 4 D. & R. 283, S. C.; [2 *Chitty Contr.* (11th Am. ed.) 905, 906, and cases in notes, 939, and notes; *Dana v. Kemble*, 17 Pick. 545; *Diamond v. Carpenter*, 3 John. 183; *Sturtevant v. Waterbury*, 2 Hall, 453. So this action lies for money unlawfully exacted and taken under color of office. See *Ripley v. Geltson*, 9 John. 201; *Clinton v. Strong*, 9 John. 370; *Williams v. Dodd*, Superior Court of Connecticut cited 2 Esp. N. P. 154, note (1). So for money paid under a judgment subsequently reversed. *Sturges v. Allen*, 10 Wend. 354. So for services by a woman who was induced to marry the defendant and live with him upon a fraudulent representation that he was a single man, when in fact he had another wife alive. *Higgins v. Brown*, 9 Missou. 497.]

(*m*¹) [2 *Chitty Contr.* (11th Am. ed.) 948.]

(*n*) *Boyter v. Dodsworth*, 6 T. R. 681; *Wills v. Wells*, 8 Taunt. 264; *Crockford v. Winter*, 1 Campb. 124.

(*o*) *Hill v. Ferrott*, 3 Taunt. 274; *Abbotts v. Barry*, 5 Moore, 98; *Edmeads v. Newman*, 1 B. & C. 418; 2 D. & R. 568, S. C.

(*p*) *Russell v. Bell*, 10 M. & W. 340.

(*q*) *Brewer v. Sparrow*, 7 B. & C. 310; 1 M. & R. 2, S. C.

(*r*) See *Smith v. Hodson*, 4 T. R. 211; *Edmeads v. Newman*, 1 B. & C. 418; 2 D. & R. 568, S. C.

(*s*) *Waterhouse v. Keen*, 4 B. & C. 211; 6 D. & R. 265, S. C.; *Pratt v. Vizard*, 5 B. & Ad. 808. Thus, where a party who had worked into his neighbor's land, and dug coal, which he had sold, retaining the proceeds, died intestate, it was held that an action for money had and received by the intestate was maintainable against his ad-

ministratrix for the value of the coal so disposed of, such remedy being independent of the statute 3 & 4 W. 4, c. 42, s. 2, and not affected thereby; *Powell v. Rees*, 2 N. & P. 571; 7 Ad. & El. 426, S. C. [The whole extent of this doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds. *Parker C. J.* in *Jones v. Hoar*, 5 Pick. 289, 290; *Gilmore v. Wilbur*, 12 Pick. 120; *Gardiner Manuf. Co. v. Heald*, 5 Greenl. 381; *Smith v. Hatch*, 46 N. H. 146; *Carleton v. Haywood*, 49 N. H. 314, 321; *Mann v. Locke*, 11 N. H. 246; *Woodbury v. Woodbury*, 47 N. H. 22; *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227; *Smith v. Smith*, 43 N. H. 536; *Miller v. Miller*, 7 Pick. 183; *Lamb v. Clark*, 5 Pick. 193; *Merrick J.* in *Brown v. Holbrook*, 4 Gray, 102, 103; *Stearns v. Dillingham*, 22 Vt. 624; *Morrison v. Rogers*, 2 Scam. 317; *Gray v. Griffiths*, 10 Watts, 431; *Willett v. Willett*, 3 Watts, 277; *Elliot v. Jackson*, 3 Wisc. 649; *Pike v. Bright*, 29 Ala. 332; *Sanders v. Hamilton*; 3 Dana, 552; *Putnam v. Wise*, 1 Hill, 234; *Guthrie v. Wickliffe*, 1 Marsh. 83; *Centre Turnpike Co. v. Smith*, 12 Vt. 212; *O'Conley v. Natchez*, 1 Sm. & M. 31; *Ripley v. Geltson*, 9 John. 201; *Stockett v. Watkins*, 2 Gill & J. 326; *Bigelow v. Jones*, 10 Pick. 161; *Richardson v. Kimball*, 28 Maine, 463; *Balch v. Patten*, 45 Maine, 41; *Dickenson v. Whitney*, 4 Gilman, 406; *Jameson v. Moon*, 43 Miss. 598; *Staat v. Evans*, 35 Ill. 455; *Hutton v. Wetherald*, 4 Harr. (Del.) 38; *Budd v. Heiler*, 27 N. J. (Law) 43; *Berly v. Taylor*, 5 Hill (N. Y.), 577; *Strother v. Butler*, 17 Ala. 733; *O'Reer v. Strong*, 13 Ill. 688. Some benefit must have actually accrued to the wrong-doer. *Webster v. Drinkwater*, 5

cases it is sometimes most advisable to declare in case or trover, in order to avoid a set-off, or the effect of the law of mutual credit, in the case of bankruptcy. (t) So a master may sue in assumpsit a person who has enticed away or harbored his apprentice for the work and labor of such apprentice; (u) and it lies to recover back rents tortiously received. (x) In some cases also where money has been extorted by duress of goods, it may be recovered back in assumpsit. (y)

Greenl. 319. Tenants in common must join in assumpsit, when a tort to the common property is waived, and they sue in contract. *Gilmore v. Wilbur*, 12 Pick. 120. And where the tort is waived, joint trespassers may be sued in assumpsit. *Gilmore v. Wilbur*, *supra*. In this action the plaintiff waives all torts and special damages, and recovers only for the money received; and in most cases he so far confirms the defendant's acts, that he cannot deny his right to receive it. *Hanna v. Pegg*, 1 Blackf. 181; *Wilder v. Aldrich*, 2 R. I. 518. And if the tort has once been waived, the defendant cannot afterwards be treated as a wrong-doer. *Lythgoe v. Vernon*, 5 H. & N. 180. In *Hill v. Davis*, 3 N. H. 384, where one took the goods of another and converted them to his own use, without the license of the owner, it was decided, upon an agreed statement of facts, that the tort might be waived and assumpsit be supported for the price, although it was agreed in the statement of facts, that there was no contract. So, in the case of *Gordon v. Bruner*, 49 Missou. 570, where the property converted had not been sold by the wrong-doer, but still remained in his hands, it was held, that the owner might waive the tort and sue as for goods sold and delivered. See, also, *James v. Buzzard*, *Hempst. 200*; *Alsbrook v. Hathaway*, 3 Sneed (Tenn.), 454; *Halleck v. Mixer*, 16 Cal. 574; *Goodenow v. Snyder*, 3 Iowa, 599; *Fratt v. Clark*, 12 Cal. 89; *Chambers v. Lewis*, 2 Hilton, 591; *Hudson v. Gilliland*, 25 Ark. 100; *Hawk v. Thorn*, 54 Barb. 164. But this is held not to be the correct doctrine, in other cases. As in *Jones v. Hoar*, 5 Pick. 285, it was held that in an action for a trespass in cutting and carrying away trees from the plaintiff's land, he cannot waive the tort and sue in assumpsit, unless the trees have been sold by the defendant. *Parker C. J.* said: "There is no contract express or implied between the parties, and therefore an action *ex contractu* will not lie." "No case can be shown where assumpsit as for goods sold lay in such a case, except it be against the executor of the wrong-doer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining. Such was the case of *Hambly v. Trott*," *Cowp.* 371. So in *Brown v. Holbrook*, 4 Gray, 102, 103, *Merrick J.* said the action "must be upon a count for money had and received, and not for goods sold and delivered." In *Smith v. Hatch*, 46 N. H. 146, it appeared that the

plaintiff and defendant had made a parol agreement, by which the plaintiff was to convey to the defendant a tract of wild land in part-payment for a farm which defendant was to convey to the plaintiff. The plaintiff had conveyed the wild land to the defendant, but the defendant refused to convey the farm to the plaintiff, although the defendant had sold the wild land and received some money for it. The action was *indebitatus assumpsit*, for land sold, and for money had and received. *Sargent J.* said: "If the defendant had not sold this land, the count for money had and received could not have been maintained, though the count for land sold would then have been well enough. But the plaintiff may now, by adopting the act of selling on the part of the defendant and ratifying the same, recover the money which defendant received for the land under a count for money had and received." Where there was a mistake in delivering goods under a contract, and the purchaser fraudulently returned to the vendor other goods, the vendor was permitted to waive the tort and recover the price at which his own goods were sold by the fraudulent purchaser in assumpsit for money had and received. *Gray v. Griffiths*, 10 Watts, 431. But after the plaintiff has sued in tort and recovered judgment for taking the goods, he cannot waive the tort and maintain assumpsit for the proceeds. *Floyd v. Brown*, 1 Rawle, 121.]

(t) *Smith v. Hodson*, 4 T. R. 211. See *Hunter v. Princep*, 10 East, 378; *Thomason v. Frere*, 10 East, 418; *Fair v. M'Iver*, 16 East, 130. Where the ground of action is assumpsit, declaring in tort will not render a person liable who would not have been so on his promise. *Green v. Greenbank*, 2 Marsh. 485; *Bretherton v. Wood*, 3 B. & R. 62. See *Lee v. Shore*, 1 B. & C. 94; 2 D. & R. 198, S. C.

(u) *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Coulston*, 1 Taunt. 112; [*James v. Le Roy*, 6 John. 274; *Ayer v. Chase*, 19 Pick. 556, 558; *Trongott v. Byres*, 5 Cowen, 480.] When not, *Gye v. Felton*, 4 Taunt. 876.

(x) *Boyter v. Dodsworth*, 6 T. R. 683; *Bul. N. P.* 133; *Lindon v. Hooper*, *Cowp.* 414.

(y) *Pratt v. Vizard*, 5 B. & Ad. 808; *Astley v. Reynolds*, 2 Stra. 915; *Irving v. Wilson*, 4 T. R. 485; *Bul. N. P.* 132; *Hills v. Street*, 5 Bing. 37; *Shaw v. Woodcock*, 7 B. & C. 73; 9 D. & R. 889, S. C.; 1 Wightw. 22; *Parsons v. Landby*, 1 Wightw. 22; [*Wakefield v. Newbon*, 6 Q. B. 276.]

But the proprietor of cattle wrongfully distrained *damage feasant*, who has paid money for the purpose of having them redelivered to him, *cannot recover back that money in this action, because such mode of proceeding would impose great difficulties on the defendant, by not apprising him of what he was to defend; and the law has provided specific remedies for trying the legality of a distress, viz. replevin, trespass, or trover. (z) Again, this action lies to recover interest, (z¹) if not secured by deed; money due on an account stated; or for services and works of different descriptions, and for poundage due to the sheriff; (a) or for the sale, use, or hire of goods or of land, or other personal or real property; and upon bills of exchange, whether foreign or inland; checks on bankers; promissory notes; policies of insurance on ships, or on lives, or against fire; (a¹) or on charter-parties, when not under seal; and upon the implied contract to contribute towards the general average. (b)

Assumpsit is also sustainable specially upon wagers (b¹) and feigned issues; and upon awards, where the submission was not by deed; (b²) also, to recover money due on an award made by virtue of an order of nisi prius; (c) on by-laws; (d) on an Irish, (e) or foreign judgment; (f) or for legacies charged on land; (g) though debt is more usual in the last three instances. But neither assumpsit nor any other

(z) *Lindon v. Hooper*, Cowp. 414; *Shipwick v. Blanchard*, 6 T. R. 298. See *Marshall v. Hopkins*, 15 East, 309.

(z¹) [*Tucker v. Randall*, 2 Mass. 284; *Greenleaf v. Kellogg*, 2 Mass. 268; 2 Chitty Contr. (11th Am. ed.) 950 *et seq.* and notes. But after acceptance of the principal an action will not in general lie for the interest. *Tillotson v. Preston*, 3 John. 229; *Johnson v. Brannan*, 5 John. 268.]

(a) *Stanton v. Suliard*, Cro. Eliz. 654.

(a¹) [Otherwise, if the policy of insurance is under seal. *Marine Ins. Co. of Alexandria v. Young*, 1 Cranch, 332; *S. P. Strobel v. Large*, 3 McCord, 114.]

(b) *Dobson v. Wilson*, 3 Campb. 480; *Birkley v. Pregrave*, 1 East, 220; *Price v. Noble*, 4 Taunt. 123.

(b¹) [*Phillips v. Ives*, 1 Rawle, 36; 1 Chitty Cont. (11th Am. ed.) 735 *et seq.*]

(b²) [*Mitchell v. Burt*, 7 Cowen, 185; *Bates v. Curtis*, 31 Pick. 247; *Tullis v. Sewell*, 3 Ohio, 516; *Brady v. Brooklyn*, 1 Barb. 534. But not, where made in pursuance of a submission under seal. *Holmes v. Smith*, 49 Maine, 242; *Tullis v. Sewell*, 3 Ohio, 10; *Horton v. Rolands*, 2 Porter, 79.]

(c) *Bonner v. Charlton*, 5 East, 139.

(d) Cases cited in *Company of Feltmakers v. Davis*, 1 B. & P. 98.

(e) *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C. See *Collins v. Lord*, *Matthew*, 5 East, 474.

(f) *Walker v. Witter*, Dougl. 1; *Messin v. Lord Massacreene*, 4 T. R. 493; *Henry v.*

Adey, 3 East, 221; *Hall v. Odber*, 11 East, 124; *Vaughan v. Plunkett*, in note to *O'Callaghan v. Marchioness Thomond*, 3 Taunt. 85; [*Buttrick v. Allen*, 8 Mass. 273; *post*, 119. See, in reference to judgments of other states of the Union, *Lambkin v. Nance*, 2 Brevard, 99; *Shumway v. Stillman*, 6 Wend. 447; *M'Kim v. Odom*, 12 Maine, 94, 110; *India Rubber Co. v. Hoit*, 14 Vt. 92. So an action of assumpsit may be maintained in Massachusetts upon an instrument made in another state, and a specialty by the law of that state, if, by the law of Massachusetts, it is a simple contract. *M'Clees v. Burt*, 5 Met. 198.]

(g) *Ewer v. Jones*, 2 Salk. 415; 6 Mod. 27; *Lord Rayn.* 937; but see *Webb v. Jiggs*, 4 M. & Sel. 113; *Braithwaite v. Skinner*, 5 M. & W. 313; and *Wms. Exors.* 3d ed. 1514-1518. [It lies on an express promise by a devisee to pay a specific sum charged on the land devised. *Beecker v. Beecker*, 7 John. 99; *Kelsey v. Dayo*, 3 Cowen, 133; *Tole v. Hardy*, 6 Cowen, 333; *Van Orden v. Van Orden*, 10 John. 30; *Brown v. Furer*, 4 Serg. & R. 313; *Gauze v. Wiley*, 4 Serg. & R. 504. One who takes land devised to him, on condition of his paying a legacy or an annuity, is liable in assumpsit for the legacy or annuity, without any express promise to pay. *Felch v. Taylor*, 13 Pick. 133; *Swasey v. Little*, 7 Pick. 296; *Sheldon v. Purple*, 15 Pick. 528; *Adams v. Adams*, 14 Allen, 65.]

form of action at law is sustainable for a pecuniary legacy payable out of the general assets of the testator; (*h*) or for a distributive share of an intestate's property, to which the plaintiff is entitled, (*i*) although the personal representative has promised payment; unless there be evidence showing that he holds the money, not as executor or administrator, but in his individual character upon a new contract for a loan of it to him. (*k*) It may also be supported for money due for tithes, where there has been an agreement for a composition; (*l*) but unless there have been such a composition, the only remedy is in a court of equity or in the ecclesiastical courts; or in debt upon the statute, (*m*) to recover the treble value of the tithe omitted to be set out, and which act extends only to prædial tithes that are capable of being set out in kind. (*n*) This form of action is also maintainable for money due for *tolls*, (*n*¹) or to recover the value of goods which should have been rendered in specie for toll; but in such case the declaration * must state that the goods were of some certain value. (*o*) Assumpsit also lies for money due for port duties, and for *stallage*, where there is a legal liability to pay, although there has not been an express contract, (*p*) and this although trespass might be sustainable, because the owner may waive the tort. (*p*) So it lies for contributions to party-walls; (*q*) or canal calls; (*r*) or on promises to pay money in consideration of forbearance to sue the defendant, or a third person; or in consideration of services or works done; (*r*¹) or goods sold to the defendant, or a third person at the defendant's request; and upon contracts to guaranty; (*s*) indemnify; (*t*) to serve and em-

(*h*) *Deeks v. Strutt*, 5 T. R. 690; *Jones v. Tanner*, 7 B. & C. 544; 1 M. & R. 420, 8 C. Secus, as to a specific legacy after assent. *Wms. Exors.* 3d ed. 1516. [In many of the American states assumpsit or contract will lie for a pecuniary legacy, without any express promise. *Farwell v. Jacobs*, 4 Mass. 635; *Cowdin v. Perry*, 11 Pick. 503; *Jones v. Richardson*, 5 Met. 249; *Colwell v. Alger*, 5 Gray, 67; *Brooks v. Lynde*, 7 Allen, 64; *Kent v. Dunham*, 106 Mass. 586; *Warren v. Rogers*, 2 Root, 166; *Knapp v. Hanford*, 6 Conn. 176; *Goodwin v. Chaffee*, 4 Conn. 163; *Clark v. Herring*, 5 Binn. 33; *Cowell v. Oxford*, 6 N. J. (Law) 432; *Woodruff v. Woodruff*, 3 N. J. (Law) 552; *Smith v. Lambert*, 80 Maine, 137; *Prescott v. Morse*, 62 Maine, 447. In North Carolina, see *M'Neil v. Quince*, 2 Hayw. 153. In New York, *Kelsey v. Deyo*, 3 Cowen, 133; *Tole v. Hardy*, 6 Cowen, 333; *De Witt v. Schoonmaker*, 2 John. 243; *Wilson v. Wilson*, 3 Binn. 559.]

(*i*) *Jones v. Tanner*, 7 B. & C. 542; 1 M. & R. 420, 8 C.

(*k*) *Gregory v. Harman*, 1 M. & P. 209.

(*l*) *Post*, vol. ii.; *Bac. Abr. Tithes*, Y. D. d.; *Bul. N. P.* 188-191.

(*m*) 2 & 3 Edw. 6, c. 13.

(*n*) *Bul. N. P.* 188; *Eagle on Tithes*, 150.

Where the tithes do not exceed the annual value of 10*l.*, the remedy, except in certain cases, is under 5 & 6 W. 4, c. 44.

(*n*¹) [*Bearcamp River Co. v. Woodman*, 2 Greenl. 404; *Proprietors &c. v. Taylor*, 6 N. H. 499; *Chesley v. Smith*, 1 N. H. 20; *Quincy Canal v. Newcomb*, 7 Met. 276; *Central Bridge Corp. v. Abbott*, 4 Cush. 473. See *Chesnut Hill Turnp. Co. v. Martin*, 12 Penn. St. 361.]

(*o*) *Mayor of Reading v. Clarke*, 4 B. & Ald. 368; *The Earl of Falmouth v. Penrose*, 6 B. & C. 385; 9 D. & R. 452, 8 C.

(*p*) *The Mayor of Newport v. Saunders*, 3 B. & Ad. 411.

(*q*) 14 Geo. 3, c. 78; *Peck v. Wood*, 5 T. R. 130; *Beardmore v. Fox*, 8 T. R. 214. See *Sangster v. Birkhead*, 1 B. & P. 303; [*Ingles v. Brighthurst*, 1 Dall. 341; *Hart v. Rucher*, 5 Serg. & R. 1.]

(*r*) *Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

(*r*¹) [Assumpsit lies for counsel fees. *Wilson v. Burr*, 25 Wend. 386.]

(*s*) 1 Saund. 211 a; *Wain v. Warlters*, 5 East, 10.

(*t*) *Goddard v. Vanderheyden*, 3 Wils. 262. See *Taylor v. Higgins*, 3 East, 169; *Toussaint v. Martinant*, 2 T. R. 105; *Cowell v. Edward*, 2 B. & P. 268.

ploy; (u) or perform works; (x) and against attorneys and solicitors, (x¹) wharfingers, (y) surgeons, (z) innkeepers, (a) carriers (a¹) and other bailees, (a²) for neglect or other breach of duty. Assumpsit is also the proper remedy for a breach of a promise to marry; and against a vendor for not delivering goods bought; (a³) or against the vendee for not accepting goods sold; or for not delivering a bill of exchange in payment for the same; (b) or upon an express warranty of the goodness or quality of any personal chattel, either on the sale or exchange thereof, or upon an express or implied warranty as to the property therein (c) and by and against vendors and purchasers for not completing a contract of sale, and for not rendering a just account of moneys or goods. (d) So where there has been an express agreement not under seal between landlord and tenant; or where the law implies a contract on the part of the latter to manage the farm in a husbandlike manner; this action may be sustained for the breach of such contract. (e) But where the tenant has been guilty of voluntary waste, it is usual to declare in case, unless there be also a money demand, which might be included in a declaration in assumpsit. (f) And by the statute, (g) the executor of a tenant for life may, in assumpsit, recover a proportion of rent up to the day of his testator's death, where the tenancy determined on such death; though when the tenant held under a lease granted in pursuance of a leasing power, the remainder-man must sue for the whole rent on such lease. (h) The

(u) See *Hulle v. Heightman*, 2 East, 145; 8 C. 4 Esp. Rep. 77; *Martyn v. Hind*, Cowp. 437.

(x) *Elsee v. Garward*, 5 T. R. 143; [*Sidwell v. Evans*, 1 Penn. 383; *Canfield v. Merrick*, 11 Conn. 425.]

(x¹) [Assumpsit lies against an attorney for negligence in transacting the business of his profession. The facts which show a breach of duty amounting to tortious negligence show also a breach of promise implied from the consideration of hire. *Stimpson v. Sprague*, 6 Greenl. 471; *Ellis v. Henry*, 5 J. J. Marsh. 248; *Church v. Mumford*, 11 John. 479; *Cook v. Bloodgood*, 7 Ala. 683; *Varnum v. Martin*, 15 Pick. 440.]

(y) *Baker v. Liscoe*, 7 T. R. 171; *post*, vol. ii. 262.

(z) 1 Saund. 312, note; *Slater v. Baker*, 2 Wils. 359; 8 Co. 32.

(a) *Beauett v. Mellor*, 5 T. R. 273; [*Dickinson v. Winchester*, 4 Cush. 115; *Bradish v. Henderson*, 1 Dane Ab. 310.]

(a¹) [School District in Medford v. Boston, *Hartford & Erie Railroad Co.* 102 Mass. 552, 554, 555.]

(a²) [*Bank of Mobile v. Huggins*, 3 Ala. 206; *Cooper v. Halsabeck*, 5 Blackf. 14; *Cooper v. Berry*, 21 Geo. 526; *Reardon v. Farrington*, 7 Ark. 364; *Kenniard v. Jones*, 3 Graham, 183; *Ferrier v. Wood*, 9 Ark. 25.]

(a³) [For not delivering goods when payment was to be made in goods, *Marshall v. McPherson*, 8 Gill & J. 333.]

(b) *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582.

(c) *Post*, vol. ii. 256 *et seq.*; 2 Bl. Com. 451; 3 Bl. Com. 160; 1 Rol. Abr. 90; [*Mahurin v. Harding*, 28 N. H. 128, 130; *Evertson v. Miles*, 6 John. 138; *Hallock v. Powell*, 2 Caines, 216; *Kimball v. Cunningham*, 4 Mass. 505; *Timrod v. Shoolbred*, 1 Bay (S. Car.), 324; *Byers v. Bostwick*, 2 Treadw. (S. Car.) Const. 75; *Hillman v. Wilcox*, 30 Maine, 170; *Wood v. Ashe*, 3 Strobb. (S. Car. 64; *Fowler v. Williams*, 2 Brevard, 304.

(d) 1 Marsh. 115; *Topham v. Braddick*, 1 Taunt. 572; *post*, vol. ii. 250.

(e) *Powley v. Walker*, 5 T. R. 373; *Lagh v. Hewitt*, 4 East, 154; *Roe v. Ward*, 1 H. Bl. 99.

(f) *Ib. Ibid.*; *Govett v. Radnidge*, 3 East, 70.

(g) 11 Geo. 2, c. 19, s. 15. As to the apportionment of rent in other cases, see 4 & 5 W. 4, c. 22, s. 1; *Neale v. Mackenzie*, 2 Cr. M. & R. 84; *Oldershaw v. Holt*, 12 Ad. & El. 590.

(h) 1 Swanst. 337; 2 Saund. 282 *c*, note (2); 8 Ves. 311; 2 Ves. & B. 334; 2 Bro. C. C. 659.

difficulty of investigating * a disputed account before a jury seems also to constitute no legal objection to this action. (i)

The action of assumpsit was, until the 3 & 4 W. 4, c. 42, in general the only remedy against an executor or administrator, for the breach by the testator of a contract not under seal, which was made with him; (k) for (unless in the court of exchequer, in which wager of law was not allowed), (l) *debt* was not sustainable against an executor, as such, upon the simple contract of his testator; although it lay against an executor on a simple contract made with him in that character. (m) And in general assumpsit is the only remedy for the recovery of an instalment due on a simple contract, (m¹) in respect of an entire sum payable by instalments, the whole of which have not accrued due; as debt is not sustainable in such case. (n) Where a simple contract creates a collateral liability, as for the payment of the debt of a third person, debt not being sustainable, assumpsit is the only form of action. (o) For the same reason, assumpsit is the only remedy at the suit of the payee, not being the drawer, or indorsee of a bill of exchange against the acceptor, or of the indorsee of a promissory note against the maker. (p) And on an award to perform any act, except to pay money, assumpsit is the only remedy, unless the submission were by bond. (q) Formerly it was thought, that in action of debt on simple contract, the precise sum stated to be due in the declaration must be recovered, or that the plaintiff would be nonsuited; (r) and therefore at that time it was usual, when the amount of the debt was uncertain, to declare in assumpsit; but as this notion no longer prevails, and the plaintiff will recover, if he prove any sum to be due to him, though less than that stated in the declaration, it is no longer material in this respect whether the plaintiff declare in assumpsit or debt. (s)

When a party has different securities of different descriptions for the same debt or demand, and from the same person, he must found his action on that security which is in law of the higher

(i) *Tompkins v. Willshear*, 5 Taunt. 431; 1 Marsh. 115.

(k) *Barry v. Robinson*, 1 New Rep. 293; 9 Co. 86 b.

(l) 3 Bl. Com. 347; 9 Co. 88 a.

(m) *Riddell v. Sutton*, 5 Bing. 200. See post, 126.

(m¹) [*Tucker v. Randall*, 2 Mass. 283. It lies for interest payable at specified times, although the principal is not yet payable. *Greenleaf v. Kellogg*, 2 Mass. 568; *Tucker v. Randall*, 2 Mass. 283, 284; *Hastings v. Wiswall*, 8 Mass. 455; *Cooley v. Rose*, 3 Mass. 221; *Sparks v. Garigues*, 1 Binn. 152. In some cases where a party has covenanted to do an act and failed in the performance, the covenantee has been allowed to recover back the consideration paid, in

assumpsit. *Weaver v. Bentley*, 1 Caines, 47; *D'Utriecht v. Melchor*, 1 Dall. 428; *Howes v. Barker*, 3 John. 509; *Selby v. Hutchinson*, 4 Gilman, 319.]

(n) *Rudder v. Price*, 1 H. Bl. 547; *Beckwith v. Nott*, Cro. Jac. 504; 2 Saund. 303, note (6); 337, 350, 374; *Fitzg.* 302; *Com. Dig. Action, F.*; 3 Co. 22 a; post, 127.

(o) *Hardw.* 486; *Com. Dig. Debt, B.*; *Purslow v. Bailey*, 2 Ld. Raymond, 1040.

(p) *Bishop v. Young*, 2 B. & P. 78; *Webb v. Geddes*, 1 Taunt. 540. See post, 122 and 127, as to when debt is sustainable.

(q) 2 Saund. 62 b, note (5).

(r) 3 Bl. Com. 155.

(s) *M'Quillin v. Cox*, 1 H. Bl. 249; *Rudder v. Price*, 1 H. Bl. 550; *Walker v. Witter*, Dougl. 6.

nature and efficacy. The law has prescribed different forms of action on different securities. Thus, assumpsit cannot in general be supported when there has been an express contract under seal or of record, which relates to the same subject-matter, and is still in force, (*s*¹) but the party must proceed in debt or covenant where the contract is under seal, (*s*²) or in debt or *scire facias* if it be of record, even though the debtor, after such contract were made, expressly promised (*s*³) to perform it. (*t*) * And if there be a charter-party under seal between the master and freighter, assumpsit will not lie by the owners for freight, which the defendant by the deed covenanted with the master to pay. (*u*) But if the owners of a ship be not charged directly on the contract of charter-party, but upon their general liability, they may be sued in case for negligence in conveying the goods, notwithstanding the charter-party be under seal, entered into by the master, and whereby he covenanted to convey the cargo: the action not being inconsistent with the provisions of the deed, and the master, contracting as such, not as part-owner. (*x*) If the deed be only exe-

(*s*¹) [Hinkley v. Fowler, 15 Maine, 285; Gannum v. Ohio Ins. Co. Wright, 214; Fletcher v. Piatt, 7 Blackf. 522; Andrews v. Callander, 13 Pick. 484; Young v. Preston, 4 Cranch, 239; Codman v. Jenkins, 14 Mass. 93; Brown v. Gauss, 10 Missou. 265; Andrews v. Montgomery, 19 John. 162. It cannot be supported on a domestic judgment, or a judgment rendered in a sister state. Vail v. Mumford, 1 Root, 142; Bain v. Hunt, 3 Hawks, 572; India Rubber Co. v. Hoyt, 14 Vt. 92; Andrews v. Montgomery, 19 John. 162; Garland v. Tucker, 1 Bibb, 361; McKim v. Odom, 12 Maine, 94.]

(*s*²) [Richards v. Killam, 10 Mass. 243, 247; McManus v. Cassidy, 66 Penn. St. 260; Codman v. Jenkins, 14 Mass. 93; Warren v. Ferdinand, 9 Allen, 357.]

(*s*³) [Landis v. Urie, 10 Serg. & R. 321; Codman v. Jenkins, 14 Mass. 99; Miller v. Watson, 5 Cowen, 195; Gillion v. Stewart, 7 Watts, 116; Hawkes v. Young, 6 N. H. 300; Anderson v. Solomon, 2 Const. Ct. 329; Davis v. Gibson, Cam. & N. 102; Richards v. Killam, 10 Mass. 239; Bliss v. Negus, 8 Mass. 46. But it has been held that where there is a covenant to pay money, and part has been paid, assumpsit will lie on a promise to pay the balance. Danforth v. Schoharie Turnp. Co. 12 John. 277; Stamp v. Estill, Peck, 178.]

(*t*) 1 Roll. Abr. 11, 517; 1 Leon. 293; 2 Leon. 110; Bennis v. Guylidley, Cro. Jac. 506; Darnall v. Morgan, Cro. Jac. 598; Balstrode v. Gilburn, 2 Stra. 1027; Tournais v. Martinnant, 2 T. R. 100, 105; Atty v. Parish, 1 New Rep. 108. See the observation of Bayley J. on this case in Tilson v. The Warwick Gas Light Company, 4 B. & C. 266; 7 D. & B. 381, S. C.; Hunter v. Princep, 10 East, 378; The East India Company v. Lewis, 3 C. & P. 358; [Knowlton v.

Tilton, 38 N. H. 257, 261; Andrews v. Montgomery, 19 John. 162.] A foreign judgment does not merge a simple contract debt, Hall v. Odber, 11 East, 118, 126; Lyman v. Brown, 2 Curtis, 559, 561; Taylor v. Bryden, 8 John. 173. Where a defendant granted and assigned by indenture certain demised premises to the plaintiff, who, having been distrained upon for rent in arrears to the superior landlord before the assignment, brought assumpsit to recover money paid under the distress, and relied upon an express promise by the defendant to repay it, it was held that, as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise, as it was not founded on a new consideration. Baber v. Harris, 1 P. & D. 300; 9 Ad. & El. 532, S. C. See, also, Gwynne v. Davy, 1 M. & G. 857; Harris v. Goodwyn, 9 Dowl. 409; and West v. Blake-way, 9 Dowl. 846. But if money be lent, and a mortgage deed be afterwards executed to secure the repayment, and the mortgage deed contain no covenant to pay the mortgage money, the mortgagee may sue for money lent, and the mortgage deed will be no answer to the action. Yates v. Asten, 12 L. J. R. N. S. Q. B. 160.

(*u*) Schack v. Anthony, 1 M. & Sel. 573; Bell v. Kymer, 3 Campb. 549, note (a). Where it does not lie for interest secured by deed, Schack v. Anthony, 1 M. & Sel. 573; Herries v. Jameson, 5 T. R. 556.

(*x*) Leslie v. Wilson, 6 Moore, 415; 3 B. & B. 171, S. C. [Assumpsit lies against a company for goods furnished, though its agents had contracted under their seals to pay the plaintiff for them, if he would furnish them to the company. Cram v. Bangor House, 3 Fairf. 354.]

cutted by the plaintiff and not by the defendant, the action must be in assumpsit; (*y*) and if there be an agreement by deed to let a house, by words not amounting to an actual demise, the party may maintain assumpsit for use and occupation. (*x*) So assumpsit lies for the use and occupation of a water-course. (*a*) Where on the separation of a husband and wife, he covenanted by deed with a trustee to pay an allowance for her separate maintenance, but made default, and the trustee provided the wife with necessaries, it was decided that he might support assumpsit on the common law obligation. (*b*) So if the contract under seal be invalid, (*b*¹) and there be any evidence upon which an implied contract can be raised, assumpsit may in some cases be supported; as where an annuity deed has been set aside, or objected to for some defect in the memorial, &c.; (*c*) and the taking a security by deed on usurious terms, for money previously lent and not affected by usury, would not bar an action of assumpsit for money lent. (*d*) And where a *feme covert*, without authority from her husband, contracted with a servant by deed, the service having been performed, it was decided, that the * servant might maintain assumpsit against the husband. (*e*) If in respect of a *new consideration*, there has been a *new* simple contract to pay a debt, or perform a contract under seal, assumpsit may be supported; (*f*) as on a promise to an assignee of a bond, to pay him in consideration of forbearance; (*g*) or on a promise by an heir, having assets by descent, to pay the debt of his ancestor

(*y*) Sutherland v. Lishnan, 3 Esp. Rep. 42. [Where a person accepts a deed-poll containing a reservation of certain duties to be performed by the grantee, assumpsit or contract lies for the breach of those duties. Guild v. Leonard, 18 Pick. 511; Nugent v. Riley, 1 Met. 117; Newell v. Hill, 2 Met. 180; Huff v. Nickerson, 27 Maine, 106; Goodwin v. Gilbert, 9 Mass. 510; Phelps v. Townsend, 8 Pick. 392; Hinsdale v. Humphrey, 15 Conn. 432; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Preble v. Baldwin, 6 Cush. 549; Fletcher v. M'Farlane, 12 Mass. 47; Pike v. Brown, 7 Cush. 133; Hatch v. Crawford, 2 Porter, 54; Carter v. Carter, 14 Pick. 424, 428; Rawson v. Copeland, 2 Sandf. Ch. 251. This action lies to recover the consideration money for land sold. Shephard v. Little, 14 John. 210; Vellie v. Myers, 14 John. 162; Bowen v. Bell, 20 John. 338; Wilkinson v. Scott, 17 Mass. 249; Butler v. Lee, 11 Ala. 885; 1 Chitty Contr. (11th Am. ed.) 422, note (2); 2 Ib. 119, note (y).] (*z*) Elliott v. Rogers, 4 Esp. Rep. 59. When not, Kirtland v. Pounsett, 2 Taunt. 145. See Dunk v. Hunter, 5 B. & Ald. 322. (*a*) Davis v. Morgan, 4 B. & C. 8; 6 D. & R. 42, S. C.

(*b*) Nurse v. Craig, 2 New Rep. 148.

(*b*¹) [Or be rescinded. Hill v. Green, 4 Pick. 114; Watchman v. Crook, 5 Gill & J. 240; Hitchcock v. Lukens, 8 Porter, 333.]

(*c*) Scurfield v. Gowland, 6 East, 241;

Waters v. Mansel, 3 Taunt. 56. See Kerri-son v. Cole, 8 East, 231; [Hitchcock v. Lukens, 8 Porter, 333. So, where there has been a waiver, abandonment, or rescinding of a contract under seal, so that a promise independent of that expressed in the sealed instrument may be implied. Little v. Morgan, 31 N. H. 499; Pierce v. Lacy, 23 Mass. 193; Brown v. Gauss, 10 Missou. 265; Gilman v. School Dist. 18 N. H. 215; Hill v. Green, 4 Pick. 114; Bassett v. Sanborn, 9 Cush. 58; Munroe v. Perkins, 9 Pick. 298; Hoyt v. Wilkinson, 10 Pick. 31; Mill Dam Foundry v. Hovey, 21 Pick. 417.]

(*d*) Saund. 295, note (1).

(*e*) White v. Cuyler, 6 T. R. 176.

(*f*) White v. Parkin, 12 East, 578; [Mill Dam Foundry v. Hovey, 21 Pick. 417, 428, 429; Monroe v. Perkins, 9 Pick. 298; Codman v. Jenkins, 14 Mass. 95; Hawker v. Young, 6 N. H. 800; Andrews v. Montgomery, 19 John. 162; Miller v. Watson, 7 Cowen, 39; Lattimore v. Hansen, 14 John. 430. A promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt as a debt by specialty. The original debt is merely a consideration, which renders the new promise available. Field's estate, 2 Rawle, 351; ante, 62, note.]

(*g*) Fenner v. Mears, 2 Bl. R. 1269; 1 Saund. 210, note (1); Innes v. Dunlop, 8 T. R. 595; [Landis v. Urie, 10 Serg. & R. 321.]

for the same consideration; (*h*) or on a promise to the husband to pay the arrears of a rent-charge due to the wife in her lifetime, although the rent was secured by deed; (*i*) or by the debtor himself, in respect of any new consideration. (*k*) And though it has been decided that assumpsit cannot be supported against a party, on his undertaking to pay the debt and costs recovered against himself, in consideration that the plaintiff would stay execution; (*l*) it is clear that such action might be supported on a similar undertaking made by a third person. (*m*) So between partners, who have by deed covenanted to account with each other, and to pay over what shall appear to be due; if they state an account, and one expressly promise to pay the balance, assumpsit may be supported, notwithstanding the deed. (*n*) And where a contract under seal has afterwards been varied in the terms of it by a distinct simple contract, made upon a sufficient consideration, such substituted or new agreement must be the subject of an action of assumpsit, and not of an action of covenant; (*o*) and where several things unconnected with a deed are, with other stipulations in a deed, afterwards made the subject of a parol contract, assumpsit may be sustained for the breach of it; (*p*) and when freight is recoverable *pro rata itineris*, assumpsit is the proper remedy, and not covenant on the charter-party. (*q*)

It is also a rule, that when a bond or other security, under seal or of record, has been accepted in *satisfaction* of a simple contract, the latter is *merged* in such higher security, and assumpsit is not sustainable; (*r*) unless such new security be void no account of usury (*s*) or under the annuity act, &c. in which cases the party may proceed on the original simple contract if valid. (*t*) So if an infant give a bond in a penalty for necessities, the bond being inoperative, the creditor *may proceed in assumpsit; (*u*) and if after a secret act of bankruptcy,

(*A*) 2 Saund. 137 *b*; Com. Dig. Action, Assumpsit, B. 1.

(*i*) Anonymous, 1 Leon. 293, cited in *Moorsom v. Kymmer*, 2 M. & Sel. 309.

(*k*) Brett v. Read, Cro. Car. 343; *Sterlyn v. Albany*, Cro. Eliz. 67; 12 Mod. 511; 1 Vin. Abr. 272; 1 Roll. Abr. 8, pl. 6; Bac. Abr. Assumpsit, A.

(*l*) Anon. Cowp. 128, 129. See Hutton, 77; *Flight v. Crasden*, Cro. Car. 8. *Semble*, that a party discharged out of custody on a *ca. sa.* on his promise to pay at a future period is liable to assumpsit upon such new agreement. *Vigers v. Aldrich*, 4 Burr. 2483.

(*m*) Anon. Cowp. 129; *Hardr.* 71; *Russell v. Haddock*, 1 Lev. 188. See, also, *Lewis v. Davison*, 4 M. & W. 654; [*Duncan v. Kirkpatrick*, 13 Serg. & R. 298.]

(*n*) *Foster v. Allanson*, 2 T. R. 488; *Smith v. Barrow*, 2 T. R. 478. When partners may sue each other, see *ante*, 45.

(*o*) *Heard v. Wadham*, 1 East, 630; *Burn v. Miller*, 4 Taunt. 748; [*Lawall v. Rader*, 24 Penn. St. 263; *M'Voy v. Wheeler*, 6 Por-

ter, 201; *Raymond v. Fisher*, 6 Missou. 29; *ante*, note (*f*); *Lattimore v. Hansen*, 14 John. 230; *Munroe v. Perkins*, 9 Pick. 298; *Hill v. Green*, 4 Pick. 114; *Sibley v. Brown*, 4 Pick. 139; *Baird v. Blagrove*, 1 Wash. 170. See *Casey v. Brush*, 2 Caines, 296, and *Baits v. Peters*, 9 Wheat. 556; *Langworthy v. Smith*, 2 Wend. 587; *Luciani v. The American Fire Ins. Co.* 2 Whart. 167; *McManus v. Cassidy*, 66 Penn. St. 260; *Vickary v. Moore*, 2 Watts, 451.]

(*p*) *Schack v. Anthony*, 1 M. & Sel. 575; *Foster v. Allanson*, 2 T. R. 479.

(*q*) *Ritchie v. Atkinson*, 10 East, 295; *Atty v. Lindo*, 1 New Rep. 240.

(*r*) *Acton v. Symon*, Cro. Car. 415; Bac. Abr. Debt, G.; *Obligation*, A. note; *Drake v. Mitchell*, 3 East, 259.

(*s*) 1 Saund. 295, note (1).

(*t*) *Scarfield v. Gowland*, 6 East, 241. [Or promissory note. *M'Crillis v. How*, 3 N. H. 348; *Hammond v. Hopping*, 13 Wend. 505.]

(*u*) Bul. N. P. 182; Co. Litt. 172; *Ayliff*

the bankrupt give a bond in satisfaction of a simple contract debt, it will not so far extinguish the simple contract as to preclude the creditor from petitioning thereon for a commission. (*x*) And the acceptance by a landlord of a bond for rent is no extinguishment of the rent, because the rent, issuing out of the realty, is a debt of as high a nature as a specialty claim. (*y*) But a judgment obtained on a bond would extinguish the demand on the bond. (*z*) The taking a *collateral* security of a higher nature, whether from the principal or a surety, does not preclude the creditor from suing the original debtor in assumpsit on the first contract; (*a*) though judgment may have been obtained upon such collateral security. (*b*)

It was also a branch of this rule, that assumpsit could not be supported for rent, &c. *issuing out of real property*, though not reserved by deed, unless an express promise to pay could be proved; (*b*¹) the demand, in the technical phrase, *savoring of the realty*, and being recoverable by higher remedies, as by debt or distress. (*c*) The statute 11 Geo. 2, c. 19, was passed to remedy the common law in this respect; since which, rent due on a demise not under seal may be recovered by action of assumpsit as well as debt. (*d*) And indeed, the notion that assumpsit does not lie for a duty, merely because the plaintiff claims an inheritance, in respect whereof *the duty is payable, appears no longer to exist.* (*e*) And if a party hold over, after the expiration of a demise by deed, he may be sued in assumpsit for use and occupation, to recover rent accruing due

v. Archdale, Cro. Eliz. 920. [See the doctrine stated in *Roof v. Stafford*, 7 Cowen, 179, and the cases there cited.] It has been held that an infant may bind himself by single bill, i. e. a bond without a penalty to pay for necessities. *Cupworth's case*, 1 Roll. Abr. 729; *Russell v. Lee*, 1 Lev. 86; *contra*, H. 21, H. 6, fo. 31, pl. 18, per Paston J.; and see P. 18, E. 4, fo. 2, pl. 7, per Brian C. J. and Littleton J. *Mennings v. Knopp*, 1 Roll. Abr. 18, pl. 2; *Cro. El. 700*; 1 Vin. Abr. 301; *Ayliff v. Archdale, Cro. El. 920*; *Plowd. 364 b*; 9 Vin. Abr. 380; *Co. Litt. 172 a*; 1 Tho. Co. Litt. 175. See note to *Harrison v. Fane*, 1 M. & Gr. 551. [An infant may bind himself for necessities for a contract, the consideration of which is open to inquiry. *Stone v. Dennison*, 13 Pick. 1; *Earle v. Reed*, 10 Met. 387, 389, 390; *Breed v. Judd*, 1 Gray, 455; *Dubose v. Wheddon*, 4 McCord, 221; *Locke v. Smith*, 41 N. H. 346. In an action upon such contract the promisee may show that it was made, in whole or in part, for necessities, and may recover thereon as much as the necessities were reasonably worth, and no more. *Earle v. Reed*, 10 Met. 387; *Bradley v. Pratt*, 23 Vt. 378; 1 Chitty's Contr. (11th Am. ed.) 198, note (*h*¹).]

(*z*) Bull. N. P. 182; *Ambrose v. Clendon*,

Stra. 1042; *Gray v. Fowler*, 1 H. Bl. 462.

(*y*) Bull. N. P. 182 *a*, cites 3 D'Anv. Abr. 507, A. 1. That rent, whether due on a lease or a parol demise, is of equal degree with a specialty, at least in the administration of assets, see Com. Dig. Administration, C. 2; Wms. Exors. 3d ed. 810.

(*z*) Bull. N. P. 182 *a*; 6 Co. 44.

(*a*) 2 Leon. 110; *White v. Cuyler*, 6 T. R. 176, 177; 18 Ves. 20; 5 Dow. 234.

(*b*) *Drake v. Mitchell*, 3 East, 251; [Willoughby v. Spear, 4 Bibb, 397; *Hills v. Elliott*, 12 Mass. 26; *Snow v. Thomaston Bank*, 19 Maine, 269.]

(*b*¹) [Smith v. Stewart, 6 John. 48; *Marshall v. M'Pherson*, 8 Gill & J. 338.]

(*c*) 1 Rol. Abr. 7, Action sur Case, O.; *Dartnall v. Morgan, Cro. Jac. 598*; *Reade v. Johnson, Cro. Eliz. 242*; *Johnson v. May*, 3 Lev. 150. See *Shuttleworth v. Garnet*, 3 Lev. 261; 3 Wooddes. 152, 153; *Freem. 234*.

(*d*) See as to the count for use and occupation, *post*, 122.

(*e*) *Mayor &c. of Nottingham v. Lambert*, Willes, 111, 118; [Epps v. Cole, 4 Hen. & M. 161; *Hayes v. Acre, Cam. & N. 19*; *Smith v. Sheriff*, 1 Bay, 444; *Cummings v. Noyes*, 10 Mass. 433; *Stier v. Surget*, 10 Sm. & M. 154; *Beach v. Gray*, 2 Denio, 94.]

after the end of the term. (*f*) A corporation aggregate may maintain *assumpsit for the use and occupation* of buildings or land, or *tolls*, though they did not grant the tolls to the occupier by any instrument under their common seal. (*g*)

Though a *statute* may in some respects be considered as a specialty, (*h*) yet *assumpsit* may be supported for money, &c. accruing *due to the plaintiff under the provisions thereof, (*h*¹) On a statute. he not being thereby restricted to any other particular remedy. (*i*) The order of an inferior court of justice may be the subject of this action if there be an express agreement to observe the same. (*k*)

This action is also sustainable upon the *judgment* of a *foreign* court, which is not considered as a debt of record in this country; (*l*) and it lies upon an Irish judgment, (*m*) and upon a On a judgment.

(*f*) *Davis v. Morgan*, 4 B. & C. 8; 6 D. & R. 42, S. C.; [1 Chitty Contr. (11th Am. ed.) 510 *et seq.* A contract express or implied is necessary to sustain *assumpsit* for use and occupation. *Boston v. Binney*, 11 Pick. 1; *Featherstonhaugh v. Bradshaw*, 1 Wend. 134; *Smith v. Stewart*, 6 John. 46; *O'Connor v. Tynes*, 3 Rich. 276; *Ward v. Bail*, 1 Branch, 271; *Stoddart v. Newman*, 7 Harr. & J. 252; *Eppes v. Cole*, 4 Hen. & M. 171; *Sutton v. Mandeville*, 1 Munf. 407; *Gunn v. Scovil*, 1 Bay, 315; *Smith v. Sheriff*, 1 Bay, 443; *Stockett v. Watkins*, 2 Gill & J. 326; *M'Gunnagle v. Thornton*, 10 Serg. & R. 251; *Bradley v. Davenport*, 6 Conn. 1; *Churchward v. Ford*, 4 H. & N. 446; *Sloper v. Saunders*, 29 L. J. Exch. 275; *Vandenheue v. Storrs*, 3 Conn. 203; *Tew v. Jones*, 13 M. & W. 12; *Ryan v. Marsh*, 2 Nott & McC. 156; *Wiggin v. Wiggin*, 6 N. H. 298; *Richey v. Hinde*, 6 Ham. 371; *Lloyd v. Hough*, 1 How. (U. S.) 153; *Young v. Buchanan*, 10 Gill & J. 149; *Curtis v. Treat*, 21 Maine, 525; *Beach v. Gray*, 2 Denio, 84; *Stacy v. Vermont &c. R. & Co.* 32 Vt. 551. No promise by a city will be implied in favor of one who, without request, performs a duty incumbent on the city to perform; as, where a city was bound to provide a place for holding a court, but did not, the judge cannot recover of the city for the rent of a room provided by himself for that purpose, without request. *French v. Auburn*, 62 Maine, 453; two judges dissenting with *Tapley J.*, who gave a dissenting opinion.]

(*g*) *Mayor of Stafford v. Till*, 12 Moore, 260; 4 Bing. 77, S. C.; *The Mayor & Burgesses of Carmarthen v. Lewis*, 6 C. & P. 508; [1 Chitty Contr. (11th Am. ed.) 380.]

(*h*) 1 Saund. 37, 38.

(*h*¹) [*Pawlet v. Sandgate*, 9 Vt. 621. As to the character of the declaration and the averments required in an action to collect assessments of shareholders in a corporation, see *Bethel &c. Bridge Co. v. Bean*, 58 Maine, 89; *Woonsocket Union R. R. Co. v. Taft*, 8 R. L. 411.

(*i*) *Bul. N. P.* 129; *Cowp.* 474; *Doug.* 10, note (2), 402, 407; *Peck v. Wood*, 5 T. R. 130; *Com. Dig.* Action upon the Statute. See *post*, 125; [*Hillsborough v. Londonderry*, 43 N. H. 451. It lies on an implied promise to discharge a legal obligation created by statute. *Bath v. Freeport*, 5 Mass. 325; *Watson v. Cambridge*, 15 Mass. 286.]

(*k*) *Smith v. Whalley*, 2 B. & P. 484.

(*l*) *Walker v. Witter*, 1 Doug. 4; *Hall v. Odber*, 11 East, 124. When not, *Buchanan v. Rucker*, 1 Campb. 63; *Sadler v. Robins*, 1 Campb. 253; [*Buttrick v. Allen*, 8 Mass. 273; *Bissell v. Briggs*, 9 Mass. 464; *Hubbell v. Coudry*, 5 John. 132; *Cole v. Driscoll*, 1 Blackf. 16; *Hoagland v. Rogers*, 3 Blackf. 501.]

(*m*) *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 571, S. C. [Assumpsit will not lie on a judgment rendered in the court of a sister state. *Garland v. Tucker*, 1 Bibb, 361; *Andrews v. Montgomery*, 19 John. 162; *M'Kim v. Odom*, 3 Fairf. 96; *India Rubber Co. v. Hoyt*, 14 Vt. 92; but see *Hubbell v. Coudry*, 5 John. 132; *Shumway v. Stillman*, 6 Wend. 447; *Lambkin v. Nance*, 2 Brevard, 99. Nor on a judgment of a justice of the peace. *Bain v. Hunt*, 3 Hawkes, 572; but see *Robinson v. Prescott*, 4 N. H. 450; *Mahurin v. Bickford*, 6 N. H. 567; *Collins v. Modiset*, 1 Blackf. 69; *Adair v. Rogers*, *Wright*, 428; in which judgments of a justice of the peace, rendered in another state are placed on the same footing with foreign judgments. As to the effect of a judgment obtained in one of the United States, when made the subject of an action in another, see *Armstrong v. Carson*, 2 Dall. 302; *Bartlett v. Knight*, 1 Mass. 401; *Bissell v. Briggs*, 9 Mass. 462; *Hitchcock v. Aicken*, 1 Caines, 460; *Taylor v. Bryden*, 8 John. 173; *Hubbell v. Coudry*, 5 John. 132; *Paulding v. Wilson*, 13 John. 192; *M'Rea v. Mattson*, 13 Pick. 53; *Thurber v. Blackburne*, 1 N. H. 342; *Shumway v. Stillman*, 4 Cowen, 292; *Holbrook v. Murray*, 5 Wend. 161; *Harding v. Alden*, 9 Greenl. 140; *Winchester v. Evans*, *Cooke*, 429; *Curtis v. Gibbs*, 1

Scotch decree. (n) But neither *assumpsit* nor debt can be sustained on the decree of the court of chancery for a specific sum of money, founded on equitable considerations only, (o) or on a mere interlocutory order of a court of law. (p) But an action may be maintained on a decree of a colonial court for payment of a balance due on a partnership account. (q) We have already noticed the instances in which an action is sustainable by a party against his *copartner*. (r)

Assumpsit cannot in general be supported against a *corporation*, because a corporation cannot contract by parol; (s) except in the case of promissory notes (t) and bills of exchange, where the power of drawing and accepting them is recognized by statute, (u) and other contracts sanctioned by particular legislative provisions. (v) But a corporation may be plaintiffs in this form of action; at least upon an executed consideration, as for use and occupation of buildings or land, or even tolls, where the tenant has held the premises under them, and paid rent. (w) And the London Gas

By and
against cor-
porations.

Penn. 399; *Miller v. Miller*, 1 Bailey. 242; *Wernwag v. Paulding*, 5 Gill & J. 500; *Hall v. Williams*, 6 Pick. 247; *Clarke v. Day*, 2 Leigh, 172; *St. Albans v. Bush*, 4 Vt. 58; *Aldrich v. Kinney*, 4 Conn. 380; *Bigelow Estoppel*, 185 *et seq.*; *Lyman v. Brown*, 2 Curtis C. C. 559, and cases cited; 2 Chitty *Constr.* (11th Am. ed.) 1177, note (b), and cases cited *Houlditch v. Donegall*, 2 Cl. & Fin. (Am. ed.) 470, note (2), and cases cited.]

(n) *Douglass v. Forrest*, 4 Bing. 686; 1 M. & P. 663, S. C.; *Russell v. Smyth*, 9 M. & W. 810.

(o) *Carpenter v. Thornton*, 3 B. & Ald. 52; but see *Henley v. Soper*, 8 B. & C. 20; 2 M. & R. 165, S. C.; [*Hugh v. Higgs*, 8 Wheat. 697; *Storer v. Hinkley*, 3 Caines, 87. Otherwise in Pennsylvania, *Evans v. Tatam*, 9 Serg. & R. 252. See *Dubois v. Dubois*, 6 Cowen, 494.]

(p) *Emerson v. Lashley*, 2 H. Bl. 248; *Fry v. Malcolm*, 4 Taunt. 705; *Carpenter v. Thornton*, 3 B. & Ald. 56.

(q) *Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 153, S. C.; *Saddler v. Robins*, 1 Campb. 253.

(r) *Ante*, 45. [See *Atwater v. Fowler*, 1 Hall, 181.]

(s) 1 Rol. R. 82. See *Slark v. Highgate Archway Company*, 5 Taunt. 792; *Mayor of Stafford v. Till*, 4 Bing. 77. [*Assumpsit* lies against a corporation when a duty is imposed on it by law, a promise to discharge it being implied by law. *Waller v. Bank of Kentucky*, 3 J. J. Marsh. 205. A corporation may be sued on an implied promise as well as individuals. *Smith v. First Congregational Meeting-house in Lowell*, 8 Pick. 178; *Baptist Church v. Mulford*, 3 Halsted, 182; *Chesapeake & Ohio Canal Co. v. Knapp*, 9 Peters, 541; *North Whitehall v. South Whitehall*, 3 Serg. & R. 117; *Sheldon v. Fairfax*, 21 Vt. 102; *Lime Rock*

Bank v. Macomber, 29 Maine, 564; *Petrie v. Wright*, 6 Sm. & M. 647; *Merrick v. Burlington P. R. Co.* 11 Iowa, 75; *New York R. Co. v. New York*, 1 Hilton, 587; *Palmer v. Medina Ins. Co.* 20 Ohio, 537; *San Antonio v. Lewis*, 9 Texas, 69; *Danforth v. Schaharrie Turmp. Co.* 12 John. 227; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Hayden v. Middlesex Turmp. Corp.* 10 Mass. 397; *Dunn v. St. Andrews Church*, 14 John. 118; *Ellis v. Essex Merrimac Bridge*, 2 Pick. 243; *Poultney v. Wells*, 1 Aiken, 180; *Savings Bank v. Davis*, 8 Conn. 202, and cases cited; *Waring v. Catawba Co.* 2 Bay, 209; *Fleckner v. United States Bank*, 8 Wheat. 357; *Bank of United States v. Dandridge*, 12 Wheat. 68; *Peterson v. New York*, 17 N. Y. 449; *Fister v. La Rue*, 15 Barb. 323; *Bulkley v. Briggs*, 30 Misson. 452; *Angell & Ames Corp. § 237*. A special action of *assumpsit* will lie against a bank for refusing to transfer stock. *Shipley v. Mechanics Bank*, 10 John. 484; *Kortwright v. Buffalo Com. Bank*, 20 Wend. 91; S. C. 22 Wend. 348. In Connecticut it has been decided that no action at law will lie against a county. *Ward v. County of Hartford*, 12 Conn. 404.]

(t) 3 & 4 Ann. c. 9.

(u) *Murray v. The East India Company*, 5 B. & Ald. 204; *Broughton v. The Manchester Water Works Company*, 3 B. & Ald. 1, 2; *Edie v. East India Company*, 2 Burr. 1216.

(v) 6 Vin. Abr. 317, pl. 49; *Rex v. Chippling Norton*, 5 East, 239, 242. See *Yarborough v. Bank of England*, 16 East, 6.

(w) *Mayor of Stafford v. Till*, 4 Bing. 75; 1 Moore, 260; *East London Water Works v. Bailey*, 4 Bing. 287. When not; 4 Bing. 283; *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608; *Tilson v. Warwick Gas Light Company*, 4 B. & C. 962, 968; 7 D. & R. 376, 381, S. C.

Company may sue in assumpsit for gas supplied, although there was no contract by deed under their seal. (x)

* Where there has been an express contract, the party injured may sustain an action of assumpsit, though the breach amount to a trespass; (y) but unless there have been such contract, or the law will, under the circumstances, imply a contract, the plaintiff must resort to another form of action. (z) Therefore, assumpsit for use and occupation cannot be supported where the possession is adverse, (z¹) and the relation of landlord and tenant has never subsisted between the parties, (z²) but the plaintiff must declare in ejectment or trespass. (a) Nor is assumpsit the proper remedy in the

In general there must be a contract.

(x) *The City of London Gas Light & Coke Company v. Nicholls*, 2 C. & P. 365. Until recently no definite rule was laid down as to the extent to which corporations aggregate could bind themselves without seal; but it has now been decided that they may so contract in cases where convenience, amounting almost to necessity, require that they should do so, as in hiring inferior servants, or doing acts frequently recurring, and too insignificant to be worth the trouble of affixing the common seal; and that it makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory, or whether the promises be express or implied. See *Beverly v. The Lincoln Gas Light & Coke Company*, 6 Ad. & El. 829; 2 N. & P. 283, 8 C.; *Church v. The Imperial Gas Light & Coke Company*, 6 Ad. & El. 846; *Mayor of Ladlow v. Charlton*, 6 M. & W. 822, and the cases there cited. [A corporation may maintain assumpsit against a person for a sum subscribed by him for stock in the corporation. *Stokes v. Lebanon & Sparta Turnp. Co.* 6 Humph. 241. See, also, *Gayle v. Cahawba R. R. Co.* 8 Ala. 586.]

(y) *Dicken v. Clifton*, 2 Wils. 321; *Mast v. Goodson*, 3 Wils. 354. See, also, *Smith v. White*, 6 Bing. N. C. 218; 8 Dowl. 255, 8 C.

(z) *Burchell v. Hornsby*, 1 Campb. 360; *Birch v. Wright*, 1 T. R. 386. [Where it appeared that the defendant went upon the plaintiff's land with his knowledge and assent, and cut and carried away the grass there growing, it was held that the defendant was not a trespasser, and that the plaintiff might maintain assumpsit to recover the value of the grass. *Goldthwaite v. Kempton*, 13 N. H. 449.]

(z¹) [*Boston v. Binney*, 11 Pick. 1; *Featherstonhaugh v. Bradshaw*, 1 Ward, 134; *Smith v. Stewart*, 6 John. 46; *O'Connor v. Tynes*, 3 Rich. 276; *Ward v. Ball*, 1 Branch, 271; *Stoddert v. Newman*, 7 Harr. & J. 252; 1 Chitty Contr. (11th Am. ed.) 515; *Ryan v. Marsh*, 2 Mott & McC. 156; *Wiggin v. Wiggin*, 6 N. H. 298; *Richey v. Hinde*, 6 Ham. 371; *Stockett v. Watkins*, 2 Gill & J. 327.]

(z²) [If a party be let into possession

under a contract for the purchase of premises which is not completed, on account of a defect in the title, the vendor cannot maintain an action for the use and occupation of the premises up to the time at which the contract went off. *Winterbottom v. Ingham*, 7 Q. B. 611; *Hough v. Birge*, 11 Vt. 190; *Little v. Pearson*, 7 Pick. 301; *Carson v. Baker*, 4 Dev. 220; *Jones v. Jones*, 2 Rich. 542; *Brewer v. Craig*, 3 Harr. 214; *Doe v. Cochran*, 1 Scam. 209; *Jones v. Tipton*, 2 Dana, 295; *Bell v. Ellis*, 1 Stew. & P. 296; *Smith v. Stewart*, 6 John. 46; *Bancroft v. Wardell*, 13 John. 459; *Coffman v. Huck*, 19 Miss. 495; *McNair v. Schwartz*, 16 Ill. 24; *Greenup v. Vernon*, 16 Ill. 26. But if a party, who is let into possession under such circumstances, continues in possession after the contract has gone off, he is liable to an action for use and occupation, at the suit of the vendor, for the period during which he so continues in possession. *Howard v. Shaw*, 8 M. & W. 118; 1 Sugden V. & P. (8th Am. ed.) 179, 180. If the contract fails by accident, as, by the destruction of the premises by fire, before the conveyance, or goes off by consent, the tenant is liable in assumpsit for the use and occupation, so far as they have been beneficial; *Gould v. Thompson*, 4 Met. 224; or, at least, for the time he occupied after the termination of the contract. *Howard v. Shaw*, 8 M. & W. 118. If the contract fails of performance by the fault of the vendee, he is liable for an occupation rent; either in trespass, where he refuses to complete the purchase; *Smith v. Stewart*, 6 John. 46; *Bancroft v. Wardell*, 13 John. 489; *Vandenhoevel v. Storrs*, 3 Conn. 203; or in trespass or assumpsit, at the vendor's election. *Clough v. Hosford*, 6 N. H. 234; *Alton v. Pickering*, 9 N. H. 494, 498; *Ayer v. Hawkes*, 11 N. H. 148; *Davidson v. Ernest*, 7 Ala. 817; *Seabury v. Stewart*, 22 Ala. 207; *Smith v. Wooding*, 20 Ala. 324; *Johnson v. Beauchamp*, 9 Dana, 124; *Faterson v. Stoddard*, 47 Maine, 355.]

(a) *Birch v. Wright*, 1 T. R. 378, 386, 387; *Lamine v. Dorrell*, Lord Raym. 1216; *Bac. Abr. Assumpsit, A.*; *The Mayor of Northampton v. Ward*, 2 Stra. 1239; *Burchell v. Hornsby*, 1 Campb. 360; [*Cummings v. Noyes*, 10 Mass. 435, 436; *Brewer v. Craig*,

case of a deceitful representation, not embodied in, or noticed on the face of, a written contract between the parties; but the remedy should be case for the fraud. (b) But where the defendant in selling a horse refused to warrant it, and yet said that it was "sound, as far as he knew," it was held, that he was liable in assumpsit, on proof negating the soundness, and showing that the defendant knew the horse was unsound, and that it was not necessary to declare in case for the deceitful representation. (c) The cases in which the plaintiff may waive a tort or trespass and declare in assumpsit, have been already adverted to. (d) It is not judicious to adopt this form of action where the plaintiff may declare in tort in cases where, by suing *ex contractu*, the right of set-off may attach. (e) And if goods be obtained under a fraudulent contract, giving the purchaser a specified credit, although the vendor may disaffirm the contract, and maintain trover before the expiration of the credit, yet he cannot, during the prescribed period, maintain assumpsit for goods sold. (f) And where the debt is small, and it is important to avoid the expense and delay of executing a writ of inquiry, it is judicious to declare in debt.

The *declaration* in this action must, except in the instances of bills of exchange, promissory notes, and checks, disclose the consideration upon which the contract was founded, (f¹) the contract itself, whether express or implied, and the breach thereof; (g) and damages should be laid sufficient to cover the real amount; and Reg. Gen. H. T. 4 W. 4, prohibits more than *one count* upon the same transaction. The most general *plea* was *non assumpsit*, that the defendant did not undertake and promise as alleged by the plaintiff, and under which the defendant might formerly give in evidence most matters of defence. But now the Reg. Gen. H. T. 4 W. 4, wholly abolishes the plea of *non assumpsit* in some actions, and greatly narrows its utility in * others, as will be fully shown in the chapter on pleas, where the rules with regard to the *form* and application of pleas in this action will be fully noticed.

The *judgment* in favor of the plaintiff is, that he recover a specified sum, assessed by a jury, or on reference to the master, for his damages which he hath sustained by reason of the defendant's non-performance of his promises and undertakings; and for full *costs* of suit, to which the plaintiff is in all cases entitled in this action, though the damages

3 Harr. 214; *Curtis v. Treat*, 21 Maine, 525; *Lloyd v. Hough*, 1 How. (U. S.) 153; *De Young v. Buchanan*, 10 Gill & J. 149.]

(b) *Meyer v. Everath*, 4 Campb. 22; *Gardiner v. Gray*, 4 Campb. 144; *Laing v. Fidgeon*, 4 Campb. 169; *Lord Ellenborough C. J. in Powell v. Edmunds*, 12 East, 11.

(c) *Wood v. Smith*, 4 C. & P. 45; [*Parlin v. Bundy*, 18 Vt. 582.]

(d) *Ante*, 112.

(e) *Ib.*

(f) *Ferguson v. Carrington*, 9 B. & C. 59.

(f¹) [*Moore v. Ross*, 7 N. H. 528; *Shelton v. Bruce*, 9 Yerger, 24; *New Market Iron Foundry v. Harvey*, 23 N. H. 406.]

(g) *Bac. Abr. Assumpsit, F.*

recovered be under 40s., unless the judge certify to take away costs under the statute ; (h) or unless the plaintiff ought to have proceeded for the recovery of the debt in some inferior court established by virtue of an act of parliament, which deprives a party suing elsewhere of the right to costs. In some cases the superior courts will stay the proceedings where the debt sued for is under 40s., and the plaintiff may recover it in an inferior court. (i)

II. DEBT.

This action is so called because it is in legal consideration for the recovery of a *debt* (i¹) *eo nomine* and *in numero* ; and though *damages* are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and are not, as in *assumpsit* and *covenant*, the principal object of the suit ; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to. (k)

Debt is, in some respects, a more extensive remedy for the recovery of money than *assumpsit* (k¹) or *covenant* ; for *assumpsit* is not sustainable upon a specialty, and *covenant* does not lie upon a contract not under seal ; whereas *debt* lies to recover money due upon legal liabilities ; (l) or upon simple contracts, express or implied, (m) whether verbal or written ; and upon contracts under seal ; (n) or of record ; (o) and on statutes by a party aggrieved or by a common informer ; whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty. (p) It may be supported on a contract to pay so much per load for wood, the quantity of which was not then ascertained ; or on a *quantum meruit* (q) for

(h) 43 Eliz. c. 6.

(i) Tidd, 9th ed. 516.

(i¹) [For the ancient law in reference to this action, see 1 Reeve's Hist. E. L. 158, 159 ; 2 Reeve's Hist. E. L. 252, 262, 329, 333 ; 3 Reeve's Hist. E. L. 58, 65.]

(k) Rudder v. Price, 1 H. Bl. 550 ; Bul. N. P. 167 ; Cowp. 588. [The action of debt was abolished by the practice act of Massachusetts, Genl. Sts. c. 129, § 1. So by the New York Code, § 140.]

(k¹) [The action of debt is founded on the contract and *assumpsit* on the promise. *Simmonson v. Barrell*, 21 Wend. 362.]

(l) Hob. 206 ; Com. Dig. Debt, A. 1.

(m) Hob. 206 ; Bul. N. P. 167 ; Com. Dig. Debt, A. 9.

(n) *Ib.* *Ibid.*

(o) *Ib.* *Ibid.* ; [*Republica v. Lacaze*, 2 Dall. 123. A joint action of debt lies against persons who have bound themselves by the same writing to pay a sum of money, the

one with and the other without seal. *Oldham v. Hunt*, 4 Humph. 332. This is the proper form of action on a sealed instrument, where an unliquidated demand which can readily be made certain, is sought to be recovered. *Wetumpka R. R. Co. v. Hill*, 7 Ala. 772.]

(p) Bull. N. P. 167 ; *Sanders v. Marke*, 3 Lev. 429 ; *Sir T. Jones*, 104 ; *Ingledew v. Cripps*, Lord Raym. 814 ; *Hooper v. Shepherd*, 2 Stra. 1089 ; *Walker v. Witter*, Doug. 6 ; *Emery v. Fell*, 2 T. R. 29 ; [*Home v. Sample*, 3 McLean, 150 ; *Gregory v. Bewly*, 5 Ark. 318 ; *Nash v. Nash*, 16 Ill. 79 ; *United States v. Colt*, 1 Peters C. C. 147 ; *Little v. Mercer*, 2 Misson. 218 ; *Lee v. Gardiner*, 26 Miss. 521 ; *Wetumpka Railroad Co. v. Hill*, 7 Ala. 772 ; *Rockwell v. State*, 11 Ohio, 130 ; *Long v. Long*, 1 Hill, 597 ; *Sims v. Alderson*, 8 Leigh, 479 ; *New York v. Butler*, 1 Barb. 325.]

(q) [*Van Dusen v. Blum*, 18 Pick. 229 ;

work; or to pay a proportion of the costs of a suit expected to be incurred; (*r*) or to recover the treble value of tithes not set out according to the statute. (*s*) But it is not *sustainable when the demand is rather for unliquidated damages than for money; (*t*) unless the performance of the contract were secured by a penalty, in which case debt may be supported for the penalty, and the real demand is to be ascertained according to the provisions of the 8 & 9 W. 3, c. 11. (*t*¹) Debt also lies in the *detinet* for goods, as upon a contract to deliver a quantity of malt; which action differs from that of *detinue* in respect of the property in any specific goods, not being necessarily vested in the plaintiff at the time the action is brought, which is essential in *detinue*. (*u*)

On *simple contracts* and *legal liabilities* (*x*) debt lies to recover money lent, paid, had and received, and due on an account stated; (*y*) for interest due on the loan or forbearance of money; (*z*) for work and labor; (*a*) for fees; (*b*) for goods sold; (*c*) and for use and occupation. (*d*) It is sustainable for any debt or duty created by common law or custom, (*e*) as on a bill of exchange, (*e*¹) by the payee against the drawer, on the default of the acceptor or by the drawer against the acceptor of a bill of exchange, though not expressed to be for value received; (*f*) and by first indorsee against first indorser, who was also the drawer of a bill payable to his own order (*g*) and on a promissory note by the payee against the maker, though not shown to have been drawn for value

Smith v. Lowell, 8 Pick. 178; Norris v. Windsor, 3 Fairf. 293; Thompson v. French, 10 Yerger, 452; Mahaffey v. Petty, 1 Kelly, 261.] It has been doubted whether debt lies upon a *quantum meruit*; and it has been usual to omit the *quantum meruit* count in debt.

(*r*) Saunders v. Marke, 3 Lev. 429.

(*s*) President and College of Physicians v. Salmon, Lord Raym. 682; 1 Roll. Abr. 598; pl. 19.

(*t*) Ante, 121, note; Purslow v. Bailey, Lord Raym. 1040; 2 Saund. 62 b. [See Wetumpka Railroad Co. v. Hill, 7 Ala. 772.]

(*t*¹) [See Rockwell v. Ohio, 11 Ohio, 130.]

(*u*) Dyer, 24 b.; Com. Dig. Debt, A. 5; Bac. Abr. Debt, F.; 3 Woodd. 103, 104.

(*x*) Ante, 121.

(*y*) Com. Dig. Debt, A.; Speake v. Richards, Hob. 207; 1 Roll. Abr. 593, pl. 25; [Young v. Hawkins, 4 Yerger, 171.]

(*z*) Herries v. Jamieson, 5 T. R. 553.

(*a*) Com. Dig. Debt, B.; [Thompson v. French, 10 Yerger, 452.]

(*b*) Bac. Abr. Debt, A.; 1 Roll. Abr. 598; Com. Dig. Pleader, 2 W. 11.

(*c*) Emery v. Fell, 2 T. R. 28; [Dillingham v. Skein, 1 Hempst. 181.]

(*d*) Eglen v. Marsden, 5 Taunt. 25; Wilkins v. Wingate, 6 T. R. 62; King v. Fraser

6 East, 348. And that, although there be an express demise, provided it be not by deed. Gibson v. Kirk, 1 G. & D. 252. See the judgment in that case for an admirable history of the action for use and occupation. [Debt lies for rent for an agreed sum; whether the demise be by deed, or parol contract written or oral. Trapnall v. Merrick, 21 Ark. 503; McEwen v. Joy, 7 Rich. (S. Car.) 33; Davis v. Shoemaker, 1 Rawle, 135; McKean v. Whitney, 3 Denio, 452.]

(*e*) Com. Dig. Debt, A. 9; Speake v. Richards, Hob. 206.

(*e*¹) [Hollingsworth v. Milton, 8 Leigh, 50; Sharpe v. Fowkes, 7 Humph. 512.]

(*f*) Priddy v. Henbrey, 3 D. & R. 165; 1 B. & C. 674, S. C.; Hatch v. Trayer, Watson v. Kightley, 3 P. & D. 408, 11 Ad. & El. 702, S. C.

(*g*) Stratton v. Hill, 3 Price, 253; Watkins v. Wake, 7 M. & W. 488; 9 Dowl. 242; [See, however, Lindo v. Gardiner, 1 Cranch, 343; Whiting v. Ring, Minor, 122; Smith v. Segar, 3 Hen. & M. 394; Frierson v. Reeve, 7 Humph. 357.] But debt will not lie by the indorsee against the acceptor, Powell v. Ancell, 9 Dowl. 893, as it is only applicable where there is an immediate privity between the parties. See post, 127.

received; (*h*) but not by or against any other collateral party; (*i*) and for tolls, (*i*¹) port duties, and copyhold fines; (*k*) and for quit-rent. (*l*) And it lies on an award to pay money, (*l*¹) but not if it were to perform any other act, unless there were an arbitration bond, in which case the action must be brought thereon. (*m*) It lies also on by-laws, (*n*) for fines and amerciaments, (*o*) on English judgments not of record, (*p*)* as well as on such as are of record, on an Irish judgment, (*q*) and on foreign judgments, (*r*) and upon the decree of a colonial court for payment of a balance due on a partnership account. (*s*) Debt clearly lies against a corporation for the recovery of a debt in those cases in which assumpsit may be maintained against them, (*t*) and in all those instances in which they contract by deed to pay money. And even assuming that a corporation cannot in general contract but by deed, the court will presume on general demurrer that there was a deed, in order to support a count in debt that the corporation was "indebted," &c. (*u*) And it is laid down as a general rule,

(*h*) *Creswell v. Crisp*, 3 Dowl. 635; *Lyons v. Cohen*, 3 Dowl. 243; *Priddy v. Henbrey*, 1 B. & C. 674; 3 Dowl. & R. 165; *Hatch v. Traves*, *Watson v. Kightley*, 11 Ad. & El. 702; 3 P. & D. 408; [*Wilburn v. Greer*, 6 Ark. 255; *Evans v. Landon*, 3 Ill. 53; *Casey v. Barcraft*, 5 Missou. 128; *Nelson v. Bank of Missouri*, 7 Missou. 219; *Phillips v. Rannels*, 1 Morr. (Iowa) 391; *Wilmarth v. Crawford*, 10 Wend. 340; *Carroll v. Meeks*, 3 Porter, 226.]

(*i*) *Webb v. Geddes*, 1 Taunt. 540; *Bishop v. Young*, 2 B. & P. 78; *Laxton v. Peat*, 2 Campb. 187, note (*a*); *Powell v. Ancell*, 9 Dowl. 893; *Lewin v. Edwards*, 1 Dowl. N. S. 693; 9 M. & W. 720. [See *Whiting v. King*, Minor (Ala.), 122; *Olive v. Napier*, *Cooke (Tenn.)*, 11.] But a joint and several maker of a note who received no consideration from the payee may be sued in debt. *Sison v. Kidman*, 1 Dowl. N. S. 493; 4 Scott N. R. 429, S. C.

(*i*¹) [*Kellogg v. Union Company*, 12 Conn. 7.]

(*k*) Com. Dig. Debt, A. 9.

(*l*) 5 Wentw. 152, 153.

(*l*¹) [*Stanley v. Chappel*, 8 Cowen, 235; *Ex parte Wallis*, 7 Cowen, 522.]

(*m*) 2 Saund. 62, note (5); *Perry v. Nicholson*, Barr. 278; — *v. Marygold*, Salk. 72; *Foreland v. Hornigold*, Lord Raym. 715; *Dilley v. Polhill*, 2 Stra. 923.

(*n*) *Company of Felmakers v. Davis*, 1 B. & P. 98. [For violation of town ordinances, *Israel v. Jacksonville*, 2 Ill. 290; *Meaher v. Chattanooga*, 1 Head, 74.]

(*o*) *Earl of Lincoln v. Fysher*, Cro. Eliz. 581; Bull. N. P. 167; — *v. Shepherd*, 1 H. Bl. 162; *Wicker v. Norris*, Rep. temp. Hard. 116; *Speake v. Richards*, Hob. 206; *Hopkins v. The Mayor &c. of Swansea*, 4 M. & W. 621; S. C. in error, 8 M. &

W. 901. See, also, *Graves v. Colby*, 1 P. & D. 253; 9 Ad. & El. 356, S. C.; *Poulterers' Company v. Phillips*, 6 Bing. N. C. 314.

(*p*) 1 Saund. 92, note (2); [*Pease v. Howard*, 14 John. 479; *Bennet v. Moody*, 2 Hall, 472.]

(*q*) Note to *O'Callaghan v. Marchioness Thomond*, 3 Taunt. 85. See *Ferguson v. Mahon*, 3 P. & D. 143. Assumpsit is also maintainable. *Harris v. Saunders*, 4 B. & C. 411; 6 D. & R. 471, S. C.

(*r*) *Henry v. Adey*, 3 East, 221; *Walker v. Witter*, Doug. 1; *Douglas v. Forrest*, 4 Bing. 686; ante, 119; [*post*, 125; *Hubbell v. Coudry*, 5 John. 132; *Andrews v. Montgomery*, 19 John. 192; *Mills v. Duryee*, 7 Cranch, 481.]

(*s*) *Henley v. Soper*, 8 B. & C. 16; 2 M. & R. 153, S. C. Debt or assumpsit will lie for costs awarded by a Scotch decree, per Lord Abinger C. B. *Russell v. Smyth*, 1 Dowl. N. S. 935; 9 M. & W. 810, S. C. [Debt lies on a decree of a court of chancery in another state, for the payment by the defendant of money only without any acts to be done by the plaintiff. *Post v. Neafie*, 3 Caines, 22; *Evans v. Tatem*, 9 Serg. & R. 252. It lies on a decree of a court of chancery fixing the balance of a partnership account. *Thrall v. Waller*, 13 Vt. 231. So it lies to recover a sum of money decreed as alimony. *Howard v. Howard*, 15 Mass. 196. See *Elliott v. Ray*, 2 Blackf. 31; *Irving v. McLean*, 4 Blackf. 52; *Van Buskirk v. Mullock*, 3 Harring. 184; *Eichelberger v. Smyser*, 8 Watts, 181; *Koons v. Maddox*, 2 H. & Gill, 106.]

(*t*) Ante, 119.

(*u*) *Tilson v. Warwick Gas Light Company*, 4 B. & C. 962; 7 D. & R. 376, S. C.

that debt lies upon every contract in deed or in law. (*x*) And now by express enactment, debt on simple contract is sustainable against an executor in any court of law. (*y*)

Debt lies also to recover money due on any *specialty*, or contract under seal to pay money, (*z*) as on single bonds, (*a*) on charter-parties, (*b*) on policies of insurance under seal, (*c*) and on bonds conditioned for the payment of money (*c*¹) or for the performance of any other act, by or against the parties thereto and their personal representatives, (*d*) and against the heir of the obligor, if he be expressly named in the deed, or against a devisee having legal assets, (*e*) and by the sheriff or his assignee on bail bonds, (*f*) and replevin bonds, (*g*) on leases for rent or penalties, as for ploughing up meadow, &c. (*h*) on annuity deeds, and on mortgage deeds. An action of debt is not sustainable against the assignee of *part* of land demised. (*i*) Debt is the remedy given by the statute (*k*) to the executor of a tenant in fee or for life, to recover rent which accrued due to the testator, and to *husbands to recover rent which became due to them and their wives, for rents of the wives' freeholds during the life of the wives. Debt is also sustainable for a rent-charge or annuity granted for years, or by the executors of a tenant for life of a rent-charge, or of a tenant *pur autre vie* after the death of *cestui qui vie*. (*l*) But it should seem that no action can be supported at law for the arrears of an annuity, unless it be granted by deed, and

(*x*) Com. Dig. Debt, A. 1; Underhill v. Ellicombe, 1 M'Clel. & Y. 457; [Elder v. Rouse, 15 Wend. 220; Meakings v. Ochiltree, 5 Porter, 395.] It lies for calls on shares in companies. See Edinburgh & Leith Railway Company v. Hebblewhite, 6 M. & W. 707; Southampton Dock Company v. Richards, 1 M. & G. 448; 1 Scott N. R. 219, S. C. And for calls under the General Turnpike Act, 9 Geo. 4, c. 77; Meigh v. Clinton, 3 P. & D. 211; 11 Ad. & El. 418, S. C.

(*y*) 3 & 4 W. 4, c. 42, s. 14; [Childress v. Emory, 8 Wheat. 642. Debt lies against an executor to recover a legacy. Pettigrew v. Pettigrew, 1 Stewart, 580.]

(*z*) Hooper v. Shepherd, 2 Stra. 1089; White v. Parkin, 12 East, 583. Thus debt lies on an absolute covenant by A. to pay a sum certain on a certain day due from B. on mortgage. Evans v. Jones, 5 M. & W. 295; 7 Dowl. 482, S. C. But debt will not lie on a collateral and independent covenant to pay the debt of another person on non-performance by him, the proper remedy being covenant. Randall v. Rigby, 4 M. & W. 130; 6 Dowl. 650, S. C.; Harrison v. Matthews, 10 M. & W. 768; 2 Dowl. N. S. 318, S. C.

(*a*) Com. Dig. Debt, A. 4; Hooper v. Shepherd, 2 Stra. 1089; [Ingram v. Hull, Mart. (N. Car.) 1.]

(*b*) Hooper v. Shepherd, 2 Stra. 1089; Atty v. Parish, 1 New Rep. 104.

(*c*) Marsh on Ins. 596; 6 Geo. 1, c. 18, s. 4; [Ellicott v. United States Ins. Co. 8 Gill & J. 166; Marine Ins. Co. of Alexandria v. Young, 1 Cranch, 332. Upon a policy of insurance renewed by a parol indorsement. People's Ins. Co. v. Spencer, 53 Penn. St. 353.]

(*c*¹) [Upon a bond, for the payment of a specified sum "in specie or its equivalent," if the plaintiff seeks to recover only the amount of the bond as specified. Rhyne v. Wacaser, 63 N. C. 36. To recover interest on bond, payable before principal is due. Sparks v. Garigues, 1 Binn. 152.]

(*d*) Com. Dig. Debt, A. 4; *post*, vol. ii. 27.

(*e*) Bac. Abr. Heir; Wilson v. Knubley, 7 East, 128.

(*f*) 4 Anne, c. 16, s. 20.

(*g*) 11 Geo. 2, c. 19; [Manning v. Pierce, 3 Ill. 4; Darling v. Peck, 15 Ohio, 65; Salter v. Richardson, 3 Mon. 204; Chalfant v. Hart, 1 A. K. Marsh. 572.]

(*h*) Com. Dig. Debt, A. 5, B.; 3 Bl. Com. 231; Atty v. Parish, 1 New R. 104, 109.

(*i*) Curtis v. Spitley, 1 Bing. N. C. 759. But the landlord must proceed by distress; *Id.* *Ibid.* or by action of covenant; *Id.*; Lougham v. King, Cro. Car. 221.

(*k*) 32 Hen. 8, c. 36.

(*l*) 1 Saund. 282, note (1), 276.

there must be an express grant in such deed. (*m*) And debt is not sustainable for the arrears of an annuity or yearly rent devised, payable out of lands to A. during the life of B., to whom the lands are devised for life, B. paying the same thereout, so long as the estate of freehold continues; (*n*) and this although it is not stated in the declaration that the grantor had a freehold in the premises out of which it was payable, as it must be inferred that he had such an interest, where nothing appears, to the contrary. (*o*) The reason assigned is, that the law will not *suffer a real injury* to be remedied by an action merely personal; neither does the action lie by the statute 8 Anne, (*p*) for that statute applies only to cases of demises from landlord to tenant. (*q*) The assignee of a rent reserved upon a lease may maintain debt for the arrears. (*r*)

This action also lies on *records* (*r*¹) as upon the *judgment* of a superior or inferior court of record, (*s*) either generally, or against an executor or administrator, suggesting a devas- ON RECORDS. tavit. (*t*) Although the judgment was erroneous, debt lies until it has been reversed; (*u*) and the mere circumstance of the defendant having been rendered, will not bar the action. Where, however, the defendant has been charged in execution on the judgment, no action can be supported on the judgment; although he was discharged out of custody upon a promise to pay the sum recovered by instalments, and which he neglects to do. (*x*) And where the defendant has been discharged out of custody under the lords' act, debt is not sustainable; (*y*) and an action upon a judgment has become less frequent since the statute (*z*) which *precludes the plaintiff from recovering costs in action on a judgment, unless the court or one of the judges thereof

(*m*) In re Locke, 2 D. & R. 603; Neild v. Smith, 14 Ves. 491.

(*n*) Webb v. Jiggs, 4 M. & Sel. 113; 2 Saund. 304, note (8). See, also, Randall v. Rigby, 4 M. & W. 130; 6 Dowl. 650, S. C.

(*o*) Kelly v. Clubbe, 6 Moore, 335; 3 B. & B. 130, S. C.

(*p*) 8 Anne, c. 14.

(*q*) Webb v. Jiggs, 4 M. & Sel. 113; Randall v. Rigby, 4 M. & W. 130; 6 Dowl. 650; S. C.

(*r*) Allen v. Bryan, 5 B. & C. 512. [The lessor may maintain debt against the assignee of his lessee, to recover rent in arrear, under a sealed lease. M'Keon v. Whitney, 3 Denio, 452.] The assignee of the reversion may maintain debt against the assignee of the term. Hornidge v. Wilson, 3 P. & D. 641; 11 Ad. & El. 645, S. C.; Pryer v. Combs, 11 Ad. & El. 403; 4 P. & D. 119, note (*a*), S. C.; [Howland v. Coffin, 12 Pick. 125; Howland v. Coffin, 9 Pick. 52.] *Seem*, that for occupation which took place before the assignment of the reversion, the assignee should bring debt on a *parol demise*, and not declare for use and occupa-

tion; per Parke B. Mortimer v. Preedy, 3 M. & W. 605. See, also, How v. Kennett, 3 Ad. & El. 659; 5 N. & M. 10, S. C.

(*r*¹) [Shelburn v. Eldridge, 10 Vt. 123; Greathouse v. Smith, 3 Scam. 542; Eames v. Pettis, 4 Vt. 356; Headly v. Roby, 6 Ohio, 521.]

(*s*) Gilb. Debt, 391, 392; Salk. 209; Com. Dig. Debt, A. 2. *Seem*, that debt will lie on a judgment of an inferior court of record. Read v. Pope, 1 Cr., M. & R. 302; 4 Tyrw. 403, S. C.; Jones v. Jones, 5 M. & W. 523; 7 Dowl. 841, S. C.

(*t*) 1 Saund. 216, 218, 219, notes (7), (8); Woodcock v. Morgan, 6 Mad. 306; Hope v. Bague, 3 East, 2.

(*u*) Haray v. Daniel, 2 Lev. 161; 1 Marsh. 284; Prince v. Nicholson, 5 Taunt. 667.

(*z*) Vigers v. Aldrich, 4 Burr. 2482; Taylor v. Wat, 5 M. & Sel. 108. [But see Fish v. Sawyer, 11 Conn. 545.] *Query*, if the defendant died in execution. Taylor v. Wat, 5 M. & Sel. 104.

(*y*) 32 Geo. 2, c. 28, s. 20.

(*z*) 43 Geo. 3, c. 46, s. 4.

shall otherwise direct. (a) It appears that debt lies upon the judgment or decree of a colonial or foreign court, &c. (b) in those instances in which assumpsit is maintainable upon them, and which have been already alluded to. (c) Debt is often brought upon a recognizance of bail, (d) and the remedy by *scire facias* is also frequently adopted. (d¹) Upon the proceeding by *scire facias*, the bail are not liable to the costs of the *scire facias*, unless they appear and plead thereto; (e) nor are damages for detaining the debt recoverable. (f) And it appears therefore judicious to proceed by action upon the recognizance in ordinary cases. (g) So debt lies upon a *statute merchant*, though not upon a statute staple, because the seal of the party is not affixed to the latter; but it lies on a recognizance in the nature of a *statute staple*, to which the seal of the conusor is affixed. (h) It lies also on a *sheriff's return* of *feri feci*, which is in the nature of a record, to recover the money which he has received. (i)

Debt is frequently the remedy on *statutes* either at the suit of the party grieved, or of a common informer. (k) In some cases it is given to the *party grieved*, by the express words of a statute, as against a tenant for double value for not quitting in pursuance of a notice to quit given by his landlord. (l) And if a statute prohibit the doing an act under a penalty or forfeiture to be paid to a party grieved, and do not prescribe any mode of recovery, it may be recovered in this form of action; (m) as treble the value of tithes not

(a) When such costs will be allowed, see Tidd. Prac. (9th ed.) 969.

(b) See Hains v. Saunders, 4 B. & C. 418; 6 D. & R. 474, S. C.; O'Callaghan v. Marchioness Thomond, 3 Taunt. 85; Parkins v. Stewart, 9 Price, 1; Russell v. Smith, 1 Dowl. N. S. 935; 9 M. & W. 810, S. C.; [Letson v. Wadsworth, 2 Speers, 277; M'Kim v. Odom, 12 Maine, 94; Williams v. Preston, 3 J. J. Marsh. 600; Drakely v. Rook, 2 Rott, 138; Moore v. Adie, 18 Ohio, 430; Jordan v. Robinson, 15 Maine, 167; M'Intire v. Caruth, 3 Brevard, 395; Warren v. McCarthy, 25 Ill. 95; Stanfield v. Felters, 7 Blackf. 558; Headly v. Roby, 6 Ohio, 527; Carter v. Crews, 2 Porter, 81; Thrall v. Waller, 13 Vt. 231; James v. Henry, 16 John. 233; Cole v. Driscoll, 1 Blackf. 16. But see Van Buskirk v. Mulock, 18 N. J. (Law) 184.]

(c) *Ante*, 119.

(d) *Post*, vol. ii. 27; Gilb. Debt, 395. [On a recognizance to the state in a criminal proceeding. Dowlin v. Standifer, 1 Hemst. 290; Commonwealth v. Green, 12 Mass. 1; Green v. Dana, 13 Mass. 493; State v. Folsom, 26 Maine, 209.]

(d¹) [Debt will not lie upon a bail bond in Massachusetts, for reasons peculiar to the operation of the instrument in that state. It contains the properties of bail below and bail above, at common law. It is in form a bond to the sheriff, but has the force and

effect of bail above by recognizance. It is so far regarded as a recognizance to the creditor, that *scire facias* will lie upon it by him against the bail. It is therefore treated as a recognizance of record of the court in which the judgment is rendered. Debt by the sheriff will not lie upon it. Shaw C. J. in Gale v. Boyle, 6 Cush. 138; Crane v. Keating, 13 Pick. 339; Niles v. Drake, 17 Pick. 516. See Pierce v. Reed, 2 N. H. 359; Palmer v. Atchison, 1 Misson. 176; Hewins v. Currier, 62 Maine, 236.]

(e) See 8 & 9 W. 3, c. 11, s. 3; Abbott v. Rawley, 3 B. & P. 14.

(f) Knox v. Costello, 3 Burr. 1791.

(g) See Tidd (9th ed.) 1100.

(h) 2 Saund. 60, 70, in *notis*; Com. Dig. Debt, A. 3.

(i) 2 Saund. 343, 344, note (2); Cockram v. Welbye, 2 Show. 79; Speake v. Richards, Hob. 206.

(k) Com. Dig. Action on Statute, E.; Bac. Abr. Debt, A.

(l) 4 Geo. 2, c. 28, s. 1; Luke v. Smith, 1 New Rep. 174.

(m) 1 Rol. Abr. 598, pl. 18, 19; Underhill v. Ellicombe, 1 M. & Y. 457. [Whenever a statute gives a remedy to recover damages which are ascertained by the act itself, an action of debt lies and is proper, if no other specific mode of recovery is provided. Blackburn v. Baker, 7 Porter, 284; Bigelow v. Cambridge Turnpike Co. 7 Mass. 202;

duly set forth, (*n*) or treble the amount of damages incurred by extortion. (*o*) Where a statute, incorporating a gas company, provided that the expenses of obtaining the act should be first paid out of the subscriptions, it was held, that the attorneys who obtained the act might recover their costs in an action of debt founded upon the statute. (*p*) On the other hand, upon a new statute, which prescribes a * particular remedy, no remedy can be taken but that particular remedy given by the act. (*p*¹) Therefore no action of debt will lie for a poor's rate; (*s*) and surveyors of highways cannot maintain debt to recover composition money duly assessed in lieu of statute-duty, the remedy by distress being prescribed by the acts of parliament. (*t*) Where a *penal* statute expressly gives the whole or a part of a penalty to a *common informer*, and enables him generally to sue for the same, debt is sustainable; (*u*) and he need not declare *qui tam* unless where a penalty is given for a contempt; (*x*) but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty. (*y*)

In some cases this action is the *peculiar* remedy, as against a lessee for an apportionment of rent, where he has been evicted from part of the premises by a third person; though covenant is in such case sustainable against the assignee of the lessee. (*z*) It was also before the 11 Geo. 4 and 1 W. 4, c. 47, the only remedy against a devisee of land, for a breach of covenant by the devisor. (*a*)

When the
peculiar
remedy.

Adams v. Woods, 3 Cranch, 341; Ex parte Marquand, 2 Gall. 552; Cushing v. Dill, 2 Scam. 461; Israel v. Jacksonville, 1 Scam. 291; Rice v. Barre Turnpike, 4 Pick. 130; Strange v. Powell, 15 Ala. 452; Spence v. Thompson, 11 Ala. 746; Vaughan v. Thompson, 15 Ill. 39; Portland Dry Dock & Ins. Co. v. Trustees of Portland, 12 B. Mon. 77; Van Hook v. Whitlock, 3 Paige, 409; Gedney v. Tewksbury, 3 Mass. 309, 310; Blanchard v. M. & L. Turnp. Co. 1 Dana, 86.]

(*a*) Ib. Ibid.; President and College of Physicians v. Salmon, 1 Lord Raym. 682.

(*o*) Savage *qui tam* v. Smith, 2 Bl. Rep. 1101; [Reed v. Davis, 8 Pick. 514.]

(*p*) Tilson v. Warwick Gas Light Company, 4 B. & C. 962; 7 D. & R. 376, S. C.; Carden v. The General Cemetery Company, 5 Bing. N. C. 253; 7 Dowl. 275, S. C.; [Andover Turnpike v. Gould, 6 Mass. 40; Andover Turnpike v. Hay, 7 Mass. 102; Franklin Glass Co. v. White, 14 Mass. 286; Peabody v. Hoyt, 10 Mass. 36; Woods v. Pettis, 4 Vt. 556; Wiley v. Yale, 1 Met. 563.] But no action can be maintained against a corporation for the performance of duties imposed upon a party by the provisions of an act which does not provide any recompense. Jones v. The Mayor of Carmarthen, 8 M. & W. 605.

(*p*¹) Almy v. Harris, 2 John. 175; *post*, 161, and note; Smith v. Drew, 5 Mass. 514;

Gedney v. Tewksbury, 3 Mass. 307; Smith v. Woodman, 28 N. H. 520.]

(*s*) Per Dennison J. Stevens v. Evans, 2 Burr. 1157.

(*t*) Underhill v. Ellicombe, 1 M'Clel. & Y. 450. So arrears of assessed taxes cannot be recovered by information in the nature of a popular action of debt under the statutes 43 G. 3, c. 99, s. 45, and 5 & 6 W. 4, c. 20, s. 13, inasmuch as the latter section provides that the amount shall be recoverable from the person and persons making default of payment thereof *as a debt upon record* to the king's majesty. The proceedings ought to be by *scire facias* or extent or information upon the record itself. Attorney General v. Sewell, 4 M. & W. 77.

(*u*) Com. Dig. Action, Debt, E. 1, 2.

(*x*) Ib. Ibid.; 2 Saund. 374, note (1), (2); 1 Saund. 136, note (1).

(*y*) Fleming *qui tam* v. Bailey, 5 East, 313, 315; Rex v. Malland, 2 Stra. 828; Bac. Abr. Action, *Qui Tam*, A.

(*z*) Stevenson v. Lambard, 2 East, 579, 580.

(*a*) Wilson v. Knubley, 7 East, 128. See *ante*, 60, note (*f*). Debt also appears to be the peculiar remedy to recover rent where a trustee or assignee of the tenant has not taken actual possession, and where consequently *assumpsit* or debt for use and occupation cannot be maintained. How v. Ken-

Debt, however, is not in any case sustainable, unless the demand be for a sum certain, or for a pecuniary demand (*a*¹) which can readily be reduced to a certainty, (*a*²) as in the instances before enumerated; (*b*) nor could it be supported against an executor, on a simple contract made with the testator, unless in the court of exchequer, (*c*) or in those cases in which the testator, if living, could not have waged his law, (*d*) though if the executor pleaded, and did not demur, he could not afterwards object to the form of action; (*e*) and an executor might be sued in debt upon a simple contract which he had entered into in his representative capacity; (*f*) and now by 3 & 4 W. 4, c. 42, s. 14, it is enacted "that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator. (*f*¹) * Debt cannot be supported for a debt payable by instalments till the whole of them be due; (*g*) though for rent payable quarterly, or otherwise, or for an annuity, or on a stipulation to pay 10*l.* on one day, and 10*l.* on another, debt lies on each default; (*h*) and even where one sum is payable by instalments, if the payment be secured by a penalty, debt is sustainable for such penalty. (*i*) When the landlord has accepted rent from the assignee of a lessee, he cannot sustain debt against the lessee or his personal representative, but must proceed by action of covenant on the express contract; (*k*) and debt is not sustainable on a *collateral contract*, as on a promise to pay the debt of another in consideration of forbearance, &c. (*l*) nor against

nett, 3 Ad. & El. 659; 5 N. & M. 10, S. C. So also it seems the only remedy by the assignee of the reversion for occupation previous to the assignment. Per Parke B. Mortimer v. Preedy, 3 M. & W. 605.

(*a*¹) [Wilson v. Hickson, 1 Blackf. 231; Osborne v. Fulton, 1 Blackf. 234; Cassady v. Laughlin, 3 Blackf. 134; Neilson v. Ford, 5 Ohio, 473; Young v. Hawkins, 4 Yerger, 171; Gift v. Hull, 1 Humph. 480; Taylor v. Meek, 4 Blackf. 388; Gregory v. Bewley, 5 Pike, 318. An action of debt has been held to lie for a stipulated sum in property. Snell v. Kirby, 3 Missou. 21; Dorsey v. Lawrence, Hardin, 508; Henry v. Gamble, Minor, 15; Ballinger v. Thurston, 4 Const. Ct. 447; Crawford v. Daigh, 2 Virg. Cas. 521; Bradford v. Stewart, Minor, 44.]

(*a*²) [Little v. Mercer, 9 Missou. 218.]

(*b*) *Ante*, 121, 122; [Little v. Mercer, 9 Missou. 218. It does not lie on a promise to pay a debt in a particular kind of "money," "funds," or "currency." Hudspeth v. Gray, 5 Ark. 157; Deberry v. Darnell, 5 Yerger, 451; Sinclair v. Piercy, 5 J. J. Marsh. 63; Young v. Scott, 5 Ala. 475; Scott v. Conover, 6 N. J. (Law) 222; January v. Henry, 2 Mon. 58; Osborn v. Fulton, 1 Blackf. 234; Curle v. Pettus, 6 Missou. 497. See Rhyne v. Wacaser, 63 N. Car. 86; Campbell v. Weisten, 1 Litt. 30; Biernie v. Dun-

lap, 8 Leigh, 514; Wilson v. Hickson, 1 Blackf. 230.]

(*c*) Barry v. Robinson, 1 New Rep. 293; Norwood v. Read, Plowd. 182; 9 Co. 86 *b*; 1 Saund. 216 *a*; *ante*, 115.

(*d*) 1 Saund. 216 *a*, note (4); 9 Co. 87 *b*; [Childress v. Emory, 8 Wheat. 642, 672, 673.]

(*e*) Norwood v. Read, Plowd. 182; 1 Marsh. 72; Prince v. Nicholson, 5 Taunt. 335, 665, S. C.; Lyttleton v. Cross, 3 B. & C. 317.

(*f*) Biddell v. Sutton, 5 Bing. 200.

(*f*¹) [See Knapp v. Hanford, 6 Conn. 170; Tupper v. Tupper, 3 Ham. 387.]

(*g*) Rudder v. Price, 1 H. Bl. 554; 2 Saund. 303, note (6); 3 Co. 22 *a*; *ante*, 115; Bac. Abr. 669; [Fontaine v. Aresta, 2 McLean, 127; Farnham v. Hay, 3 Blackf. 167. See Hoy v. Hoy, 44 Ill. 469; Sparks v. Garigues, 1 Binn. 152.]

(*h*) *Ib.* *Ibid.*

(*i*) 8 & 9 W. 3, c. 11; Bac. Abr. Debt, B.; Coates v. Hewit, 1 Wils. 80; Com. Dig. Action, F.; [Fontaine v. Aresta, 2 McLean, 127.]

(*k*) *Ante*, 57; 1 Saund. 241, 242, note (5); 2 Saund. 181, 182, 297, note (1), 303, note (5), 306; Bac. Abr. Debt, D.; Com. Dig. Debt; Orgill v. Kemahhead, 4 Taunt. 642.

(*l*) Hardr. 486; Com. Dig. Debt, B.;

the indorser of a bill or note, or by an indorsee against the acceptor. (m)

Formerly, when the trial by wager of law was in practice, the action of assumpsit was preferable to that of debt on simple contract. (n) The mode of defence and trial was in general in force when the debt was due on a simple verbal contract, (o) and it might have been adopted (except in the exchequer, or when the creditor had become so by legal necessity, as in the case of a debt to a gaoler, or innkeeper, &c. for fees); (p) but of late it was so much disused and discountenanced, (q) that debt had become very frequent, and was preferable in some respects to the action of assumpsit, the judgment therein being final in the first instance, and not interlocutory, as in assumpsit. And at length the 3 & 4 W. 4, c. 42, sect. 13, enacted, "that no wager of law should hereafter be allowed." (q¹) It was once considered that in an action of debt the plaintiff could * not in any case recover less than the sum demanded (t) and that if the plaintiff could not, upon the *indebitatus* or *quantum meruit* count, prove that he was entitled to recover the precise sum alleged to be due, he must be nonsuited. It is, however, now completely settled, that the

Of wager of law and other difficulties and advantages.

Bishop v. Young, 2 B. & P. 83; *Sands v. Trevilian*, Cro. Car. 107, 193; 1 Salk. 23; [*Gregory v. Thompson*, 31 N. J. (Law) 166; *Tappen v. Campbell*, 9 Yerger, 436; *Long v. Long*, 1 Hill, 579. But debt was held to lie upon a guaranty in these words: "I guaranty the payment of the within note to A. for value received." *Brown v. Bussey*, 7 Humph. 573; *Hall v. Rogers*, 7 Humph. 536.] So where by indenture certain lands were granted to R. H. and the defendant, to the use and interest, that the plaintiff should receive out of the land a clear yearly rent of 63s., and the said R. H. and the defendant covenanted that they would well and truly pay the said rent to the plaintiff, it was held that debt could not be maintained for arrears of the annuity, but that covenant was the proper remedy. *Randall v. Rigby*, 4 M. & W. 130; 6 Dowl. 650, S. C. See, also, *Harrison v. Matthews*, 2 Dowl. N. S. 318; 10 M. & W. 768, S. C. But where a party enters into a new, original, and immediate contract with the plaintiff, although it be a security for a collateral debt, an action of debt can be supported. *Sison v. Kidman*, 1 Dowl. N. S. 493; 4 Scott N. R. 429. [But debt will not lie on a contract of indemnity against unliquidated or unascertained damages. *Flanagan v. Camden M. Ins. Co.* 25 N. J. (Law) 506.]

(m) *Bishop v. Young*, 2 B. & P. 78. Debt will not lie by the indorsee against the acceptor. *Powell v. Ancell*, 9 Dowl. 893; *Cloves v. Williams*, 3 Bing. N. C. 868; 5 Scott, 68, S. C.; [Smith v. Segar, 3 Hen. & M. 394; *Stovell v. Woodson*, 2 Munf. 302; but see *Raborg v. Peyton*, 2 Wheat. 385; *Kirkman v. Hamilton*, 6 Peters, 20; *Home*

v. Semple, 3 McLean, 150; *Vowell v. Alexander*, 1 Cranch C. C. 33; *Planters Bank v. Galloway*, 11 Humph. 343;] but it will by the indorsee against his immediate indorser; *Watkins v. Wake*, 7 M. & W. 488; although not against any previous indorser between whom and the plaintiff there is no privity of contract; *Lewin v. Edwards*, 1 Dowl. N. S. 639; 9 M. & W. 720, in which case Parke B. said he knew of no authority in favor of debt lying against the drawer by the holder of a banker's check payable to bearer. See ante, 122, notes. [As to whether debt lies for the bearer of a promissory note, payable to bearer, against the maker, see *Carroll v. Meeks*, 3 Porter, 226; *Howell v. Hallett, Minor*, 102.]

(n) 3 Bl. Com. 347.

(o) *Ibid.*; *Barry v. Robinson*, 1 New Rep. 293; *King v. Williams*, 4 D. & R. 207; 3 B. & C. 538, S. C. [See *Childress v. Emory*, 8 Wheat. 642, 672.]

(p) 3 Bl. Com. 345, 346; 1 Saund. 216 a, note (1); 9 Co. 87 b.

(q) *King v. Williams*, 4 D. & R. 206.

(q¹) [See *Childress v. Emory*, 8 Wheat. 642, 675, where it is said, that "the wager of law, if it ever had a legal existence in the United States, is now completely abolished." This is deduced from the constitutional guaranty of the right of trial by jury.]

(t) 3 Bl. Com. 155; *Aylett v. Lowe*, 2 Sir W. Bl. 1221; *Emery v. Fell*, 2 T. R. 28; *Bul. N. P.* 171; *Hooper v. Shepherd*, 2 Stra. 1089; [Newlin v. Palmer, 11 Serg. & R. 100; *United States v. Colt*, *Peters C. C.* 145; *Perrin v. Sikes*, 1 Day, 19.]

plaintiff may in debt on simple contract, prove and recover less than the sum stated to be due in his declaration; (*u*) for the difference is, that where debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum mentioned in the deed will vitiate; but where the deed relates to the matter of fact, there, though the plaintiff demand more than is due, he may enter a *remittitur*. (*x*)

The *declaration* in this action, if on *simple contract*, must show the consideration upon which the contract was founded, precisely as in assumpsit, (*x*¹) and should state either a legal liability, or an express *agreement*; but it must be alleged that the defendant *agreed*, not that he *promised*, to pay the debt, &c. (*y*) But on *specialties*, or *records*, no consideration need be shown, (*y*¹) unless where the performance of the consideration constitutes a condition precedent, when performance of such consideration must be averred, (*y*²) and where the action is founded on a deed, it must be declared upon, except in the instance of debt for rent. (*z*) If the declaration go for damages for detention of the sum *expressly* agreed to be paid, as for interest, *the damages at the conclusion* must be proportionably increased and not as usual be merely nominal. (*a*) The *plea* of the general issue to debt on simple contracts, or on statutes, or where the deed was only matter of inducement, was formerly *nil debet*. But now, by Reg. Gen. Hil. T. 4 W. 4, the plea of *nil debet* is abolished, and it is ordered that in actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead "that he *never was* indebted in manner and form as in the declaration alleged," &c. (*b*) In debt on specialty, the plea denying the execution of the deed set out in the declaration, is *non est factum*; (*c*) and to debt on record, *nul tiel record*; and as those pleas merely deny the existence of the deed, or record, most matters or grounds of defence must *now* in debt on a deed be specially pleaded. The pleadings in debt will be fully noticed in subsequent parts of the work. The *judgment* in the plaintiff's * favor, which at common law is final, in all cases is, that the plaintiff recover his debt, and in general, nominal damages for the detention thereof; and in cases under the 8 & 9 W. 3, c. 11, it may also be awarded, that the plaintiff have execution for the dam-

(*u*) *M'Quillin v. Cox*, 1 H. Bl. 249; *Rudder v. Price*, 1 H. Bl. 550; *Dougl.* 6; *Lord v. Houston*, 11 East, 62.

(*z*) *Per Holt C. J. Ingleden v. Cripps*, 2 Lord Raym. 816.

(*x*¹) [*Ante*, 120.]

(*y*) *Emery v. Fell*, 2 T. R. 28, 30; *Palmer v. Stavely*, 12 Mod. 511; *Brill v. Neele*, 3 B. & Ad. 208; *Dalton v. Smith*, 2 Smith, 618; *Bishop v. Young*, 2 B. & P. 78; but see *Cloves v. Williams*, 3 Bing. N. C. 368; *Compton v. Taylor*, 4 M. & W. 138; [*Metcalf v. Robinson*, 2 McLean, 363; *McGinerty v. Laguerenne*, 10 Ill. 101; *Cruikshank*

v. Brown, 10 Ill. 75. See *Mahan v. Sherman*, 8 Blackf. 63.]

(*y*¹) [*State Bank v. Clark*, 2 Ark. 375.]

(*y*²) [In debt on judgments on any matter of record the obligation must result from the record itself, and must be shown by the record, without requiring averments of additional matter. The record must show a subsisting obligation, still unsatisfied. *Dimick v. Brooks*, 21 Vt. 569.]

(*z*) *Atty v. Parish*, 1 New Rep. 104; [*Garvey v. Dobyms*, 8 Missou. 213.]

(*a*) *Watkins v. Morgan*, 6 Car. & P. 661.

(*b*) *Post*, chapter on Pleas.

(*c*) *Warren v. Cousett*, 2 Ld. Raym. 1400.

ages sustained by the breach of a bond, conditioned for the performance of covenants; and the plaintiff, unless in some penal and other particular actions, is in general entitled to full *costs* of suit, although the damages recovered be under 40s.; (d) unless the judge certify under the statute. (e)

III. ON COVENANT.

The rules respecting this action are few and simple. It is a remedy provided by law for the recovery of *damages* for the breach of a *covenant* or contract under seal. (f) It cannot be maintained except against a person who, by himself, or some other person acting on his behalf, (g) has executed a deed under seal, or who, under some very peculiar circumstances, which will be noticed hereafter, (h) has agreed by deed to do a certain thing. (i) In the case of a covenant under seal, an action of covenant may be supported, whether such covenant be contained in a deed-poll or indenture; (k) or be *express* or *implied by law from the terms of the deed*; (l) or be for the performance of something *in futuro*, or that something has been done. (m) In some cases it is sustainable, although the covenant relate to matter *in presenti*, as that the covenantor is seised and *hath* good title; (n) though it is said, that in general covenant will not lie on a contract *in presenti*, as on a covenant to stand seised; or that a certain horse is yours; or shall

III. Cov.
ENANT.
In general.

Implied for
title, 6 Bing.
656.

(d) Tidd's Prac. 9th ed. 945, 963, 984.

(e) 43 Eliz. c. 6. [The verdict and judgment in debt should show how much is for debt and how much for damages. *Loose v. Loose*, 36 Penn. St. 528.]

(f) *Moore v. Jones*, 2 Lord Raym. 1536; F. N. B. 145; *Bennus v. Guyldley*, Cro. Jac. 506; Com. Dig. Pleader, 2 V. 2, Covenant, A. 1; [Simonton v. Winter, 5 Peters, 141, 150; *Gale v. Nixon*, 6 Cowen, 445; *Ludlum v. Wood*, 1 Penn. 56; *Bilderback v. Panner*, 2 Halst. 64; *Tribble v. Oldham*, 5 J. J. Marsh. 137; *Vicary v. Moore*, 2 Watts, 451; *M'Voy v. Wheeler*, 6 Porter, 201. Where a cause of action arises upon a specialty, the action must be covenant or debt. *McManus v. Cassidy*, 66 Penn. St. 260.]

(g) Covenant cannot be maintained against the chairman of the board of directors of a joint stock company upon a deed under the seal of a former chairman of the company, although sealed by him for and on behalf of the company. *Hall v. Barnbridge*, 1 M. & Gr. 42.

(h) Post, 133.

(i) *Barnett v. Lynch*, 5 B. & C. 602; *Somerville v. Stephenson*, 2 Stewart, 271; *Vicary v. Moore*, 2 Watts, 451; *Rees v. Overbaugh*, 6 Cowen, 746; *Powers v. Ware*, 2 Fick. 451; *Baseett v. Jordan*, 1 Stewart, 252; *Powell v. Clark*, 2 Penn. 517; *Bell v. Curtis*, 1 Penn. 142.]

(k) 1 Rol. Abr. 517, pl. 40; Com. Dig. Covenant, A. 1.

(l) Com. Dig. Covenant, A. 2; *Andrews v. Ellison*, 6 Moore, 199, 202, note (a); *Salton v. Houstoun*, 1 Bing. 433; *Easterby v. Sampson*, 9 B. & C. 505; 1 C. & J. 105, S. C.; *Baber v. Harris*, 9 Ad. & El. 532; 1 P. & D. 300. See ante, 116, note (t). [As to implied covenants of title or warranty, see *Frost v. Raymond*, 2 Caines, 88; *Kent v. Welch*, 7 John. 258; *Dorsey v. Jackman*, 1 Serg. & R. 42. Implied covenants may be set forth in the declaration in the same manner as if they were expressed in the instrument. *Grannis v. Clark*, 8 Cowen, 36; *Barnes v. Keith*, 5 Wend. 502.]

(m) Com. Dig. Covenant, A. 1; Bac. Abr. Covenant, A.; *Sharrington v. Strotton*, Plowd. 308; *Adams v. Gibney*, 6 Bing. 666. What is considered an implied covenant, so as to render this the proper remedy, see *Randall v. Lynch*, 12 East, 179, 182; *Seddon v. Senate*, 13 East, 63, 71, 74; *Platt on Cov.* 46, &c.; Index Ib. Implied Covenant. Covenant on the word "demise" in a lease. *Burnett v. Lynch*, 5 B. & C. 609; *Merrill v. Frame*, 4 Taunt. 329; *Adams v. Gibney*, 6 Bing. 666; ante, 58, 116, note (t).

(n) 3 Woodd. 85, 86; *Browning v. Wright*, 2 B. & P. 13; 2 Saund. 181 b; *Kingdon v. Nottle*, 4 M. & Sel. 53; *Adams v. Gibney*, 6 Bing. 656.

henceforth be the property of another. (*o*) It is not essential that the word "covenant" should be in the instrument, in order to render the defendant liable in covenant; (*p*) nor is it *material that the covenantee has not executed the deed. (*q*) It would be foreign to the present inquiry, relating merely to the application of the remedy to examine into the nature and description of the different covenants, which are to be found in the works referred to in the note. (*r*)

Covenant is the usual remedy upon indentures of apprenticeship, against the master for not instructing his apprentice, or against the party who covenanted for the due service of such apprentice, but it will not lie against an infant apprentice. (*s*) It lies also on articles of agreement under seal, (*t*) or deeds of separate maintenance; (*u*) and on covenants in deeds of conveyance, &c. for good title, &c.; (*v*) on charter-parties of affreightment; (*x*) on policies of insurance under seal against fire, &c.; (*y*) and on annuity and mortgage deeds; though debt in the last instances is in general preferable when the demand is for money; and it seems that covenant lies on a bond, for it proves an agreement. (*z*)

An action of covenant is also the usual remedy on leases at the suit of the lessee, his executor or assignee, against the lessor, &c. for the breach of a covenant for quiet enjoyment, &c. and by the lessor, &c. against the lessee, &c. for non-payment of rent, (*a*) not repairing, &c.

At common law, upon the death of a lessor seised in fee, his heir might sue for a subsequent breach of a covenant running with the land, although not named in the lease; (*b*) and the action of *debt* lay for the assignee of the reversion for *rent*, at common law; (*c*) but no persons could formerly support an action of *covenant*, or take advantage of any covenant or condition, except such as were parties or privies thereto; and of course no grantee or assignee of any reversion

(*o*) *Sharlington v. Strotton*, Plowd. 308; Finch, 49 *b*; Com. Dig. Covenant, A. 1; Vin. Abr. Covenant, A. pl. 6, G. 3; Platt on Cov. 3.

(*p*) *Andrews v. Ellison*, 6 Moore, 203.

(*q*) *Post*, 133. See *Rose v. Poulton*, 2 B. & Ad. 822; *Gooch v. Goodman*, 2 G. & D. 159; *Cardwell v. Lucas*, 2 M. & W. 111.

(*r*) *Selw. N. P. Covenant*; Com. Dig. Covenant, A. 2, 3, 4; Bac. Abr. Covenant; Platt on Cov.

(*s*) *Gylbert v. Fletcher*, Cro. Car. 179. [See *Commonwealth v. Wiltbank*, 10 Serg. & R. 416.]

(*t*) *Holles v. Carr*, 3 Swanst. 647.

(*u*) *Nurse v. Craig*, 2 New Rep. 148.

(*v*) 2 Saund. 175, 178, 181; *Browning v. Wright*, 2 B. & P. 13; *Howes v. Bruslefield*, 3 East, 491.

(*z*) *Beatson v. Schank*, 3 East, 233; *Atty v. Parish*, 1 New Rep. 104; *Randall v. Lynch*, 12 East, 179; *White v. Parkin*, 12

East, 578, 583. See *Lealie v. Wilson*, 6 Moore, 415.

(*y*) *Worsley v. Wood*, 6 T. R. 710; 6 G. 1, c. 18; *Andrews v. Ellison*, 6 Moore, 199, 202. When the directors of an insurance company are not personally liable. *Andrews v. Ellison*, 6 Moore, 199, 202, note.

(*z*) *Hill v. Carr*, 1 Ch. Ca. 294; *Holles v. Carr*, 3 Swanst. 648; *Hard*. 178; Com. Dig. Covenant, A. 2.

(*a*) An action of covenant lies for rent accruing before a reëntury for a forfeiture, although the indenture of lease provides that the lessor is to have the premises again, "as if the indenture had never been made." *Hartshorne v. Watson*, 4 Bing. N. C. 178; 6 Scott, 506, S. C.

(*b*) *Lougher v. Williams*, 2 Lev. 92; and see the concluding words of the statute 32 H. 8, c. 34, s. 1.

(*c*) 1 Saund. 241 (*c*).

or rent could maintain this form of action. To remedy this the statute 32 Hen. 8, c. 34, gives the assignee of a reversion the same remedies against the lessee, or his assignee, or their personal representatives, upon covenants running with the land, as the lessor or his heir, or their successor, had at common law; and on the other hand, *such assignee is liable by the statute to an action for a breach of covenant running with the land, as the lessor, &c. was at common law. (*d*) An assignee of *part* of the reversion, (*e*) and a remainder-man, (*f*) are within the statute. We have already observed, that *debt* is the remedy given by the 32 Hen. 8, c. 37, to executors of persons who were seized in fee, or for life, of property, to recover arrears of rent which accrued due to the testators; and to husbands, who survive their wives, to recover rents which became due in the lifetime of the latter, in respect of their freehold property.

Where the demand is for rent or any other liquidated sum, the lessor has an election to proceed in *debt*, or *covenant*, against the *lessee*, unless he has accepted the assignee as his tenant, or the lessee has become bankrupt, in which case the action of *debt* is not in general sustainable; and the lessor can only sue the lessee, after such assignment, in *covenant*, and then only upon an *express* covenant, and not upon a covenant in law. (*g*) On the other hand, as a personal contract cannot be apportioned, where there has been an eviction from a part of the land, even by a stranger, the *lessee* cannot be sued in *covenant*, but only in *debt*; though a distress may be supported. (*h*) With respect to the *assignee* of the lessee, the lessor may support *debt*, (*i*¹) or *covenant*, at common law; (*i*) and an assignee of a part of the premises may be sued in *covenant*, (*k*) though not in *debt*, (*l*) and it lies for an apportionment against the assignee of the lessee, in case of a partial eviction by a stranger, (*m*) though we have seen that it is not in such case sustainable against the lessee. (*n*)

It is a general rule, as before observed, (*o*) that *covenant* lies upon an implied covenant, or a covenant in law; as on the word "demise," which amounts, in general, in the absence of an express covenant, to

(*d*) 3 Bl. Com. 158. See the observations on the statute, Bac. Abr. Covenant, E. 5; Vin. Abr. Covenant, K. 3. As to the parties to sue and be sued, *ante*, 19, 56.

(*e*) Twynam v. Pickard, 2 B. & Ald. 106; Henniker v. Turner, 4 B. & C. 157.

(*f*) Isherwood v. Oldknow, 3 M. & Sel. 382.

(*g*) *Ante*, 57; 1 Saund. 241, note (5); Ludford v. Barber, 1 T. R. 92; Brett v. Cumberland, Cro. Jac. 523; Cullen, 392, 393.

(*h*) Stevenson v. Lambard, 2 East, 575; Doe v. Meyler, 2 M. & Sel. 277.

(*i*¹) [Norton v. Valtze, 1 Hall, 384.]

(*i*) 1 Saund. 241 c; 3 Co. 22 b; Stevenson v. Lambard, 2 East, 580.

(*k*) Congham v. King, Cro. Car. 221, cited in Curtis v. Spitty, 1 Bing. N. C. 759; Conen v. Kemise, Sir W. Jones, 245; Stevenson v. Lambard, 2 East, 580. [But see Fulton v. Stewart, 2 Ohio, 215.]

(*l*) Curtis v. Spitty, 1 Bing. N. C. 756.

(*m*) If the eviction be by the *lessor*, covenant cannot be maintained by him for any portion of the rent. Neale v. Mackenzie, 1 M. & W. 747. But this doctrine does not extend to breaches of other covenants, such as to repair, &c. Newton v. Allin, 1 G. & D. 44.

(*n*) Stevenson v. Lambard, 2 East, 575; Doe v. Meyler, 2 M. & Sel. 277.

(*o*) *Ante*, 129.

a stipulation for quiet enjoyment during the term ; (*o*¹) but we may remember that such implied covenant ceases with the estate of the covenantor, and will not furnish the lessee with a remedy against the executors of his lessor, if the latter were only tenant for life, and the remainder-man evict the lessee. (*p*)

*From the preceding observations, it appears that the action of covenant, being for the recovery of *damages* for the non-performance of a contract *under seal*, differs very materially from the actions of assumpsit and debt. Assumpsit, though for the recovery of damages, is not in general sustainable where the contract was originally under seal, or where a deed has been taken in satisfaction ; (*q*) and though debt is sustainable upon a simple contract, a specialty, a record, or a statute, yet it lies only for the recovery of a sum of money *in numero*, and not where the damages are unliquidated and incapable of being reduced by averment to a certainty ; (*r*) and though, where the object of the action of covenant is the recovery of a money demand, the distinction between the terms "damages" and "money *in numero*," may not on first view appear substantial, yet we shall find it material to be attended to. (*s*) Covenant and debt are concurrent remedies for the recovery of any *money* demand, where there is an express or implied contract in an instrument under seal to pay it ; but in general debt is the preferable remedy, as in that form of action the judgment is final in the first instance, if the defendant do not plead.

Covenant is the *peculiar* remedy for the non-performance of a contract under seal, where the damages are unliquidated, and depend in amount on the opinion of a jury, in which case we have seen that neither debt nor assumpsit can be supported. (*t*) It is the proper remedy where an entire sum is by deed stipulated to be paid by instalments, and the whole is not due, nor the payment secured by a penalty. (*u*) And it is frequently more advisable to proceed in covenant on a lease, &c. for general damages than to

When the peculiar or best remedy.

(*o*¹) [Grannis v. Clark, 8 Cowen, 36.]
 (*p*) Adams v. Gibney, 6 Bing. 656; *ante*, 58, 118, note (*t*). The word "demise," in a lease of lands, implies a covenant for title and a covenant for quiet enjoyment, but both breaches of such implied covenant are restrained by an express covenant for quiet enjoyment. Line v. Stephenson, 5 Bing. N. C. 183. As to the effect of the word *demise* in a lease of personality, it is laid down in Com. Dig. tit. "Covenant" (A. 4), that "if goods be demised by indenture for years, and the lessee be evicted, that covenant does not lie upon the word *demise*, for the law does not create a covenant for a personal thing." So in Bac. Abr. tit. "Covenant" (B.), it is said that "if a man leases certain goods for years by indenture which are evicted within the term, yet he shall not have a writ of covenant, for the law does not create any covenant upon such personal thing," and

for which is cited Owen, 104 (Bedford v. Bull); Roll. Abr. 519; 6 Vin. Abr. 385.

(*q*) *Ante*, 110, 111.

(*r*) Bul. N. P. 167.

(*s*) *Rien en arrears* is a good plea in *debt* for rent, but not in covenant, because the latter action is for damages. Warner v. Theobald, Cowp. 588, 589.

(*t*) *Ante*, 110, 126, 127. [See Wilson v. Hixon, 1 Blackf. 231; Osborn v. Fulton, 1 Blackf. 234; Harper v. Levy, 1 Blackf. 294; Coldren v. Miller, 1 Blackf. 291; Hedges v. Gray, 1 Blackf. 216. No action but covenant will lie on an instrument under seal, in the words, "Due A. B. \$10.43, value received, payable in cotton." Fortenbury v. Tunstall, 5 Pike, 263; January v. Henry, 2 Monroe, 58.]

(*u*) Com. Dig. Action, F.; 2 Saund. 303, note (*b*); [Stevens v. Chamberlin, 1 Vt. 25; Fontaine v. Aresta, 2 McLean, 127.]

declare in debt for a penalty, securing the performance of a covenant; because, if the party elect to proceed for the penalty, he is precluded from afterwards suing for general damages; and he cannot, in case of further breaches, recover more than the amount of the penalty, and in many cases before he can issue execution he must proceed under the statute 8 & 9 W. 3, c. 11; whereas if he proceed in covenant for every repeated breach, he may ultimately recover beyond the amount of the penalty. (x) And where rent is due upon a lease, and there has *also been another breach, as for not repairing, for which the plaintiff claims unliquidated damages, covenant is preferable to debt; because in the former, both the breaches of covenant may be included in one action, and damages for the whole demand may be recovered.

On the other hand, covenant *cannot* in general be supported unless the contract were under *seal*, and when it is by parol the plaintiff must proceed by action of assumpsit, &c. (y) But ^{When not sustainable.} by special custom in London (z) and Bristol, (a) covenant lies, although the contract be not under seal. So against the lessee or patentee of the crown, covenant may be supported, although he did not seal the lease or any counterpart of the lease, it being matter of record, and the lessee's acceptance of the demise being in such case as obligatory as an express covenant. (b) A peculiar case is put in Co. Litt.; (c) viz. that if a lease be made to A. and B. by indenture between the landlord of the one part, and A. and B. of the other part, and A. only execute it, but B. agree thereto, and enjoy the premises by virtue of the demise, "an action" may be maintained against A. and B. jointly, upon a covenant therein running with the land, and purporting to be made by them. This has been supposed to be an authority for the position, that in the above instance an action of *covenant* may be maintained against A. and B. (d) But the authorities cited in Co. Litt. (e) do not support that position; and it has been disputed, with much appearance of reason, in a recent valuable publication. (f) And it would seem that if a lessee by deed-poll assign the term, although in express terms, "*subject* to the covenants in the

(x) *Robinson v. Bland*, 2 Burr. 1087; *Bird v. Randall*, 3 Burr. 1351; *Ingledew v. Cripps*, 2 Lord Raym. 814; *Cotterell v. Hooke*, Doug. 97; *Harrison v. Wright*, 13 East. 347, 348; [*Dick v. Garkill*, 2 Whart. 184.] Covenant is the peculiar remedy on a collateral and independent covenant to pay the debt of another person, on non-performance by him. *Randall v. Rigby*, 4 M. & W. 130; 6 Dowl. 650, S. C.; *Harrison v. Matthews*, 10 M. & W. 768; 2 Dowl. N. S. 318, S. C. So covenant is the only remedy against the lessee after the lessor has accepted the assignee of the lessee as tenant. *Ante*, 127.

(y) *Ante*, 110, 111.

(z) 22 E. 4, 2 a; *Priv. Lond.* 149; *F. N. B.* 146, A.; *Com. Dig.* London, N. 1.

(a) *Wade v. Bomboe*, 1 Leon. 2.

(b) *Lord Ewre v. Strickland*, Cro. Jac. 240; *Bret v. Cumberland*, Cro. Jac. 399, 521; *Com. Dig.* Covenant, A. 1; *Vin. Abr.* Covenant, B. pl. 1; *Platt on Cov.* 9, 10.

(c) 231 A.

(d) See 4 Cru. Dig. 393, 3d ed.; *Com. Dig.* Covenant, A. 1; *Vin. Abr.* Condition, I. a, 2; *Dyer*, 13 b, pl. 66; 2 *Roll. Rep.* 63, 159; *Brett v. Cumberland*, 3 Bulst. 164; *Co. Litt.* 230 b, note (1), by Butler; *Co. Litt.* by Thomas, vol. 2, 229, note. *Per Lord Tenterden, *Burnett v. Lynch*, 5 B. & C. 602.

(e) Namely, 38 Edw. 3, 8 a; 3 Hen. 6, 26 b; 45 Edw. 3, 11, 12.

(f) *Platt on Cov.* 10-18.

lease," the proper remedy by the *lessee* against the assignee for not performing the covenants, whereby the lessee was damnified, is an action of *assumpsit*, not an action of covenant; the assignee not having executed any deed covenanting to perform the covenants in the lease. (*g*)

Covenant may be supported, although the covenantee did not execute the indenture; (*h*) and we have seen that in the case of a * deed-poll, a stranger to it may sue on a covenant therein to pay him a sum of money, though it is otherwise in the case of a deed *inter partes*. (*i*) The right of suit is constituted by the covenantor's execution of the deed; and in these cases the acceptance of the deed by the covenantee, and his production of it at the trial, sufficiently testify his assent to the contract, if necessary, to render it binding. (*k*) But it appears to be essential that the party claiming the benefit of the covenant should be named therein as the covenantee. (*l*) Where a contract under seal has afterwards been varied in the terms of it by a subsequent parol contract, made on a new consideration, such substituted agreement must be the subject of an action of *assumpsit*, and not of covenant; (*m*) and it has been holden, that covenant cannot be supported against the assignee of the grantor of a rent-charge, though debt is sustainable against the *pernor* of the profits. (*n*) In some cases where the breach of a covenant is *misfeasance*, the party has an election to proceed by action of covenant, or by action on the case for the tort, as against a lessee, either during his term or afterwards, for waste. (*o*)

The rules which affect the *form* of the pleadings in covenant will be fully considered hereafter. We may here observe generally, that the *declaration* in this action must state that the

Declarations
and pleadings.

(*g*) *Burnett v. Lynch*, 5 B. & C. 589, 602; 8 D. & R. 368, S. C. *Case* lies; *Ib. Sed vide Hawkins v. Sherman*, 3 C. & P. 462.

(*h*) 2 Roll. Ab. 22, *Faita*, F. pl. 2; *Lutw. fo.* 305; *Com. Dig. Covenant*, A. 1; *Petrie v. Bury*, 3 B. & C. 353; *Gooch v. Goodman*, 2 G. & D. 159; *Rose v. Poulton*, 2 B. & Ad. 822. And against the assignee of the lessee where the lessor has not executed the lease. *Aveline v. Whisson*, 12 Law J. R. N. S. C. P. 58. But the assignee of the reversion cannot maintain covenant on a deed purporting to be a lease for a term of years, not executed by the lessor, because either the covenants in the lease were void, the consideration for them, viz.: a lease, failing; or if the lease was not essential to the validity of the covenants, yet the defendant's possession being that of a lessee at will, or, at best, of a tenant from year to year, the assignee would not be assignee of the reversion to which the covenants in the deed were annexed. *Cardwell v. Lucas*, 2 M. & W. 111. See observations of Lord Denman C. J. upon this case in *Gooch v. Goodman*, 2 G. & D. 164, from which it appears that the lat-

ter ground is the true reason why such an action could not be maintained. [*In Hinde v. Humphrey*, 15 Conn. 431, it was held that an action of covenant will not lie against a lessee, or his assigns, for rent, under a lease sealed by the lessor only.]

(*i*) *Com. Dig. Covenant*, A. 1; *ante*, 2, 3, 4; [*Smith v. Emery*, 7 Halst. 53.]

(*k*) 4 Cruise Dig. 393, 3d ed.; *Shep. Touch.* 162.

(*l*) *Green v. Horn*, 1 Salk. 197; *Comb.* 219, S. C. *Sed vide, Nurse v. Frampton*, 1 Lord Raym. 28; 1 Salk. 214, S. C. See *Ex parte Richardson*, 14 Ves. 187; *Collins v. Plumb*, 16 Ves. 454; *Platt on Cov.* 5.

(*m*) *Ante*, 116, 117; *Heard v. Wadham*, 1 East, 630; *Littler v. Holland*, 3 T. R. 596; [*Lawall v. Rader*, 24 Penn. St. 283; *M'Voy v. Wheeler*, 6 Porter, 201; *Raymond v. Fisher*, 6 Missou. 29; *ante*, 117, and note (*f*); *Ford v. Campfield*, 6 Halst. 237.]

(*n*) *Brewster v. Kitchin*, 1 Salk. 198; 1 Lord Raym. 322.

(*o*) *Kinlyside v. Thornton*, 2 Bl. Rep. 1111. *Sed quare*, see *post*.

contract was under seal; (*p*) and should usually make a proferet thereof, or show some excuse for the omission. (*q*) It is not necessary to state the consideration of the defendant's covenant, unless the performance of it constituted a condition precedent, when such performance must be averred; (*q*¹) or unless a consideration be by law necessary; and even in that case an averment that the defendant, "for the consideration mentioned in the deed," thereby covenanted, &c. will be sufficient on general demurrer, the defendant not cravingoyer of, and setting out, a deed showing no consideration, &c. (*r*) Only so much of the deed and covenant should be set forth as is essential to the cause of action; and each may be stated according to the legal effect, though it is more usual to declare in the words of the deed. (*r*¹) The *breach* also may *be assigned in the negative of the covenant generally, or according to the legal effect. (*r*²) Several breaches may be assigned at common law; (*s*) and as the recovery of damages is the object of the suit, a sum sufficient to cover the real amount should be laid at the end of the declaration, as the amount of the damage sustained.

In covenant there is strictly no *plea* which can be termed a general issue, for *non est factum* only puts in issue the fact of sealing the deed (*s*¹) and *non infregit conventionem*, and *nil debet*, are insufficient pleas; (*t*) and therefore most matters of defence must be pleaded specially. (*u*) These rules will be fully explained hereafter. The *judgment* in this action is, that the plaintiff recover a named sum for his *damages* which he hath sustained by reason of the breach or breaches of cove-

(*p*) *Ante*, 133; *Moore v. Jones*, 2 Lord Raym. 1536; *Com. Dig. Pleader*, 2 V. 2. See *Platt on Cov.* 6; [*Smith v. Emery*, 7 Halst. 53.]

(*q*) *Read v. Brookman*, 3 T. R. 151; [*Catts v. United States*, 2 Gall. 69; *Smith v. Emery*, 7 Halst. 53.]

(*q*¹) [*Harrison v. Taylor*, 3 A. K. Marsh. 169; *Hoansford v. Fisher*, Wright, 580; *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Leonard v. Bates*, 1 Blackf. 175; *Tinney v. Ashley*, 15 Pick. 552; *Dakin v. Williams*, 11 Wend. 67; *Jones v. Sommerville*, 1 Porter, 437; *Smith v. Christmas*, 7 Yerger, 565; *Farahan v. Ross*, 2 Hall, 167; *Thompson v. Gray*, 2 Stew. & P. 60.]

(*r*) *Homer v. Ashford*, 3 Bing. 322.

(*r*¹) [*Gates v. Caldwell*, 7 Mass. 68.]

(*r*²) [*Potter v. Bacon*, 2 Wend. 583; *Randall v. Chesapeake & Del. Canal Co.* 1 Harring. 151; *Breckenridge v. Lee*, 3 Bibb, 300; *Rickert v. Snyder*, 9 Wend. 416.]

(*s*) *Com. Dig. Pleader*, 2 V. 2, 3; *Dummer v. Birch*, *Com. Rep.* 146. [If the breaches are at different times, a different action may be sustained for each breach. *Breckenridge v. Lee*, 3 A. K. Marsh. 449; *Davis v. Harrison*, 1 A. K. Marsh. 515; *Adams v. Essex*, 1 Bibb, 169.]

(*s*¹) [*Haggart v. Morgan*, 5 N. Y. 422;

Legg v. Robinson, 7 Wend. 194; *Norman v. Wells*, 17 Wend. 136; *Hebberd v. Delaplaine*, 3 Hill, 187; *Goulding v. Hewitt*, 2 Hill, 644; *Dale v. Roosevelt*, 9 Cowen, 307. The plea of *non est factum* admits all the material averments in the declaration. *M'Neish v. Stewart*, 7 Cowen, 474; *Thomas v. Woods*, 4 Cowen, 173; *Cooper v. Watson*, 10 Wend. 202; *Barney v. Keith*, 6 Wend. 555; *Kane v. Sawyer*, 14 John. 89.]

(*t*) *Com. Dig. Pleader*, 2 V. 4, &c.; *Hodgson v. The East India Company*, 8 T. R. 283; *Walsingham v. Comb*, 1 Lev. 183; [*Phelps v. Sawyer*, 1 Aiken, 150; *Bender v. Fromberger*, 4 Dall. 436; *Roosevelt v. Fulton*, 7 Cowen, 71.]

(*u*) *Com. Dig. Pleader*, V. 4, &c. [Where all the covenants are in the affirmative *omnia performavit* is a good plea. *Bailey v. Rogers*, 1 Greenl. 189; *Rangler v. Morton*, 4 Watts, 265; *Champ v. Ardery*, 2 A. K. Marsh. 246. The plea of "conditions performed" admits all the facts that are well alleged, and assumes the proof of performance. *Harrison v. Park*, 1 J. J. Marsh. 172; *Turnpike Co. v. M'Cullough*, 25 Penn. St. 303; *Neave v. Jenkins*, 2 Yeates, 107; *Roth v. Miller*, 15 Serg. & R. 106; *Bryant v. Smithson*, 3 Stewart, 339.]

nant; (x) together with full costs of suit, to which the plaintiff is in general entitled, although the damages recovered be under 40s. (y) unless the judge certify under the statute of Eliz. (z)

IV. DETINUE.

The action of *detinue* is the only remedy by suit at law for the recovery of a personal chattel *in specie*, except in those instances where the party can obtain possession by replevying the same, and by action of replevin. (b) In trespass, or trover, for taking or detaining goods, or in assumpsit for not delivering them. *damages* only can be recovered.

This is an action somewhat peculiar in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu*, or should be ranked with actions *ex delicto*. (b¹) The right to join detinue with debt, (c) and to sue in detinue for not delivering goods in pursuance of the terms of a bailment to the defendant, (d) seem to afford ground for considering it rather as an action *ex contractu* than an action of tort. (d¹) On the other hand, it seems that detinue lies although the defendant wrongfully became the possessor thereof in the first instance, without relation to any contract. (e) And it has recently been considered as an action for *tort*, * the gist of the action not being the breach of a contract, but the *wrongful detainer* for which reason, although a declaration in detinue has stated a bailment to the defendant, and his engagement to *redeliver on request*, and the defendant has pleaded that the bailment was a security for a loan, the plaintiff may, without being guilty of a departure, reply that he tendered the debt, and that the defendant afterwards wrongfully withheld the goods. (f) Since the 3 & 4 W. 4, c. 42,

(x) As to the measure of damages, see *Loosemore v. Radford*, 1 Dowl. N. S. 881; 9 M. & W. 657, S. C.; on a covenant to repair, *Doe v. Rowlands*, 9 C. & P. 734; on covenants by a sub-lessee, *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249; 2 Dowl. N. S. 263; overruling, *Neale v. Wyllie*, 3 B. & C. 533.

(y) *Tidd*, 9th ed. 945, 963, 977, 978.

(z) 43 Eliz. c. 6; *Tidd*, 9th ed. 952-954.

(b) 3 Bl. Com. 146, 152; *Kettle v. Bromsall*, Willes, 120; Co. Lit. 296 b; Com. Dig. Detinue, A. [There is no longer any action of detinue in Missouri. *Moore v. Chamberlain*, 15 Missou. 238. But this form of action is in use in New Hampshire, *Dame v. Dame*, 43 N. H. 37; and to a limited extent in Iowa, Revision of Laws, 1860, c. 143.]

(b¹) [Wittick v. Traun, 27 Ala. 562; Traun v. Wittick, 27 Ala. 570; O'Shea v. Twohig, 9 Texas, 336; Elgee v. Lovell, 1 Woolw. 102, 112.]

(c) 2 Saund. 117 (b).

(d) *Post*, 139.

(d¹) [This is certainly confirmed by the history of the action, from which it will appear that detinue was originally no other than an action of debt in the detinet instead of debt. As to which, as well as the ancient law respecting this action, see 2 Reeves's Hist. E. L. 261, 333, 336; 3 Reeves's Hist. E. L. 66, 74.]

(e) *Post*, 137. It is also clear, that a set-off is not available in this form of action. Bul. N. P. 181. But this may be on the ground that in detinue the value of the goods is unliquidated, and the claim is not reduced to a sufficiently liquidated amount to render the application of the law of set-off possible.

(f) *Gledstone v. Hewitt*, 1 Cr. & J. 565; 1 Tyr. 450, S. C. So, the action of detinue is so far considered an action of tort, that if one joint-tenant bring the action, the objection of non-joinder of the others can only be taken by plea in abatement. *Broadbent v. Ledward*, 3 P. & D. 45; 11 Ad. & El. 209.

a. 13, abolished wager of law, this action has become more frequent. (g)

This action may be considered, 1st, with reference to the nature of the thing to be recovered; 2dly, the plaintiff's interest therein; 3dly, the injury; 4thly, the pleadings; and 5thly, the judgment.

This action is only sustainable for the recovery of a specific *chattel*, and not for real property. (h) The goods for which it is brought must be distinguishable from other property, and their identity ascertainable by some certain means, (h¹) so that if the plaintiff recover, the sheriff may be able to deliver the goods to him; thus it lies for a horse, a cow, or money in a bag; but for money or corn, &c. not in a bag or chest, or otherwise distinguishable from property of the same description, detinue cannot be supported. (i) It lies for the recovery of charters and title-deeds, the property in which generally accompanies the title to the land to which they relate. (k) And it is sustainable upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract; (l) but to support this action, the property in some particular chattel must be vested in the plaintiff; and therefore assumpsit, or debt in the detinet, is the only remedy for the non-delivery of corn, &c. sold, where no specific corn was contracted for. (m)

1st. For what property it lies.

A person who has the absolute or general property in certain specific goods and the right to the immediate possession thereof, may support this action, (m¹) although he has never had the actual possession; therefore an heir may maintain detinue for an heir-loom; and if goods be delivered to A. to deliver to B., the latter may support this action, the property being vested in him by the delivery to his use. (n) * But if the plaintiff have not the right to the immediate possession of the goods, and his interest be in rever-

2dly. The plaintiff's interest.

(g) See before, *Barry v. Robinson*, 1 New Rep. 293; *King v. Williams*, 3 B. & C. 538.

(h) *Coupledike v. Coupledike*, Cro. Jac. 39.

(h¹) [Detinue lies in Iowa to recover any property which can be identified so as to be recovered in specie. *Wright v. Ross*, 2 Greene (Iowa), 266; *Laws of Iowa*, Rev. of 1860, ch. 143; so in New Hampshire, *Dame v. Dame*, 43 N. H. 37.]

(i) *Com. Dig. Detinue*, B. C.; *Co. Litt.* 286 b; 3 Bl. Com. 152; *Isaac v. Clark*, 2 Bulet. 308; *Banks v. Whetstone*, Moore, 394.

(k) *Atkinson v. Baker*, 4 T. R. 229, 231; [*Stoker v. Yerby*, 11 Ala. 322 *Lewis v. Hoover*, 1 J. J. Marsh. 500.] As a general rule the owner of the estate has a right to the title-deeds, *Harrington v. Price*,

1 B. & Ad. 170; unless a valid lien have been created on them by some person having at the time a right to do so. *Ogle v. Storey*, 4 B. & Ad. 735.

(l) *Fitz. N. B.* 138; *Kettle v. Bromsall*, Willes, 120; 3 Bl. Com. 152.

(m) 3 Wood. 104; 1 Dyer, 24 b.

(m¹) [*Shomo v. Caldwell*, 21 Ala. 448; *Frierson v. Frierson*, 21 Ala. 549; *Miller v. Eatman*, 11 Ala. 609; *Bryan v. Smith*, 22 Ala. 534; *Melton v. McDonald*, 2 Missou. 45; *Berry v. Hale*, 1 How. (Miss.) 315; *Price v. Talley*, 18 Ala. 21.]

(n) 2 Saund. 47 a, note; 1 Bro. Abr. Detinue, pl. 30, 45; 1 Rol. Abr. 606; *Com. Dig. Detinue*, A.; *Phillips v. Robinson*, 4 Bing. 111. [See *Hundley v. Buckner*, 6 Sm. & M. 70; *Jones v. Strong*, 6 Ired. (Law) 367.]

sion, he cannot support detinue, trover, or trespass. (o) And it seems to be a general rule, that the plaintiff must have a general or special property in the goods, *at the time the action was commenced* in order to maintain detinue. (p) A person who has only a special property, as a bailee, &c. may also support this action, where he delivered the goods to the defendant, or they were taken out of such bailee's custody. (q) It is said, that if a person detain the goods of a woman, which came to his hands before her marriage, the husband alone must bring this action, because the property is in him alone at the time of the action brought. (r) And an heir who is entitled to an estate *per autre vie*, as special occupant, may in this action recover the title-deeds relating to the estate. (s) If the owner of an estate deliver the title-deeds to a bailee, and then convey away the estate, the action for the detention of the deeds should be brought in the name of the new proprietor of the property. (t)

The gist of this action is the wrongful *detainer*, and not the original taking. (u) It lies against any person who has the actual possession of the chattel, and who acquired it by lawful means, as either by bailment, delivery, or finding. (x) It is a common doctrine in the books, that this action cannot be supported, if the defendant *took* the goods *tortiously*; (y) an opinion which appears to be founded on the judgment of Brian C. J., who held (z) that detinue could not in such case be supported; on this fallacious reasoning, that by the trespass the property of the plaintiff was divested, and consequently that the property in the chattel was not vested in the plaintiff at the time of the commencement of his action. (a) But it is observable, that Vavasor J., in the same case, was of a different opinion, (a¹) and the notion that the property can be changed by the tres-

(o) *Gordon v. Harper*, 7 T. R. 9; [O'Neal v. Baker, 2 Jones (Law), N. Car. 168.]

(p) *Phillips v. Robinson*, 4 Bing. 106; [*Hughes v. Jones*, 2 Md. Ch. 178; *Ramsey v. Bancroft*, 2 Missou. 151. This action cannot be sustained after the destruction of the chattel sued for. *Lindsey v. Perry*, 1 Ala. 203; *Caldwell v. Fenwick*, 2 Dana, 332.]

(q) Bro. Abr. Detinue; 1 Saund. 47 b, c, d; *Phillips v. Robinson*, 4 Bing. 111; [*Boyle v. Townes*, 9 Leigh, 158.]

(r) Bul. N. P. 50; *ante*, 82. *Sed vide* *Burn v. Mattaire*, Rep. temp. Hardw. 120.

s) *Atkinson v. Baker*, 4 T. R. 229, 231.

t) See *Phillips v. Robinson*, 4 Bing. 106.

(u) 3 Bl. Com. 152; Co. Litt. 286 b; *Isaac v. Clark*, 2 Bulst. 308; 1 New R. 140 S. C.; *Gledstone v. Hewitt*, 1 Cr. & J. 565; 1 Tyr. 450, S. C.; [*Charles v. Elliott*, 4 Dev. & B. (Law) 468; *Benje v. Creagh*, 21 Ala. 151.]

(x) *Kettle v. Bromsall*, Willes, 118; Co.

Litt. 286 b; Fitz. N. B. 138, E.; Bac. Abr. Detinue; [*Dame v. Dame*, 43 N. H. 37.]

(y) 6 H. 7, 9; 3 Bl. Com. 152; Bro. Abr. Detinue, pl. 36, 53; Com. Dig. Detinue, D.; Vin. Abr. Detinue, B. 2, pl. 5; *Trespass*, Y. pl. 12; *Bishop v. Viscountess Montague*, Cro. Eliz. 824; Selw. N. P. Detinue, 10th ed. 656. In equity, see *Nutbrown v. Thornton*, 10 Ves. 163.

(z) 6 H. 7, 9.

(a) 6 H. 7, 9. Lord Kenyon C. J. in *M'Manus v. Crickett*, 1 East, 107, 108, observed upon this doctrine of the property being altered by a trespass.

(a¹) [This point is discussed by Sargent J. in *Dame v. Dame*, 43 N. H. 37. See *Pierce v. Hill*, 9 Porter, 151; *Bernard v. Herbert*, 3 Cranch, C. C. 346; *Oberfield v. Bullitt*, 1 Missou. 749; *Owings v. Frier*, 2 A. K. Marsh. 268; *Schurtenberg v. Campbell*, 14 Missou. 491; *Hail v. Reed*, 15 B. Mon. 476; *Johnson v. Preston*, Cam. & Nor. 464; *Goff v. Gott*, 5 Sneed (Tenn.), 562; *O'Neil v. Henderson*, 15 Ark. 235.]

pass appears unfounded, for though a trespasser die possessed, the property is not thereby altered; (b) and it is a principle of law, that no person can avail himself of his own wrong. It has been decided that if goods, &c. taken away continue in specie in the hands of the executor of the wrong-doer, *replevin or detinue may be supported against the executor. (c) In pleading, it is usual to state that the defendant acquired the goods by *finding* (except where he is declared against as a bailee); yet that allegation is not traversable; (d) and, as observed in *Kettle v. Broomsall*, (e) if detinue could not be supported because the original taking was tortious, a person might be greatly injured, and have no adequate remedy; for in trover damages only can be recovered, and the thing detained may be of such a description, that a judgment merely for damages would be an inadequate satisfaction. (f) Detinue cannot be supported against a person who never had the possession of the goods; as against an executor on a bailment to the testator, unless the goods came to the possession of the executor; (g) nor does it lie against a bailee, if before demand he lose them by accident; (h) though if he wrongfully deliver the goods to another, he will continue liable. (i) And it seems that if the defendant represent that he has the goods, and thereby induce the owner to bring the action against him, he is liable, although it does not appear that he had the general controlling power over the goods. (k) If goods be delivered to a feme before her marriage, and afterwards detained, the action may be brought against the husband and wife; (l) but if the bailment were to the husband and wife after marriage, it is said that the husband must be sued alone. (m) If an infant have bought goods, and on application for payment he refuse to pay on the ground of his infancy, and any of the goods remain in specie, they should be demanded, and afterwards the prudent course will be to declare in detinue for the goods, with a count in debt for goods sold and delivered, and at least on the former the plaintiff would recover, should the defendant plead infancy to the latter. (n)

(b) Com. Dig. Bien, F.; Selw. Detinue; ante, 100, 101.

(c) Bro. Abr. Detinue, pl. 19; [Brewer v. Strong, 10 Ala. 961; Mansell v. Israel, 3 Bibb (Ky.), 510.]

(d) Doc. Plac. 124; Bro. Abr. Detinue, pl. 50; Mills v. Graham, 1 New Rep. 140; Jenk. 2, Cant. p. 78.

(e) *Kettle v. Broomsall*, Willes, 120.

(f) See, also, *Bishop v. Viscountess Montague*, Cro. Eliz. 824; Com. Dig. Action, M. 6; 27 H. 8, 22; Vin. Abr. Detinue, D. 5, pl. 62.

(g) Bro. Detinue, 19; *Isaack v. Clark*, 2 Balst. 308; *supra*, note (c); [Brewer v. Strong, 10 Ala. 961.]

(h) Bro. Detinue, pl. 1, 33, 40.

(i) Bro. Detinue, pl. 1, 33, 40, and pl. 2,

34; *Devereux v. Barclay*, 2 B. & Ald. 703; *Mertens v. Adcock*, 4 Esp. 251, cited in *Peake N. P. R.* 42, note; [Lowry v. Houston, 4 Miss. 394; O'Shea v. Twohig, 9 Texas, 336; Woodruff v. Bentley, 1 Hempst. 111; Walker v. Fenner, 20 Ala. 192.] And he will be liable although he has *bond fide* sold the chattel before action brought. *Jones v. Dowle*, 1 Dowl. N. S. 391; [Haley v. Rowan, 5 Yerger, 301; Kershaw v. Baykin, 1 Brevard, 301; Rucker v. Hamilton, 3 Dana (Ky.), 36. See *Davis v. Herndon*, 39 Miss. 484.]

(k) *Dyer v. Pearson*, 3 B. & C. 38.

(l) Co. Litt. 351 b.

(m) *Isaack v. Clark*, 2 Balst. 308; 1 New R. 140, S. C.; 38 Ed. 3, fo. 1. See *ante*, 104.

(n) *Supra*, note (c).

With respect to the *pleadings* in this action, more certainty is necessary in the description of the chattels than in an action of trover or replevin; (*o*) but it is not necessary to state the date of a deed; (*p*) and if the action be brought for several articles, the value of each need not be stated separately in the declaration, though the jury should sever the value of each by their verdict. (*q*) In the case of * a special bailment it is proper to declare, at least in one count, on the bailment; (*r*) and to lay a special request; (*s*) but in other cases it is sufficient to declare upon the supposed finding, which we have seen is not traversable. (*t*) And the plaintiff may declare on a bailment to redeliver on request, and yet in his replication rely on a different bailment. (*u*)

The Reg. Gen. Hil. Term, 4 W. 4, r. III. orders that in detinue, the plea of *non detinet* (*u*¹) shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and that no other defence than such denial shall be admissible under the plea, consequently the defendant must plead specially almost every ground of defence, as that the goods were pawned to him for money remaining unpaid; (*y*) and he must also plead specially any other description of lien. (*z*)

The nature of this action requires that the *verdict* and judgment be such, that a specific remedy may be had for recovery of the goods detained, or a satisfaction in value for each several parcel, in case they, or either of them, cannot be returned; and therefore, where the action is for several chattels, the jury ought by their verdict to assess the value of each separately; (*a*) and if the jury neglect to find the value, the omission cannot be supplied by writ of inquiry. (*b*) The *judgment* is in the alternative, that the plaintiff do recover the goods, or the value thereof, if he cannot have the goods themselves, and his damages for the detention and his full costs of suit. (*c*) This action

(*o*) 2 Saund. 74 *b*; Co. Litt. 286 *b*; [Wright v. Ross, 2 Greene (Iowa), 266; March v. Leckie, 13 Ired. (Law) 172.]

(*p*) Bac. Abr. Detinue, B.; Alcorn v. Westbrook, 1 Wils. 116.

(*q*) Pawly v. Holly, 2 Bl. Rep. 853; Jenk. 2, Cent. 112; Bul. N. P. 51 *a*. [See, as to stating the value, Britton v. Morris, 6 Blackf. 469; Haynes v. Crutchfield, 7 Ala. 189.]

(*r*) Mills v. Graham, 1 New Rep. 146.

(*s*) Kettle v. Bromsall, Willes, 120. [Demand before suit in this action is not required, except for the purpose of entitling the plaintiff to damages for detention between the time of the demand and the commencement of the suit. Cole v. Cole, 4 Bibb (Ky.), 430; Tunstal v. McClelland, 1 Bibb (Ky.), 186; Irwin v. Wells, 1 Missou. 9; Brock v. Headen, 13 Ala. 470; Mortimer v. Brumfield, 3 Munf. 122; Gentry v. McKehen, 5 Dana (Ky.), 34; Jones v. Green, 4 Dev. & B. (Law) 354; Vaughn v. Wood, 5 Ala. 304.]

(*t*) Mills v. Graham, 1 New Rep. 140;

Atkinson v. Baker, 4 T. R. 229; Kettle v. Bromsall, Willes, 120; Walker v. Jones, 3 Cr. & M. 672.

(*u*) Gledstone v. Hewitt, 1 Tyrw. 445; 1 Cr. & J. 565, S. C.

(*u*¹) [The plea of *non detinet* by an executor is a bad plea to a declaration on a judgment against his testator; and being shown to be false, will, on motion, be struck out with costs. Ames v. Webber, 10 Wend. 624.]

(*y*) Co. Litt. 283.

(*z*) Alexander v. McGowan, Sittings after M. T. 3 Geo. 4, per Abbott C. J.; and per Gaselee J. Phillips v. Robinson, 4 Bing. 112. Under a plea denying the plaintiff's property, a lien may be given in evidence; Lane v. Tewson, 1 G. & D. 584. See *post*, Chapter on Pleas.

(*a*) Pawly v. Holly, 2 Bl. Rep. 854; 3 H. 6, 43 *a*; Jenk. 2, Cent. 112.

(*b*) 10 Co. 119 *b*; Herbert v. Waters, Salk. 206.

(*c*) Peters v. Heyward, Cro. Jac. 681, 682;

before the 3 & 4 W. 4, c. 42, s. 13, abolishing wager of law in all cases, was in most cases subject to wager of law, on which account it was not much in use; but now it is frequently adopted; and it is a very advantageous remedy, especially where it is material to embrace in the same action a count in debt for a money demand as due upon a contract.

OF ACTIONS IN FORM *EX DELICTO*.

Personal actions in form *ex delicto*, and which are principally for the redress of wrongs unconnected with contract, are case, trover, (d) replevin, and trespass *vi et armis*. *Mixed actions* are ejectment, * waste, &c. Before we consider the application of these remedies, it is advisable to take a concise view of the nature of the different *injuries ex delicto*, because they in general govern the form of the action. Thus if the injury be *forcible*, and occasioned *immediately* by the act of the defendant, *trespass vi et armis* is the proper remedy; but if the injury be not in legal contemplation *forcible*, or *not direct* and *immediate* on the act done, but only *consequential*, then the remedy is by *action on the case*; (e) and there are other points relating to the nature of injuries, which, as they affect the form of the action, it is material to ascertain.

Injuries *ex delicto* are in legal consideration committed *with force*, as assaults and batteries, &c. or *without force*, as slander, &c. (f) They are also *immediate and direct*, or *mediate and consequential*. It is frequently difficult to determine when the injury is to be considered forcible or not, and when immediate or consequential, and therefore whether trespass or case is the proper remedy.

Force is, in legal consideration, of two descriptions, either *implied* by law, or *actual*; force is *implied* in every trespass *quare clausum fregit*. (g) The distinction is material, and is thus put in Salkeld: "If one enter into my ground, I must request him to depart, before I can lay hands on him to turn him out; for every

NATURE OF
INJURIES
EX DELICTO.

When forcible or not

Tidd's Forms, 388; Townshend's judgment. 1 Book, 344; 2 Book, 83, 83, 84, 85; Aston's Est. 202; 2 Keilw. 64.

(d) Trover is only a branch of actions upon the case. Detinue has been already noticed as an action *ex contractu*, ante, 135; but see lb. note.

(e) Leame v. Bray, 3 East, 593; Rogers v. Imbleton, 2 New Rep. 117; Huggett v. Montgomery, 2 New Rep. 446; [Dale Manuf. Co. v. Grant, 34 N. J. (Law) 138; Starr v. Jackson, 11 Mass. 525; Cole v. Fisher, 11 Mass. 137; Berry v. Hamill, 12 Serg. & R. 210; Cottrell v. Cummins, 6 Serg. & R. 348; Brennan v. Carpenter, 1 R. I. 474; Case v. Mark, 2 Ohio, 169; Taylor v. Rainbow, 2 Hen. & M. 423; Wimlow v. Beall, 6 Call, 44; Johnson v. Castleman, 2 Dana, 378; Percival v. Hickey, 18 John. 257; Guille v. Swan, 19 John. 381;

Baldrige v. Allen, 2 Ired. (Law) 206. See Sheppard v. Furniss, 19 Ala. 760; Coggs-well v. Baldwin, 15 Vt. 404; Humiston v. Smith, 22 Conn. 19. In some of the American states the distinction between trespass and case, as forms of action, has been abolished specially; and in some others by force of their codes of practice. See Welch v. Whittemore, 25 Maine, 86; Wright v. Wilcox, 19 Wend. 343; Luttrell v. Hazen, 3 Sneed (Tenn.), 20; Schultz v. Frank, 1 Wisc. 352; Leathers v. Carr, 24 Maine, 351. This distinction has not been abolished by the Alabama Code, but remains in that state. Guilford v. Kendall, 42 Ala. 651.]

(f) 3 Bl. Com. 118, 398, 399.

(g) Green v. Goddard, 2 Salk. 641; Co. Litt. 257 b, 161 b, 162 a; 1 Saund. 81, 149, note (4); Weaver v. Bush, 8 T. R. 78; Bac. Abr. Trespass.

impositio manuum is an assault and battery, which cannot be justified upon the account of breaking the close *in law*, without a previous request to depart; the other is an *actual* force, as in burglary, or breaking open a door or gate, and in that case it is lawful to oppose force to force; or if one break down the gate, or come into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately; so if one come forcibly and take away my goods, I may immediately oppose him, for there is no time to make a request.” (*h*) In the case of false imprisonment also force is implied. (*i*) And the law implies force where a wife, daughter, or servant has been enticed away or debauched, though in fact they consented, the law considering them incapable of consenting; and therefore in such case trespass may be supported, though case for the consequence of the wrong has, till of late, been the more usual form of declaration. (*k*) The *degree* of violence with which the act is done, is not material as far as regards the *form* of action, for if a log were put down in the most quiet way upon a man’s foot, the action would be trespass; but if thrown into *the road with whatever violence, and one *afterwards* fell over it, it would be case and not trespass. (*l*) And trespass is the remedy where rubbish is laid so *near* my wall that the *natural* consequence is, that some of it rolls against and comes in contact therewith. (*m*) With respect to injuries or rights to property not *tangible*, such as reputation and health, and real property incorporeal, as a right of way, common, &c.; as the matter or property injured cannot be affected immediately by any substance, the injuries thereto, however malevolent and however contrived, cannot be considered as committed with force. (*n*)

In general a mere *nonfeasance* cannot be considered as forcible, (*n¹*) for where there has been no act, there cannot be force, as in the case of a neglect to take away tithes, (*o*) or a mere detention of goods without an unlawful taking, (*p*) or the neglect to repair the banks of

(*h*) *Green v. Goddard*, 2 Salk. 641; *Weaver v. Bush*, 8 T. R. 78; *Rex v. Wilson*, 8 T. R. 357.

(*i*) But an imprisonment does not necessarily include a battery. *Emmett v. Lyne*, 1 New Rep. 255.

(*k*) *Tullidge v. Wade*, 3 Wils. 18; *Fitz. N. B.* 89, O.; *Weedon v. Timbrell*, 5 T. R. 361; *Macfadzen v. Olivant*, 6 East, 387; 3 Bl. Com. 140; *Woodward v. Walton*, 2 New Rep. 476; *Speight v. Oliviera*, 2 Stark. R. 495; [*Parker v. Elliott*, 6 Munf. 587; *Van Horn v. Freeman*, 1 Halst. 322; *Haney v. Townsend*, 1 McCord, 207; *Ream v. Rank*, 3 Serg. & R. 215; *Clough v. Tenny*, 5 Greenl. 446; *Jones v. Tiver*, 4 Litt. 25; *ante*, 69; *Moran v. Dawes*, 4 Cowen, 412; *Wilt v. Vickers*, 8 Watts, 233.] There is no doubt either one form or the other may be maintained. See *Chamberlain v. Hazlewood*, 7 Dowl. 816; [S. C. 5 M. & W. 515. Case

and not trespass is the proper form of action for debauching the daughter of the plaintiff, where the injury was done in the house of another. *Clough v. Tenny*, 5 Greenl. 446. Case lies for criminal conversation with the plaintiff’s wife. *Van Vacter v. McKillip*, 7 Blackf. 578.]

(*l*) *Per Le Blanc J. Leame v. Bray*, 3 East, 602; *Reynolds v. Clarke*, 1 Stra. 636; *Day v. Edwards*, 5 T. R. 649.

(*m*) *Gregory v. Piper*, 9 B. & C. 591.

(*n*) 3 Bl. Com. 122, 123.

(*n¹*) [Trespass will not lie for a neglect to repair fences which a party is bound to repair, by reason of which the plaintiff’s cow escaped on to the defendant’s land, and was there bitten by a dog. *Cate v. Cate*, 50 N. H. 144.]

(*o*) *Turner v. Hawkins*, 1 B. & P. 476; *Shapcott v. Mugford*, 1 Lord Raym 188.

(*p*) 2 Saund. 47 k, l.

a river, whereby the plaintiff's land was overflowed, (*q*) or neglect to redeliver a beast distrained damage feasant, when sufficient amends were tendered before the beast was impounded. (*r*)

When it is material to rely upon *actual* force in *pleading*, as in the case of a forcible entry, the words "*manu forti*," or "with strong hand," should be adopted; (*s*) but in other cases the words "*vi et armis*," or "with force and arms," are sufficient. (*t*)

An injury is considered as *immediate* when the act complained of *itself*, and not merely a *consequence* of that act, occasions the injury. Thus if a blow be given by one to another, (*t*¹) or he drive a carriage and horses against him or his property, (*u*) or if he pour water on another person or his land, (*x*) or do any act thereon, (*y*) or if a wild beast or other dangerous thing be turned out or put in motion, and mischief immediately ensue, (*z*) or if a log be thrown into a highway, and in the act of throwing or falling, hit another, or if a party, as just observed, lay rubbish so *near* the plaintiff's wall that the necessary or natural consequence is, that some of it will roll, and it accordingly comes against the wall, (*a*) the injury is immediate, and trespass is the remedy. (*b*) And where a lighted squib was thrown in a market-place, and afterwards thrown about by others in self-defence, and ultimately hurt the plaintiff, the injury was considered as the immediate act of the first thrower, (*b*¹) and a trespass, the new direction and * new force given to it by the other persons not being a new trespass, but merely a continuation of the original force. (*c*) It is a direct trespass to injure the person of another by driving a carriage against the carriage wherein such person is sitting, although the

When immediate or consequential.

(*q*) Bro. Abr. Action sur le Case, pl. 36; Fitz. N. B. 93; Bac. Abr. Trespass. [See Hinks v. Hinks, 46 Maine, 423.]

(*r*) 8 Co. 146.

(*s*) The King v. Wilson, 8 T. R. 357, 358.

(*t*) Ib. Ibid. But the omission of the words *vi et armis* is not objectionable on general demurrer, and is aided by verdict. 1 Saund. 81, note (*l*).

(*u*) [Ream v. Rank, 3 Serg. & R. 215; Parker v. Elliott, Gilmer, 33; Martin v. Payne, 9 John. 387; Lyon v. Hamilton, Spear v. Patterson, and Zurtman v. Miller, cited 3 Serg. & R. 216; Mercer v. Walmsley, 5 Harr. & J. 27; Vaughan v. Rhodes, 2 McCord, 227.]

(*x*) Leame v. Bray, 3 East, 593; Covill v. Leaming, 1 Campb. 497; Lotan v. Cross, 2 Campb. 465; [Taylor v. Rainbow, 2 Hen. & M. 432; Rappelyea v. Hulse, 7 Halst. 257.]

(*y*) Reynolds v. Clarke, 2 Lord Raym. 1403.

(*z*) Shapcot v. Mugford, 1 Lord Raym. 138.

(*a*) Leame v. Bray, 3 East, 596.

(*b*) Gregory v. Piper, 9 B. & C. 591.

(*b*¹) Reynolds v. Clarke, 1 Stra. 636.

(*b*¹) [Where the defendant by discharging a gun frightened the plaintiff's horse so that he ran away and broke the plaintiff's carriage, trespass was held to be the proper remedy. Cole v. Fisher, 11 Mass. 137. So trespass is the proper remedy for beating a drum in the highway, where a wagon and team are passing, by which the horses are frightened, and run away and injure the wagon. Loubz v. Hafner, 1 Dev. 185. See Childress v. Yansie, 1 Meigs, 463.]

(*c*) Scott v. Shepherd, 3 Wils. 403; 2 Bl. R. 892, S. C.; Ogle v. Barnes, 8 T. R. 190. [The distinction between case and trespass is well discussed by Foster J. in Ricker v. Freeman, 50 N. H. 420; Jordan v. Wyatt, 4 Grattan, 151. In the above case of Ricker v. Freeman, it appeared that the defendant seized the plaintiff by the arm and swung him violently around two or three times, and then let him go; and the plaintiff having there been made dizzy, involuntarily passed rapidly in the direction of, and came violently against, a third party, who instantly pushed him away, and the plaintiff then came in contact with a hook, and sustained an injury, and it was held that the plaintiff might maintain trespass *vi et armis* against the defendant.]

last-mentioned carriage be not the property of, nor in the possession of the person injured; and where the defendant drove his gig against another chaise, whereby the plaintiff's wife was much hurt and injured, it was held, that an action at the suit of the husband and wife was properly brought in trespass. (*d*) And where the defendant, driving his carriage on the wrong side of a road, when it was dark, by accident drove again the plaintiff's curricule, it was holden that the injury which the plaintiff had sustained, having been immediate, from the act of driving by the defendant, trespass might be maintained. (*e*) Case must be adopted where the defendant's servant, and not the defendant personally, caused the injury by his carelessness, &c. (*f*)

But where the damage or injury ensued not directly from the act complained of, it is termed *consequential* or mediate, and cannot amount to a *trespass*. Thus, in the instance just stated, if a log, in the act of being thrown into the highway, hit another, the injury is immediate; but if *after* it has reached the highway, a person fall over it and be hurt, the injury is only consequential, and the remedy should be case, for wrongfully or carelessly throwing and leaving the timber in the road. (*g*) So if a person pour water on my land, the injury is immediate; but if he stop up a watercourse on his own land, whereby it is prevented from flowing to mine as usual, or if he place a spout on his own building, in consequence of which water afterwards run therefrom into my land, the injury is consequential; because the flowing of the water, which was the immediate injury, was not the wrong-doer's immediate act, but only the consequence thereof, and which will not render the act itself a trespass or immediate wrong. (*h*)

It is chiefly in actions for running down ships that difficulties occur,

(*d*) *Hopper v. Reeve*, 1 Moore, 407; 7 Taunt. 698, S. C.

(*e*) *Leame v. Bray*, 3 East, 593; *Covill v. Laming*, 1 Campb. 497; *Lotan v. Cross*, 2 Campb. 465; *Day v. Edwards*, 5 T. R. 648. See *Rogers v. Imbleton*, 2 New Rep. 117; *Huggett v. Montgomery*, 2 New Rep. 446; [*Daniels v. Clegg*, 28 Mich. 32]; *Hall v. Pickard*, 3 Campb. 188; in which it is questioned whether the plaintiff may not in this instance waive the force or trespass, and declare in case for the negligence, if provable. See *post*, 129, note (*t*). The distinction appears to be that a party may sue in trespass when the injury is immediate, although it be not wilful, but that he must sue in trespass where the injury is wilful and immediate. See the above cited cases, and *Savignac v. R. Roome*, 6 T. R. 125; [*Wilson v. Smith*, 10 Wend. 324; *Percival v. Hickey*, 18 John. 257; *Baldrige v. Allen*, 2 Ired. 206. For the criterion of trespass, see *Smith v. Rutherford*, 2 Serg. & R. 358; and when the action should be trespass, and when case, *Cotteral v. Cummins*, 6 Serg. & R. 343.]

(*f*) *Post*, 146. See *Chandler v. Broughton*, 1 Cr. & M. 29, as to when the master

may be sued in trespass. [*Barnes v. Hurd*, 11 Mass. 57; *Wright v. Wilcox*, 19 Wend. 343.]

(*g*) *Leame v. Bray*, 3 East, 602; *Reynolds v. Clarke*, 1 Stra. 636; *Day v. Edwards*, 5 T. R. 649; [*Lindley v. Bushnell*, 15 Conn. 225. Case lies against a private religious corporation for leaving the walls of their church, after it had been destroyed by fire, in such a state that they were blown upon a passer-by. *Rector &c. v. Buckhart*, 3 Hill, 193.]

(*h*) *Reynolds v. Clarke*, 1 Stra. 634, 635; 2 Lord Raym. 1399; *Haward v. Bankes*, 2 Burr. 1114; [*Adams v. Hemmenway*, 1 Mass. 145; *Arnold v. Foot*, 12 Wend. 330. The owner of property may use it in any lawful manner, provided he does not interfere with some vested right in another; and any injury to his neighbor's property caused by such use is *damnum absque injuria*. The motive of the owner in this use of his own property is immaterial, and cannot be inquired into. *Auburn Plank Road Co. v. Douglass*, 9 N. Y. 444; *Radcliff v. Maye* &c. of Brooklyn, 4 N. Y. 195.]

because the force which occasions the injury is not in such case necessarily the immediate act of the person steering, for the wind and waves may and generally do occasion the force, and the personal * act of the party rather consists in putting the vessel in the way to be acted upon by the wind, and the injury might even have happened from the operation of the wind and tide counteracting his efforts. (i) In the case of an injury arising from carelessness or unskilfulness in navigating a ship, if the injury were merely attributable to negligence or want of skill, and not to the *wilful* act of the defendant, with intent to injure the plaintiff, the party injured has, it seems, an election either to treat the negligence or unskilfulness of the defendant as the cause of action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass. (k) And it is probable the same doctrine would be applied to the case of an injury resulting from the careless or unskilful driving of a carriage. (l) And it has been held, that where through *negligent and careless* driving, one vehicle is *caused forcibly* to strike another, an *action on the case* is sustainable for the injury done, although it be immediate upon the violence, unless the act producing it was *wilful*; (m) and if both parties were to blame and guilty of negligence, yet, unless the plaintiff might by the exercise of extraordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover. (n) So where there has been an illegal distress, the plaintiff has frequently the option of declaring in case or in trespass. (o) And it is clear that trover, (p) or it seems detinue, (q) may be supported, although the defendant obtained the goods by an act of trespass. In *Scott v. Shepherd*, (r) Mr. J. Blackstone said, that a person may bring trespass for the im-

(i) *Leame v. Bray*, 3 East, 601, 603; *Ogle v. Barnes*, 8 T. R. 192; *Turner v. Hawkins*, 1 B. & P. 476.

(k) *Rogers v. Imbleton*, 2 New Rep. 117; *Ogle v. Barnes*, 8 T. R. 188; *Leame v. Bray*, 3 East, 601; *Turner v. Hawkins*, 1 B. & P. 472; *Moreton v. Hardern*, 4 B. & C. 226-228. See *ante*, 142, and note (e); *Simpson v. Hand*, 6 Whart. 311; *Broadwell v. Swigert*, 7 B. Mon. 39; *Kennard v. Barton*, 25 Maine, 39; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21 Wend. 188; *The Scioto*, *Davies*, 359, 364; *Wilson v. Smith*, 10 Wend. 324; *Percival v. Hickey*, 18 John. 257; *Baldrige v. Allen*, 2 Ired. 206; *Gates v. Miles*, 3 Conn. 64; *Case v. Mark*, 2 Ham. 169; *Post v. Mann*, 1 South. 61; *Blin v. Campbell*, 14 John. 432; *Dalton v. Favour*, 3 N. H. 463.

(l) *Ib.*; see next case, supporting the author's suggestions. [In *Howard v. Tyler*, 46 Vt. 687, 688, *Pierpoint*, C. J. said: "The rule seems now to be well established by the authorities, that when the injury to the plaintiff results from the immediate force of

the defendant, and is caused by his carelessness and negligence, and is not wilful, the plaintiff can maintain either trespass or case." See *Gates v. Miles*, 3 Conn. 64; *Dalton v. Favour*, 3 N. H. 465; *Brennan v. Carpenter*, 1 R. I. 474; *Baldrige v. Allen*, 2 Ired. (Law) 206; *Blin v. Campbell*, 14 John. 432; *McAllister v. Hammond*, 6 Cowen, 342.]

(m) *Williams v. Holland*, 6 C. & P. 23; *Wilson v. Smith*, 10 Wend. 324; *Schuer v. Veeder*, 7 Blackf. 442; *Claffin v. Wilcox*, 18 Vt. 605; *McAllister v. Hammond*, 6 Cowen, 342; *Payne v. Smith*, 4 Dana, 497; *Ricker v. Freeman*, 50 N. H. 420.]

(n) *Davies v. Mann*, 10 M. & W. 546. See *post*, 146, note (n).

(o) *Branscombe v. Bridges*, 1 B. & C. 145; 2 D. & R. 256, S. C.; 3 Stark. 171; per *Ld. Denman* C. J. *Smith v. Goodwin*, 4 B. & Ad. 419.

(p) *Branscombe v. Bridges*, 1 B. & C. 146; *Moreton v. Hardern*, 4 B. & C. 228; per *Parke* J. *Smith v. Goodwin*, 4 B. & Ad. 420.

(q) *Ante*, 137, 138.

(r) *Scott v. Shepherd*, 2 Bl. Rep. 897;

mediate injury, and subjoin a *per quod* for the consequential damage, or case for the consequential damage, passing over the immediate injury; and in *Pitts v. Gaince*, (s) where the declaration was in case, and stated that the plaintiff was master of a ship laden with corn ready to sail, and that the defendant seized the ship and detained her, whereby the plaintiff was prevented from proceeding in his voyage, an exception was taken that the declaration should have been trespass, and several cases were cited, but Lord Holt observed, that in those cases the plaintiff had a property in the thing taken, but here the ship was not the master's but the owner's; the master only declared as a particular officer, and could only recover for his particular loss, yet he might have brought * trespass, as a bailee of goods may, and declared upon his possession, which is sufficient to maintain trespass. Hence it appears that either trespass or case may sometimes be supported where there is *both an immediate* and also a *consequential injury*. (t)

Bourden v. Alloway, 11 Mod. 180; 4 Co. 94 b, 95; *Wheatley v. Stone*, Hob. 180; *Styles*, 99; *Turner v. Hawkins*, 1 B. & P. 475; *Haward v. Bankes*, 2 Burr. 1113; *Pitts v. Gaince*, 1 Salk. 10.

(s) *Pitts v. Gaince*, 1 Salk. 10; 1 B. & C. 146; *Branscombe v. Bridges*, 2 D. & R. 256, S. C.

(t) [*Knott v. Diggs*, 6 Harr. & J. 230.] There are numerous cases where the party injured may maintain trespass or case, although the act for which he sues was committed with immediate force. See *Moreton v. Hardern*, 4 B. & C. 223; *Williams v. Holland*, 10 Bing. 12. And there is no doubt that where an injury has been done which partly forms the subject of an action of trespass, and partly of an action on the case, that the plaintiff may bring an action on the case in respect of that fact from which the consequential injury arises, or an action of trespass in respect of that part which causes the immediate injury. *Branscombe v. Bridges*, 1 B. & C. 145; 2 D. & R. 256; *Smith v. Goodwin*, 4 B. & Ad. 413; *Wells v. Ody*, 5 Dowl. 95; [*Waterman v. Hall*, 17 Vt. 128.] In *Moreton v. Hardern*, Mr. Justice Bayley says: "It was long a *veraxa questio* whether case could be brought when the defendant was personally present and acting in that which occasioned the mischief. Early in my professional experience, case was the form of action usually adopted for such injuries. In Lord Kenyon's time a doubt was raised upon the point, and he thought that where the act was immediately injurious, trespass was the only action that could be maintained for that injury. *Leame v. Bray* was an action of trespass. At the trial Lord Ellenborough thought it should have been case; but on further consideration the court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the

other cases on the subject, it is difficult to say that an action on the case will not lie for an injury sustained through the negligent driving of a coach, although one of the proprietors was the person guilty of that negligence. In *Ogle v. Barnes*, 8 T. R. 188, which was a case for negligently steering a ship, the declaration alleged that the ship was under the care of Barnes, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained; and it was never urged that the action should have been trespass and not case, because one of the defendants was on board, but on the ground of the injury being immediate. In *Rogers v. Imbleton*, 2 N. R. 117 (which was decided after *Leame v. Bray*), it was alleged that the defendant was driving a cart, and took such bad care of the cart and horse, that it ran with great force against the plaintiff's horse. To that there was a demurrer, upon the authority of *Leame v. Bray*, the action being in case; but the court was clearly of opinion that case would lie, and the demurrer was overruled. In *Huggett v. Montgomery*, 2 N. R. 446, although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot, and on that ground case was held to be the proper form of action. It is not necessary to say that trespass could not in this case have been sustained against Hardern. No doubt that action lies when an injury is inflicted by the wilful act of the defendant; but it is also clear that case will lie where the act is negligent and not wilful. Here the report says that the injury was occasioned by the negligent driving of the defendant Hardern. I think, therefore, that as the plaintiff had a right to sue all the proprietors of the coach, and as trespass would not lie against them all, case was the proper form of action to be

Cases sometimes arise where the law considers special consequential damage as *too remote*, but case lies for not repairing the defendant's fence, *per quod* plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack, the court considering that such damage was not too remote. (u)

When the consequential damage not too remote.

The *legality* or *illegality* of the original act is not in general the criterion whether the injury was immediate or consequential, and will not therefore be the test whether the remedy should be trespass or case. (y) A person may become an immediate trespasser *vi et armis*, (y¹) even in the performance of a lawful act, if in the course of such performance he be guilty of neglect; as if he hurt another by accident. (z) And case will lie for doing an unlawful act, if the damage sustained thereby be not immediate but consequential, although the defendant *has no malicious intention. (a) However, if the injury were committed through the medium of and under regular process, as in the case of a malicious arrest or prosecution, although such injury were forcible and immediate, yet the remedy must be case. (b) If, however, the act complained of amount to a *felony*, as if the house were entered, or the goods were taken burglariously or feloniously, the civil remedy is merged in the criminal offence, and no action can be maintained until the offender has been duly prosecuted, &c. (c)

As to the legality of the original act.

Nor is the *motive, intent, or design* of the wrong-doer towards the complainant the criterion as to the form of the remedy; (d) for where the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial; (e) and it is clear that the mind need

Intent, when material.

adopted." Where the plaintiff sues in case for an immediate but negligent act of violence, the declaration should contain no words applicable only to trespass, such for instance as import wilful force. *Day v. Edwards*, 5 T. R. 648; *Williams v. Holland*, 10 Bing. 112. See *ante*, 142, notes (e) and (f).

(u) *Powell v. Salisbury*, 2 Y. & J. 391.

(y) *Reynolds v. Clarke*, 1 Stra. 635, note (2); *Leame v. Bray*, 3 East, 601; *Scott v. Shepherd*, 3 Wils. 409; 2 Bl. Rep. 894.

(y¹) [*Blin v. Campbell*, 14 John. 432; *Cotteral v. Cummins*, 6 Serg. & R. 343.]

(z) *Scott v. Shepherd*, 3 Wils. 411; *Underwood v. Hewson*, 1 Stra. 596; 27 Hen. 6, 28 a; *Wakeman v. Robinson*, 1 Bing. 213.

(a) *Bourden v. Alloway*, 11 Mod. 180; *Scott v. Shepherd*, 3 Wils. 410, 411; 2 Bl. Rep. 895.

(b) *Belk v. Broadbent*, 3 T. R. 185; *Elsee v. Smith*, 2 Chit. Rep. 304; 1 D. & R. 97; [*Cannon v. Sipples*, 39 Conn. 505.]

(c) See *Dawkes v. Coveleigh*, Sty. 346; *Higgins v. Butcher*, Yelv. 90; *Cooper v. Witham*, 1 Sid. 375; *Parker v. Patrick*, 5 T. R. 175; *Gimson v. Woodfall*, 2 C. & P. 41. [The general rule is that for wrongs

against the public no private action can be maintained. *Ayers v. Lawrence*, 63 Barb. 454; *Currier v. West Side &c. R. Co.* 6 Blatchf. 487; *Delaware & Hudson Canal Co.* 9 Sup. Ct. (N. Y.) Rep. 163, 196 *et seq.*; *Smith v. Boston*, 7 Cush. 255; *Doolittle v. Supervisors of Broome*, 18 N. Y. 155; unless the plaintiff is specially injured. *Enos v. Hamilton*, 27 Wisc. 256; *Houch v. Wachter*, 34 Md. 265.]

(d) *Sanderson v. Baker*, 3 Wils. 309; 2 Bl. Rep. 832, S. C.; *Leame v. Bray*, 3 East, 599, 601; [*Cole v. Fisher*, 11 Mass. 137.] The intent, however, is considered by the jury in the damages; *Hartley v. Halliwell*, 2 Stark. 213; and the right of action is frequently regulated by the motive, intent, and design. [But an act legal in itself, violating no right, cannot be made actionable by the motive which induced it. *Occum Co. v. Sprague &c. Co.* 34 Conn. 529; *Chatfield v. Wilson*, 28 Vt. 49; *Auburn Plank Road Co. v. Douglass*, 9 N. Y. 444; *Fahin v. Reichard*, 8 Wisc. 255.]

(e) *The King v. Phillips*, 6 East, 464, 473, 474; *Haycraft v. Creasy*, 2 East, 107;

not in general concur of the act that occasions an injury to another, and if the action occasion an immediate injury, trespass is the proper remedy without reference to the intent. (*f*) If, however, in pleading, the injury be stated to have been committed wilfully, and in other respects it be uncertain whether it be immediate or consequential, the court will consider it as an immediate injury. (*g*) There are many cases in the books, where the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional, (*g*¹) as in *Weaver v. Ward*, (*h*) where the defendant exercising in the trained bands, and firing his musket, by accident hurt the plaintiff; and in *Underwood v. Hewson*, (*i*) where one uncocking a gun, it went off, and accidentally wounded a by-stander. And if one turning round suddenly were to knock another down (*i*¹) whom he did not see, without intending it, no doubt the action should be trespass; (*k*) and where a person accidentally drives a carriage against that of another, the injury is immediate, and trespass or case is sustainable, though the defendant was no otherwise blamable than in driving on the wrong side of the road on a dark night. (*l*) There is an exception, however, in favor of public officers, who are bound to obey the process of the courts; thus if a sheriff, after a secret act of bankruptcy committed by A. levy his goods under an execution against * him, he cannot be sued by the assignees in trespass, but only in trover, because such public officers ought not to be made trespassers by relation. (*m*) And in some other cases, though the intent may not be material to the form of action, it may decide whether any action be sustainable. In some instances, words *prima facie* slanderous are not actionable, if not spoken maliciously. And it seems to be a general rule, that if a party be in the prosecution of a legal act, an action does not lie for an injury resulting from an *inevitable* or un-

Wright v. Smith, 5 Esp. Rep. 214, 215; [*Amick v. O'Hara*, 6 Blackf. 258.]

(*f*) Per Lord Kenyon, *Ogle v. Barnes*, 8 T. R. 190; *Leame v. Bray*, 3 East, 599, 601; *Covell v. Laming*, 1 Campb. 497; *Lotan v. Cross*, 2 Campb. 465.

(*g*) *Leame v. Bray*, 3 East, 595, 601; *Ogle v. Barnes*, 8 T. R. 191; *M'Manus v. Crickett*, 1 East, 109; *Haward v. Bankes*, 2 Burr. 1114.

(*g*¹) [Trespass lies for a direct and violent injury to personal property, whether the act be done intentionally or through negligence. *Schuer v. Veeder*, 7 Blackf. 442. See *Wilson v. Smith*, 10 Wend. 324; *Percival v. Hickey*, 18 John. 257; *Baldrige v. Allen*, 2 Red. 206.]

(*h*) *Hob. 134*. See *Wakeman v. Robinson*, 1 Bing. 213.

(*i*) 1 Stra. 596. [See *Cole v. Fisher*, 11 Mass. 137; *Loubz v. Hafner*, 1 Dev. (Law) 185.]

(*i*¹) [*Loubz v. Hafner*, 1 Dev. 185; *Hodges*

v. Weltberger, 6 Monroe, 337. Where one intoxicated falls upon a stove and spills hot water thereby on another, he is liable in trespass. *Sullivan v. Murphy*, 2 Miles, 298. In *Taylor v. Rainbow*, 2 Hen. & M. 423, the defendant had negligently, but without design to injure, discharged a gun, and wounded the plaintiff, who brought an action on the case. It was held that trespass was the proper remedy, and that it was immaterial whether the injury were committed wilfully or not. See *Cole v. Fisher*, 11 Mass. 137. But see *Blin v. Campbell*, 14 John. 432.]

(*k*) Per Lord Ellenborough and Lawrence J. *Leame v. Bray*, 3 East, 595, 596.

(*l*) *Leame v. Bray*, 3 East, 593; *Williams v. Holland*, 6 C. & P. 23. See *ante*, 142.

(*m*) *Smith v. Milles*, 1 T. R. 480; *Bayly v. Bunning*, 1 Lev. 173. See *Cooper v. Chitty*, 1 Burr. 20. See the stat. 2 & 3 Vict. c. 29, which has made an important alteration in the law in this respect.

avoidable accident, which occurs without *any* blame or default on his part. (n)

In some cases of involuntary trespasses upon land, a tender of amends may be pleaded. (o) And in actions against public agents, the intent may be frequently material in considering their liability. (p)

For some *torts* which may *prima facie* appear to be forcible and immediate; as for an excessive distress; (q) or for driving a distress out of the county in which it was taken; (r) or for injuries to personal or real property in reversion; (s) or against a bailee of personal property having an interest therein, and who has injured the same, but not destroyed it; (t) an action on the case is a proper remedy. So though a master may be liable under the circumstances to compensate an immediate injury committed by his servant, in the course of his employ, with force; (u) yet the action against the master in general must be case, though against the servant it might for the same act be trespass. (x) Where an injury arose from the careless driving of a person who was one of the proprietors of the coach, it was held that he and the other proprietors might be jointly sued in case. (y) If the injury arise from the want of care or negligence of the servant, case is the remedy (y¹) but if it occurred as the necessary, probable, or natural consequence of the act ordered by the master, then the act is the master's and he should be sued in trespass (if the act were * forcible and immediate). Therefore where a master ordered a ser-

(n) *Davis v. Saunders*, 2 Chit. Rep. 639; *Wakeman v. Robinson*, 1 Bing. 213. In some cases there may have been negligence in both parties, and yet the plaintiff may be entitled to recover, for the rule is that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. Per Parke B. *Bridge v. Grand Junction Railway Company*, 3 M. & W. 248. See, also, *Lynch v. Nurdan*, 4 P. & D. 672; *Marriott v. Stanley*, 1 M. & Gr. 568; 5 C. & P. 190; *Davis v. Mann*, 10 M. & W. 546; *Smith v. Dobson*, 3 M. & Gr. 59.

(o) 21 Jac. 1, c. 16, s. 5; Vin. Abr. Trespass, 542; *Baseley v. Clarkson*, 3 Lev. 37; [Genl. Sta. Mass. c. 138, §§ 11, 12.]

(p) *Ante*, 87, 88; *Sutton v. Clarke*, 6 Taunt. 29.

(q) 52 Hen. 3, c. 4; 3 Bl. Com. 12; *Lynne v. Moody*, 2 Stra. 851; *Hutchins v. Chambers*, 1 Burr. 590; *Lynne v. Moody*, Fitzg. 85; *Branscomb v. Bridges*, 1 B. & C. 145; 2 D. & R. 256; 3 Stark. 171.

(r) *Ib.* *Ibid.*; 2 Inst. 106; *Woodcraft v. Thompson*, 3 Lev. 48; *Gimbart v. Pelah*, 2 Stra. 1272.

(s) *Ward v. Macauley*, 4 T. R. 489; *Gordon v. Harper*, 7 T. R. 9; Com. Dig. Action on Case, Nuisance, B.

(t) Bac. Abr. Trespass, B.

(u) *Ante*, 91, 92.

(x) *M'Manus v. Crickett*, 1 East, 108. See *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500, S. C.; [*Barnes v. Hurd*, 11 Mass. 57; *Johnson v. Castleman*, 2 Dana, 378; *Campbell v. Phelps*, 17 Mass. 246; *Broughton v. Whallon*, 8 Wend. 474; *Havens v. Hartford & C. R. Co.* 28 Conn. 69; *Knott v. Digges*, 6 Harr. & J. 230; *Hamilton Co. v. C. & W. Turnpike, Wright*, 603; *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 580; 2 Chitty Contr. (11th Am. ed.) 866, 867, and notes. An action on the case is an appropriate remedy for injuries caused by the wrongful acts of a servant of the defendant, even though such acts have been acts of force, and such that trespass would have been the only proper remedy against the servant. *Havens v. Hartford & C. R. Co.* 28 Conn. 69; *Hamilton Co. v. C. & W. Turnpike, Wright*, 603.]

(y) *Moreton v. Hardern*, 4 B. & C. 223; 6 D. & R. 275, S. C. See *ante*, 144, note (t).

(y¹) [*Johnson v. Castleman*, 2 Dana, 378; *Campbell v. Phelps*, 17 Mass. 246; *Broughton v. Whallon*, 8 Wend. 474.]

vant to lay some rubbish near his neighbor's wall, but that so it might not touch the same, and the servant used ordinary care, but some of the rubbish naturally ran against the wall, it was held that trespass was maintainable against the master. (z)

From this concise view of the nature of injuries *ex delicto*, as well as from the following observations on the properties of each particular action, it may be collected that there are *four* leading points to be attended to in deciding what form of action should be adopted. *First*, the nature of the *matter* or *thing* affected; *secondly*, the plaintiff's *right* thereto; *thirdly* the *means* by which the *injury* was effected; and *fourthly*, the situation in which the defendant stood.

And, *first*, the nature of the matter or thing affected; as whether it were substance or tangible, as the body, personal chattels, and real property corporeal; or not tangible, as health, reputation, and real property incorporeal. In the first instances, as the property might be affected immediately by an injury committed with force, trespass, case, replevin, trover, or detinue, may or may not be sustainable, depending on the other three points, and the particular properties of each action; (a) but in the latter instances, an action on the case is in general the only remedy, because the property could not be injured immediately by force. (a¹)

Secondly, The nature of the plaintiff's *right* to the matter or thing affected; as if the injury were to the person, whether the right were absolute or relative; in the latter instance case being sustainable, however forcible the injury; or if the damage were to personal or real property, whether the right were in severalty or joint-tenancy, or in common, or in possession or reversion; in the last instance neither trespass, trover, replevin, nor detinue could be supported, but only case. (b)

Thirdly, The *means* by which the *injury* was effected; as whether it were a commission or an omission; in the latter case, trespass is not in general sustainable; (c) or with or without force, actual or implied, for if without force, case is in general the remedy; (d) or immediate or consequential; in the latter case trespass is not sustainable; (e) or whether the injury were committed by the defendant

(z) Gregory v. Piper, 9 B. & C. 591; 4 M. & R. 500, S. C.; [2 Chitty Contr. (11th Am. ed.) 865, 866, and notes; Freeman v. Roshern, 13 Ad. & El. (N. S.) 780; Yerger v. Warren, 31 Penn. St. 319; The Thames Steamboat Co. v. The Housatonic R. R. Co. 24 Conn. 40; Howe v. Newmarch, 12 Allen, 49; McCoy v. McKowen, 26 Miss. 487; McLaughlin v. Pryor, 4 M. & Gr. 48.] See, also, Chandler v. Broughton, 1 Cr. & M. 29.

(a) Replevin lies only for personal property, and not for taking part of the freehold. Niblet v. Smith, 4 T. R. 504.

(a¹) [Wetmore v. Robinson, 2 Conn. 539; Wilson v. Wilson, 2 Vt. 68.]

(b) Gordon v. Harper, 7 T. R. 9; [Brown v. Caldwell, 10 Serg. & R. 114; Mather v. Trinity Church, 3 Serg. & R. 509; Baker v. Howell, 6 Serg. & R. 476; Wheeler v. Train, 3 Pick. 255; Collins v. Evans, 15 Pick. 63; Fairbanks v. Phelps, 22 Pick. 538; Billings v. Tucker, 6 Gray, 368.]

(c) Ante, 141.

(d) Ante, 140, 141; Hall v. Pickard, 3 Campb. 187.

(e) Ante, 140-142.

himself, or by his agent or servant, or by his cattle or property, (f) or under color of a distress for rent, &c. or of the process of a superior or inferior court.

Fourthly. The situation or character in which the defendant stood; as whether he were joint-tenant or tenant in common with the plaintiff; (g) * or whether there were any privity of contract between the plaintiff or defendant, in respect of the latter being tenant or bailee, when in general trespass cannot be supported. (h) Keeping in view these important points, we proceed to consider the nature and particular applicability of the several actions in form *ex delicto*.

I. ACTION ON THE CASE.

We have before remarked that an action upon the case was a remedy given by the common law, but that it appears to have existed only in a limited form, and to a certain prescribed extent, until the statute of Westminster 2. (i) In its most comprehensive signification it includes *assumpsit*, as well as an action in form *ex delicto*; (k) but at the present time, when an action on the case is mentioned, it is usually understood to mean an action in form *ex delicto*; and therefore, where a navigation act enacted that the company might sue for calls, &c. by action of debt, or *on the case*, it was holden that an action on the case in tort lay, though the defendant might thereby be deprived of the benefit of a set-off. (l)

Actions on the case are founded on the common law, or upon acts of parliament, and lie generally to recover *damages* for *torts* not committed with force, actual or implied; or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential; or where the interest in the property was only in reversion; in all which cases trespass is not sustainable. (m) Torts of this nature are, to the absolute or relative rights of *persons*, or to *personal property* in possession or reversion, or to *real property*, corporeal or incorporeal, in possession or reversion. These injuries may be either by *nonfeasance*, or the omission of some act which the defendant ought to perform; or by *misfeasance*, being the improper performance of some act which might lawfully be done; or by *malfeasance*, the doing what the defendant ought to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some express or implied contract between them.

(f) *Ante*, 146.

(g) *Ante*, 89; 2 Saund. 47 g.

(h) Bac. Abr. Trespass, B.

(i) *Ante*, 107.

(k) See Steph. on Pleading, 5th ed. 18; [Booth v. The Farmers' & Mechanics' Na-

tional Bank of Rochester, 1 N. Y. Sup. Ct. Rep. 45.]

(l) The Huddersfield Canal Company v. Buckley, 7 T. R. 36.

(m) Ward v. Macauley, 4 T. R. 489; Gordon v. Harper, 7 T. R. 9.

Case is the proper remedy for any injury to the *absolute rights* of *persons* not immediate, but consequential, (*m*¹) as for keeping mischievous animals, having notice of their propensity; (*n*) or for special damage arising from a public nuisance. (*o*) But if the injury were immediate, as * if the defendant incited his dog to bite another, or let loose a dangerous animal; (*p*) or if in the act of throwing a log into a public street, it hurt the plaintiff; (*q*) or if an injury be committed by cattle (*r*) to land; the action should be trespass. Also, whenever an injury to a person is occasioned by *regular process* of the court of competent jurisdiction, though maliciously adopted, case is the proper remedy, and trespass is not sustainable; (*s*) as for a malicious arrest; or for malicious prosecution of a criminal charge before a magistrate or otherwise. (*t*) If the proceeding be malicious and *unfounded*, though it were instituted in a court having no jurisdiction, case may be supported, or trespass. (*u*) Formerly it was usual, in these instances, where several persons combined in the prosecution,

(*m*¹) [Cole v. Fisher, 11 Mass. 137; Johnson v. Castleman, 2 Dana, 378; Winslow v. Beall, 6 Call, 44; Clay v. Sweet, 1 Marsh. 194; Carsten v. Murray, Harper, 113; Guille v. Swan, 19 John. 381; Percival v. Hickey, 18 John. 257; Case v. Mark, 2 Ham. 169.]

(*n*) *Ante*, 93. [A father may sue in case for an injury done to an infant child, then living with him and engaged in his service, by dogs permitted by the defendant to run at large after knowledge that such dogs were accustomed to bite mankind. Durden v. Barnett, 7 Ala. 169.]

(*o*) Chichester v. Lethbridge, Willes, 71-75; and see note to the precedent in case for laying rubbish in a street, *post*, vol. ii. 570. and Butterfield v. Forrester, 11 East, 60. When not, see The King v. The Directors of the Bristol Dock Company, 12 East, 432; [Abbott v. Mills, 3 Vt. 521.] Injuries arising from keeping mischievous animals, and from public nuisances, also frequently affect personal property; and, on the other hand, many of the wrongs hereafter enumerated as affecting personal property, may also affect persons, as negligence in riding horses and driving carriages, &c.

(*p*) *Ante*, 93; [Dilts v. Kinney, 3 Green, 130.]

(*q*) *Ante*, 141, 142.

(*r*) *Ante*, 93, 94.

(*s*) Belk v. Broadbent, 3 T. R. 185; Boot v. Cooper, 1 T. R. 535; 3 Esp. Rep. 135; Gyfford v. Woodgate, 11 East, 297; Wetherden v. Embden, 1 Campb. 295; Elsee v. Smith, 2 Chit. R. 304; 1 D. & R. 97; [Ludington v. Peck, 2 Conn. 700; Watson v. Watson, 9 Conn. 141; Warfield v. Walter, 11 Gill & J. 80; Turner v. Walker, 3 Gill & J. 377; Hayden v. Shed, 11 Mass. 500; Plummer v. Dennett, 6 Greenl. 421; Owens v. Starr, 2 Litt. 234; M'Hugh v. Fundt, 1 Bailey, 441; Beaty v. Perkins, 6 Wend. 382;

Lovier v. Gilpin, 6 Dana, 321. In Stokes v. White, 1 Cr. M. & R. 223, it was held that case would not lie for arresting the plaintiff while attending as a witness at a trial. The declaration, however, did not aver *malice*, or according to the case of Whalley v. Pepper, 7 C. & P. 506, the action might perhaps have been supported. The form of action proper to be adopted in cases where privileged persons are arrested, was much discussed in the late case of Newton v. Constable, 1 G. & D. 408, but in consequence of the court deciding against the privilege of the plaintiff, no judgment was given as to the form of action. [See Swift v. Chamberlain, 3 Conn. 537.]

(*t*) Elsee v. Smith, 2 Chitt. Rep. 304; Grainger v. Hill, 4 Bing. N. C. 212; 5 Scott, 561, S. C.; Watkins v. Lee, 5 M. & W. 270; Heywood v. Collinge, 1 P. & D. 203; James v. Phelps, 3 P. & D. 231. A party who makes a *malicious* charge before a magistrate, but who prefers an indictment unwillingly, and solely because he was bound over, on making the charge, to prosecute, is nevertheless liable to an action for *malicious indicting*. Dubois v. Keats, 3 P. & D. 306. Case will lie for causing the plaintiff to be rendered in discharge of his bail, where the defendant had no authority from the bail so to do; but *express malice* must be alleged and proved. Porter v. Weston, 5 Bing. N. C. 715; 8 Scott, 25, S. C. It will not lie for causing to be registered as a judgment against the defendant, under the 1 & 2 Vict. c. 110, s. 19, an order of a court of equity, not within the 18th section of that act, and therefore not capable of being so registered, unless *express malice* be proved. Gibbs v. Pike, 9 M. & W. 351.

(*u*) Goslin v. Wilcock, 2 Wils. 302. [See Sheppard v. Furniss, 19 Ala. 760; Dixon v. Watkins, 9 Ark. 139; Riley v. Johnston, 13 Geo. 260; Lovier v. Gilpin, 6 Dana, 320.]

to proceed by writ of conspiracy, but the action on the case is now the usual remedy. (x) If, on the other hand, the proceeding complained of were *irregular*, the remedy in general must be trespass; and therefore, where a justice of the peace maliciously and irregularly granted a warrant against a person for felony, without any information upon oath, it was decided that the remedy against the justice should have been trespass and not case; (y) and though case may be supported for maliciously suing out a commission of bankruptcy, (z) or now a fiat, yet an action of trespass is also sustainable for the seizure of goods under the same, because if the plaintiff were not subject to the bankrupt laws, the commissioners had no jurisdiction, in which case trespass is always sustainable, if in other respects the injury * were forcible and immediate. (a) Case, we have seen, is also the proper remedy, where the right affected was not tangible, and consequently could not be affected by force, as reputation and health, the injuries to which are always remediable by action on the case; as libels or verbal slander. It is also the only remedy against sheriffs, justices, especially after convictions quashed, (b) or other officers acting ministerially and not judicially, (c) for refusing bail, (d) or to receive an examination upon the statute of hue and cry, &c.; (e) and case lies against surgeons, agents, &c. for improper treatment, or for want of skill or care; though assumpsit is also sustainable. (f)

Actions for injuries to the *relative* rights of persons, as for seducing or harboring wives, enticing away or harboring apprentices or servants, are properly in case; and though it is now To persons relatively. usual, and perhaps more correct, to declare in trespass *vi et armis* and *contra pacem*, for criminal conversation, and for debauching daughters or servants; (g) yet as the consequent loss of society or service is the ground of action, the plaintiff is still at liberty to declare in case. (h) When, however, the action is for an injury really

(x) 1 Saund. 228, 230, note (4); [Mott v. Danforth, 6 Watts, 304.]

(y) Morgan v. Hughes, 2 T. R. 225; Klee v. Smith, 2 Chit. Rep. 304; 1 D. & R. 97; [Kennedy v. Terrill, Hardin, 490; Muse v. Vidal, 6 Munf. 27; Varley v. Zahn, 11 Serg. & R. 185; Berry v. Hamill, 12 Serg. & R. 200. Case lies against a justice of the peace, where, after taking time to consider a case he rendered judgment against the plaintiff, and deceitfully concealed the fact from him until it was too late to appeal. Neighbor v. Trimmer, 1 Harr. 58.]

(z) Chapman v. Pickersgill, 2 Wils. 145.

(a) Perkin v. Proctor, 2 Wils. 382, 384; Callen's Bank. Law, 412, 413. See Doswell v. Impey, 2 D. & R. 353; 1 B. & C. 163, 8 C.

(b) 43 Geo. 3, c. 141. Where justices have jurisdiction, and the conviction is still subsisting, and is not void *ex facie*, neither

the justices, nor the officers who execute the warrant of commitment, can be sued as trespassers. Baylis v. Strickland, 1 M. & Gr. 591.

(c) Com. Dig. Action on the Case, Misfeasance, A. 1, &c. See *ante*, 87, 88, as to liability of public officers.

(d) 2 Saund, 61 c, d; Osborn v. Gough, 3 B. & P. 551.

(e) Green and the Hundred of Buccle Churches case, 1 Leon. 323, 324.

(f) Searse v. Prentice, 8 East, 348; Gladwell v. Steggall, 5 Bing. N. C. 733; 8 Scott, 60, S. C.

(g) Woodward v. Walton, 2 New R. 476; Ditcham v. Bond, 2 M. & Sel. 436; [*ante*, 140, and cases cited.]

(h) See the reasons and the different precedents, *post*, vol. ii. Index, Debauching Wife and Daughters; Law v. Clarke, 2 Chit. R. 260; Chamberlain v. Hazlewood, 5 M. & W. 515; 7 Dowl. 816, S. C. [See Van Horn v.

committed with force, as by menacing, beating, (*h*¹) or imprisoning wives, daughters, and servants, it is most proper to declare in trespass. (*i*)

For injuries to *personal* property not committed with force, or not immediate, (*k*) or where the plaintiff's right thereto is in reversion; (*l*) case is the proper remedy. It lies against attorneys or other agents *for neglect* or other breach of duty, or misfeasance in the conduct of a cause, or other business, (*l*¹) &c. though it has been more usual to declare against them in assumpsit. (*m*) And though we have seen that assumpsit is the usual remedy for neglect or breach of duty against bailees; (*n*) as against carriers, (*n*¹) wharfingers, and others having the use or care of personal property, whose liability is founded on the common law as well as on the contract; yet it is clear that they * are also liable in case for an injury resulting from their neglect or breach of duty in the course of their employ. (*o*) For any misfeasance by a party in a

Freeman, 6 N. J. (Law) 322; Moran v. Dawes, 4 Cowen, 412; Parker v. Elliott, 6 Munf. (Va.) 587; McClure v. Miller, 4 Hawks, 138; Ream v. Rank, 3 Serg. & R. 215; Haney v. Townsend, 1 McCord, 207; Jones v. Tiver, 4 Litt. (Ky.) 25; Clough v. Tenney, 5 Greenl. 446; Hayden v. Smithville &c. Co. 29 Conn. 548; Van Vacter v. M'Killip, 7 Blackf. 578; *ante*, 69, 140.]

(*h*¹) [Hoover v. Heim, 7 Watts, 62.]

(*i*) Ditcham v. Bond, 2 M. & Sel. 436; 3 Campb. 526, note. Case lies by a master for an injury inflicted on an apprentice. Hodson v. Stallebrass, 3 P. & D. 200; 8 Dowl. 482, S. C.

(*k*) *Ante*, 140, 141.

(*l*) Gordon v. Harper, 7 T. R. 9; Hall v. Pickard, 3 Campb. 187.

(*l*¹) [Dearborn v. Dearborn, 15 Mass. 316; Gilbert v. Williams, 8 Mass. 51; Evans v. Watrous, 2 Porter, 205; Pennington v. Yell, 11 Ark. 212; Cox v. Sullivan, 7 Geo. 144; O'Barr v. Alexander, 37 Geo. 195; Holmes v. Peck, 1 R. I. 242; Wilson v. Russ, 19 Maine, 421; Rust v. Larue, 4 Litt. 416; Lynch v. Commonwealth, 16 Serg. & R. 368; Crooker v. Hutchinson, 1 Vt. 73; Varnum v. Martin, 15 Pick. 450; Hogg v. Martin, Riley (S. Car.), 156; Wilcox v. Plummer, 4 Peters, 172; Walker v. Goodman, 21 Ala. 647; S. C. 30 Ala. 482; Sevier v. Holliday, 2 Ark. 512; Palmer v. Ashley, 3 Ark. 75; Cavilland v. Yale, 3 Cal. 108; Smallwood v. Norton, 20 Maine, 83; Wilson v. Coffin, 2 Cush. 316; Salisbury v. Gourgass, 10 Met. 442; Ransom v. Cothran, 6 Sm. & M. 167; Coopwood v. Baldwin, 26 Miss. 129; Armstrong v. Craig, 18 Barb. 387; Church v. Mumford, 11 John. 479; Stimpson v. Sprague, 6 Greenl. 470; 2 Chitty Contr. (11th Am. ed.) 816, note (*p*¹); Hart v. Frame, 6 Cl. & Fin. (Am. ed.) 193, and note (*l*).]

(*m*) Samuel v. Judin, in error, 6 East, 333.

Case lies against an auctioneer for not selling for ready money; Earl of Ferrers v. Robins, 2 Cr. M. & R. 152; against an agent for improperly accepting a bill in the name of the plaintiff, Pickwood v. Neate, 10 M. & W. 206. [A principal may recover, in an action of tort against his agent, for all the damage caused by a breach of duty by the agent, including his neglect to pay over, on demand, money which he has collected as agent. Ashley v. Root, 4 Allen, 504. In this case Chapman J. said: "This is one of the numerous class of cases where a party may elect to sue either in contract or tort. At common law he might sue in assumpsit for breach of contract, or in case for breach of duty. The general rule is well stated in Courtenay v. Earle, 10 C. B. 73, that where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party on whom the duty is cast. See, also, Church v. Mumford, 11 John. 479, where the doctrine is applied to the case of a breach of duty by an attorney; and Howe v. Cook, 21 Wend. 29; Dwight v. Brewster, 1 Pick. 50."]

(*n*) *Ante*, 114.

(*n*¹) [School District in Medfield v. Boston, Hartford & Erie R. R. Co. 102 Mass. 552, 555; Southern Express Co. v. McVeigh, 20 Grattan, 264.]

(*o*) See Corbett v. Packington, 6 B. & C. 268; Pozzi v. Shipton, 8 Ad. & El. 963; Smith v. White, 6 Bing. N. C. 218; 8 Scott, 483, S. C.; [Bell v. Ward, 1 Dana, 147; Bank of Orange v. Brown, 3 Wend. 158; Lockwood v. Bull, 1 Cowen, 322; Southern Express Co. v. McVeigh, 20 Grattan, 264.] As to the liability of a ferryman for loss or injury of goods, see Walker v. Jackson, 10 M. & W. 161. Case will lie against a rail-

trade which he professes, the law gives an action upon the case to the party grieved against him; as if a smith in shoeing my horse prick him, and other like cases. (p) And it seems that although there be an express contract, still if a *common law duty* result from the facts, the party may be sued in tort for any neglect or misfeasance in the execution of the contract. (q)

If the contract be laid as *inducement* only, it seems that case for an act, in its nature a tort or injury, afterwards committed in breach of the contract, may often be adopted. On this ground, case for not accounting for, and for converting to the defendant's use, bills delivered to him to be discounted, or the proceeds of such bills, is probably sustainable. (r) And in *Mast v. Goodson*, (s) it was held that a count in *case*, setting out an agreement by which the plaintiff was to build a yard in defendant's close, and lay out not less than 20l., and was to enjoy it for life, and averring that plaintiff built the yard and enjoyed it for some years as an easement, but defendant afterwards wrongfully obstructed him in the enjoyment of it, was good. In that case the action was founded on a contract; but the obstruction to the plaintiff's right for which the action was brought was *ex delicto*, although the right also arose out of the contract. (t) And a count stating that the plaintiff being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, thereby increasing the expense, is sustainable. (u)

*"Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in

way company for negligently conducting a train. *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244. See, also, *Aldridge v. The Great Western Railway Company*, 1 Dowl. N. S. 247; 4 Scott N. R. 150, S. C. [The character of an action, whether tort or contract, is to be determined by the nature of the grievance rather than the form of declaration. *New Orleans & C. R. R. Co. v. Hurst*, 36 Miss. 660; *Cogswell v. Baldwin*, 15 Vt. 404; *Howe v. Cook*, 21 Wead. 29.]

(p) 1 Sannid. 312 a, and note (2). So in the late case of *Brown v. Edgington*, 2 M. & Gr. 279, where A. a wine merchant, ordered a crane rope of B. a dealer in, and who represented himself as a manufacturer of ropes; and B.'s foreman thereupon ascertained the nature and dimensions of the rope required, and being told that it was wanted to raise pipes of wine from the cellar, said that a rope must be made on purpose; but B. did not make the rope himself, but sent the order to his manufacturer, who employed a third party to make the rope; it was held, in an action on the case, by A. against B. to recover damages resulting from the insufficiency

of the rope, that B., as between him and A., was to be considered as the manufacturer of the rope, and that an implied warranty arose out of the contract that the rope was a fit and proper one for the purpose for which it was ordered, and that the action could be supported.

(q) *Dickon v. Clifton*, 2 Wils. 319; per *Bayley J. Burnett v. Lynch*, 5 B. & C. 605; 8 D. & R. 378, S. C.; *Ansell v. Waterhouse*, 2 Chit. Rep. 1; [*Emigh v. Pittsburgh & C. R. Co.* 4 Bissell, 114.]

(r) *Judin v. Samuel*, 1 New Rep. 43; *Samuel v. Judin*, 6 East, 333, S. C. in error; *Smith v. White*, 6 Bing. N. C. 218; 8 Dowl. 255, S. C.

(s) 3 Wils. 348; 2 Bl. Rep. 848, S. C.

(t) Per *Holroyd J. Corbett v. Packington*, 6 B. & C. 273; 9 D. & R. 264, S. C.; and in *Judin v. Samuel*, 1 New Rep. 46, *Heath J.* observed that in *Mast v. Goodson* the court was of opinion that a count upon a cause of action, to which a contract is only inducement, may be joined with a count upon a tort.

(u) *Elsee v. Gatward*, 5 T. R. 143. See *Wilkinson v. Coverdale*, 1 Esp. Rep. 75

assumpsit, in which the promise is stated as the gist of the action. (*u*¹) But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." (*v*) Therefore, where by *deed-poll* a lessee assigned his term to another, "subject to the rent and covenants," and in consequence of the non-performance of the covenants the lessee was damaged, it was held that he might sue the assignee in an action upon the case founded in tort; for, under the circumstances, the law raised a duty in the defendant to perform the covenants, and the breach of that duty had caused an injury to the plaintiff. (*w*)

If there be a covenant or contract under seal between the same parties, and directly relating to the matter in dispute, the action must in general be in covenant, and founded thereon; (*x*) and consequently in the instance last mentioned, if the assignee had covenanted with the lessee to perform the covenants in the lease, case could not have been maintained, though case for actual waste is sustainable, notwithstanding the defendant covenanted to keep in repair. (*y*) So where there is a charter-party between the master of a ship and the freighter, case does not lie against the master for the breach of a stipulation in the charter-party. (*z*) But we have already seen, that in some cases the owner may be sued in case upon his general liability, if not charged directly upon the charter-party made under seal with the master. (*a*)

With regard to *nonfeasance*, or neglect to perform a contract, not

(*u*¹) [Where the complaint or declaration sets forth a cause of action in contract, a recovery for a tort cannot be sustained. The plaintiff must recover, if at all, according to his allegations as well as his proofs. *Beard v. Yates*, 9 Sup. Ct. (N. Y.) 466.]

(*v*) Per Littledale J. in *Burnett v. Lynch*, 5 B. & C. 609; 8 D. & R. 381, S. C. [Where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may declare in tort or in contract, at his election. *Stoyel v. Westcott*, 2 Day, 422; *Bulkley v. Storer*, 2 Day, 531; *Vasse v. Smith*, 6 Cranch, 227; *Humiston v. Smith*, 22 Conn. 19; *Walcott v. Canfield*, 3 Conn. 194; *Phila., Wilm. & Balt. R. R. Co. v. Constables*, 39 Md. 149, 155-157; *Emigh v. Pittsburgh & C. R. R. Co.* 4 Bissell, 114. In actions founded on torts, connected with contracts, so much of the contract must be stated as is necessary to describe the wrong, or as qualifies the nature and character of the wrong. *Webster v. Hodgkins*, 25 N. H. 128; *Newell v. Horn*, 47 N. H. 379, 382.

And although the plaintiff declares as for a tort, still, so far as the tort rests upon contract, the same rules are to govern that would if the contract itself had been declared upon. *Wiley v. First National Bank of Brattleboro*, Sup. Court Vt. Feb. Term, 1875, reported 2 Central Law Journal, 271; *Towne v. Wiley*, 23 Vt. 355; *Woodward v. Barnes*, 46 Vt. 332.]

(*w*) *Burnett v. Lynch*, 5 B. & C. 589; 8 D. & R. 368, S. C. [Where an action in form of tort is brought to recover damages for an injury arising from a breach of contract, some privity between plaintiff and defendant must be shown. *Gray v. Ottolengui*, 12 Rich. (S. Car.) 101.]

(*x*) *Ante*, 132. There is an exception in the case of a tenant committing waste, *post*, 158.

(*y*) *Kinlyside v. Thornton*, 2 Bl. Rep 1111.

(*z*) *Leslie v. Wilson*, 6 Moore, 425.

(*a*) *Ib. Ibid.*; 6 Moore, 415; *ante*, 116.

even an action of *assumpsit*, much less an action upon the case, can be maintained, if no consideration existed and be stated in the declaration, to give validity to the defendant's alleged obligation to do the act. (a¹) Therefore a count stating that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day, and that the defendant accepted the retainer, but did not perform the work, *per quod* the walls were injured, cannot be supported. (b) For the count shows no consideration or legal liability on the part of the defendant to proceed with the work. There are, however, some particular * instances of persons exercising certain public trades or employments, who are bound by law to do what is required of them in the course of their employments, without the aid of an express contract, and are in return entitled to a recompense, and may therefore be sued in case, as for a breach of duty in refusing to exercise their callings. (c) As where a common carrier, having convenience, refuses to carry goods, being tendered satisfaction for the carriage; (d) or an innkeeper to receive a guest, having room for him; (e) or a smith, having materials for the purpose, to shoe the horse of a traveller; or a ferryman to convey one over a common ferry, and the like. (f) If the tort of the bailee, &c. consist in some nonfeasance or default, where the act required to be done was not imposed upon him by law, in respect of the employment, and did not impliedly result as a duty from such employment, but was created by express written contract, it would seem that case is not the proper remedy, and that the action should be in *assumpsit*. In an action upon the case a count charged that the plaintiff had delivered to the defendant certain pigs to be taken care of by him, "and in consideration thereof the defendant agreed to take care of the pigs, and to *redeliver* the same on request." The court held, that this count was to be considered in *assumpsit*; and Mr. Justice Littledale said, "Suppose a written contract had been

(a¹) [Hyde v. Moffat, 16 Vt. 271.]

(b) Elsee v. Gatward, 5 T. R. 143.

(c) Case may be maintained also against parties for neglecting to perform duties attaching to them by virtue of their office, although not entitled to any recompense in the particular instances, the subject-matter of their neglect. Thus the secretary of a company was held liable for not making out and delivering to the plaintiff a certificate of shares in the company, in accordance with the provisions of the act of parliament forming the company. Daly v. Thompson, 10 M. & W. 309. So an officer of excise is liable in case for refusing to sign a bill of entry for a person who had tendered the duty payable on his goods. Barry v. Arnaud, 2 P. & D. 633. Case will lie against bankers for refusing to honor the check of a customer. Margetti v. Williams, 1 B. & Ad. 415. See Whitaker v. Bank of England, 1 Cr., M. & R. 744. So it will lie against the Bank of

England for neglecting to transfer stock. Coles v. Bank of England, 2 P. & D. 521. *Quære*, whether an action on the case can be supported against a clergyman for refusing to solemnize a marriage. See Davis v. Black, clerk, 1 G. & D. 432.

(d) An averment that the plaintiff was willing and offered to pay whatever was legally due, is sufficient, and an actual tender of money for the carriage is unnecessary. Pickford v. Grand Junction Railway Company, 8 M. & W. 372; 9 Dowl. 766, S. C.

(e) Bac. Ab. Inns, C. 3; Ansell v. Waterhouse, 6 M. & Sel. 393. See Rex v. Jones, 7 Car. & P. 213; Fell v. Knight, 8 M. & W. 269.

(f) 1 Saund. 312 c, note (2); Elsee v. Gatward, 5 T. R. 149, 150. Case lies against a captain of a vessel for not supplying good and proper provisions during a voyage. Young v. Tewson, 8 C. & P. 55.

entered into in the terms of this count, it could never have been intended that a breach of it might be laid in tort; it would be as reasonable to lay in tort a breach of an agreement to convey a house and land." (g)

Case or assumpsit may be supported for a false warranty on sale of goods; (h) but for a breach of an express or implied contract of warranty, it is usual and perhaps better to declare in assumpsit in order that the count for money had and received, to recover back consideration paid, may be included in the declaration; and where defendant said, "the horse is sound, but mind I do not warrant him," and it was proved that he knew it was unsound, Lord Tenterden held that he was properly sued in assumpsit on his promise that he was sound. (i) Case is necessarily the form of action to be adopted (now in writing) deceitfully representing a person to be fit to be trusted, (i¹) or other deceit, independently of and without relation to any contract between the parties. (j) And for fraudulent represen-

(g) *Corbett v. Packington*, 6 B. & C. 268, 274; 9 D. & R. 265, S. C. And see 1 Saund. 312 c, note (c), 5th ed. *Sed quære*, whether trover or detinue cannot be maintained against a bailee who wrongfully refuses to redeliver the goods upon a demand, although he had expressly, verbally or in writing, agreed to restore them. See, also, *Smith v. White*, 6 Bing. N. C. 218; 8 Dowl. 255, S. C. It will be observed that the declaration referred to in the text was not framed on any breach of duty but for a breach of an agreement.

(h) *Stuart v. Wilkins*, Doug. 21; *Williamson v. Allison*, 2 East, 446; [*Mahurin v. Harding*, 28 N. H. 128. In this case, Bell J. said: "The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished, because the seller has at the same time bound himself by a warranty." "The forms of declaring in these cases are substantially different. The declaration in *assumpsit* always states a consideration and a promise or warranty, and complains of a breach of the warranty. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated." "The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty, or by statements which he knew to be false, and thereby deceived and defrauded him. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be connected with the fraud alleged in that case; though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he states them, and may fail if any material variance occurs in his proof. But the intention to defraud, the knowledge that his warranty or

his statements were false, and the fact that the plaintiff was thereby defrauded, constitute the gist of the action in cases of this kind, the very gist and foundation of the action for deceit, and must be proved or the action must fail." In this case the decision in *Williamson v. Allison*, *supra*, is very seriously questioned, the cases bearing on the subject are cited. See *Webster v. Hodgskins*, 25 N. H. 128; *Evertson v. Miles*, 6 John. 479; *Lock v. Powell*, 2 Caines, 216; *Shepherd Worthing*, 1 Aiken, 188; *Beebe v. Knapp*, 28 Mich. 53.] Case lies for the deceit in a warranty, although it was part of the contract that if the vendee disliked the goods the vendor should exchange them for others of equal value. *Wallace v. Jarman*, 2 Summ. Rep. 162.

(i) *Sittings at Westminster*, 1830, 120.

(i¹) [See *Upton v. Vail*, 6 John. 181; *sell v. Clark*, 7 Cranch, 92.]

(j) *Pasley v. Freeman*, 3 T. R. 51; *Adams v. Jervis*, 4 Bing. 73; 9 Geo. 4, c. 111, s. 1; *Lyde v. Barnard*, 1 M. & W. 101; *Swan v. Phillips*, 3 Nev. & P. 447; [*ante*, 85, note 1.] If, on the gift of a chattel, the donor asserts it to be his own, and the donee be afterwards evicted and suffer damages and costs, the gift will lie. *Barney v. Dewey*, 13 John. 120. An action on the case lies for fraud in a false affirmation in the sale of land; as where the land pretended to be sold has no existence, notwithstanding any covenant in the deed. *Wardell v. Fosdick*, 13 John. 325; *Monell v. Colver*, 13 John. 395; *Freeman v. Lewis*, 1 Day, 250; *Frost v. Leonard*, 2 Caines, 193; *Ward v. Wiman*, 2 Wend. 193. In *Gallagher v. Bruneau*, 345, the principles established in *Pasley v. Freeman*, *supra*, are fully recognized. In the later case of *Benton v. Pasley*, 2 Wend. 385, an action on the case was held to lie for the assertion of falsehood, with

tions not introduced into a written contract between the parties, respecting the subject-matter of the representations, case (*j*¹) is the proper remedy, if any. (*k*) In an action upon the case in tort for a breach of a *warranty* of goods the *scienter* need not be laid in the declaration, nor if charged need it be proved. (*l*) And where the plaintiff, an auctioneer, was employed by the defendant, who had goods in his possession, but was not the owner, to sell them, which the plaintiff did, and was afterwards compelled by the real owner to make satisfaction to him for the proceeds; it was held, after verdict, that a count in case for representing that the defendant was entitled to sell the goods, and thereby deceiving him, was maintainable, although the declaration did not charge that the defendant knew that he was not the owner of the goods at the time the representation was made. (*m*)

If goods be obtained on credit through a fraudulent contract, the proper remedy is case or trover, at least before the expiration of the credit; for if *before* that time he sue in assumpsit for goods sold, he recognizes or affirms the contract, and may be successfully met by the objection that the credit has not expired. (*n*)

We have already noticed the instances in which case or trespass should be brought against a person who causes an injury by driving

fraudulent intent as to a present or existing fact, where a direct, positive, and material injury results from such assertion. Case may be maintained against a public officer for a false and fraudulent representation made by him in reference to property sold by him; and it is no answer that the sale was made by him in his official character. *Culver v. Avery*, 7 Wend. 380.]

(*j*¹) [See *Hallock v. Powell*, 3 Caines, 216.]

(*k*) *Meyer v. Everth*, 4 Campb. 22; *Pontifax v. Bignold*, 9 Dowl. 860; 3 M. & Gr. 63, S. C.; *ante*, 120. See *Pilmore v. Hood*, 5 Bing. N. C. 97; 7 Scott, 827; 7 Dowl. 136, S. C., deciding that where a defendant makes *fraudulent* representations to B., who communicates them to C., with the knowledge of the defendant, C. may maintain an action against the defendant, provided he is induced to act on such representations, and can prove damage from the *fraud*. See, also, *Langridge v. Levy*, 2 M. & W. 532; 4 M. & W. 338 (in error); *Hill v. Gray*, 1 Stark. Rep. 434; and *Winterbottom v. Wright*, 10 M. & W. 109. If a party purchase shares upon the faith of false representations of a company contained in advertisements, the company is liable for the deceit; but *semble*, otherwise, if the statements were made with a reasonable belief in their truth. *Shrewsbury v. Blount*, 2 M. & Gr. 475; 2 Scott N. R. 568.

(*l*) *Williamson v. Allison*, 2 East, 446; *Adamson v. Jarvis*, 4 Bing. 73; [*Beebe v. Knapp*, 28 Mich. 53. In *Mahurin v. Harding*, 28 N. H. 128, it was decided that, in an

action on the case for deceit in the sale of a horse, the *scienter* is essential to be proved. The decision in *Williamson v. Allison*, *supra*, was treated as unsound law. Bell J. referring to it, said: It "is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive." See *Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265; *Stone v. Denny*, 4 Met. 151; *Vail v. Strong*, 10 Vt. 457; and other cases cited in *Mahurin v. Harding*, *supra*.]

(*m*) *Ib. Ibid.* 66. [A person who, in making a contract, assumes to act as the agent of another without authority, may be made liable for all damages in an action on the case, as for a deceit. *Clark v. Foster*, 8 Vt. 98. If the contract made by him be under seal, case is the appropriate remedy. *Redfield J. in Roberts v. Button*, 14 Vt. 195; *ante*, 41, note.]

(*n*) *Ferguson v. Carrington*, 9 B. & C. 59. [But see *Weigand v. Sichel*, 4 Abb. Court of App. Decis. 592, where it was held that if the making of a contract, giving credit, is induced by fraud, the creditor may sue upon the implied agreement founded on the consideration of the contract, and may prove the fraud under the ordinary complaint for goods sold, &c. for the purpose of avoiding the stipulation as to credit. See *Roth v. Palmer*, 27 Barb. 652; *Masson v. Bovet*, 1 Denio, 69; *Osborne v. Bell*, 5 Denio, 370; *Kingman v. Hotelling*, 25 Wend. 423.]

his carriage against another's, (*o*) or by negligence in navigating ship; (*p*) * and the distinctions when the master should be sued in case and when in trespass, have also been adverted to. (*q*)

Where a distress has been made for rent, and there was no rent due, an action of trespass, or case on the statute, (*r*) may be supported. (*s*) So where a distress is made after a tender of the rent, case or trespass may be supported. (*t*) If the person making the distress turn the tenant out of possession, or continue in possession an unreasonable time beyond the five days, trespass lies; (*u*) and it may be supported where a party taking a distress *damage feasant* has been guilty of any irregularity, (*u*¹) rendering him a trespasser *ab initio*. (*v*) In the case of a distress for rent, if it were lawful in its inception, subsequent irregularity will not render the party a trespasser *ab initio*, or subject him to an action of trespass or trover; (*y*) and case is the proper remedy in these and most other instances of irregularity in the taking or sale or disposal of a distress. (*z*) This action also lies for the rescue or pound-breach of cattle, or goods distrained for rent *damage feasant*; (*a*) or for the rescue of a person arrested on mesne process; and for an excessive levy on a *fieri facias*; (*b*) and against sheriffs, &c. for escapes on mesne or final process, if damage can be proved; (*c*) or for not arresting the debtor when he had an opportunity

(*o*) *Ante*, 142. Case is the proper remedy at the suit of the owner of horses let to hire against a third person; *Hall v. Pickard*, 3 Campb. 187; 5 Esp. Rep. 35; but trespass should be brought if the horses were merely lent. *Lotan v. Cross*, 2 Campb. 464.

(*p*) See *ante*, 143, 144.

(*q*) *Ante*, 146.

(*r*) 2 W. & M. c. 5.

(*s*) [*Olinger v. McChesney*, 7 Leigh, 660.] As to what are irregularities in a distress for which this action is maintainable, see *post*, vol. ii. and notes to the precedents.

(*t*) *Branscomb v. Bridges*, 2 D. & R. 256; 1 B. & C. 145; *Smith v. Goodwin*, 4 B. & Ad. 413.

(*u*) *Etherton v. Papplewell*, 1 East, 139; *Winterbourne v. Morgan*, 11 East, 395; *Messing v. Kemble*, 2 Campb. 115. How long the landlord may remain, see *Pitt v. Shew*, 4 B. & Ald. 208, qualifying *Wallace v. King*, 1 H. Bl. 13.

(*u*¹) [*Sackrider v. McDonald*, 10 John. 252; *Hopkins v. Hopkins*, 10 John. 269; *Fitzwater v. Stout*, 16 Penn. St. 22; *Morse v. Reed*, 28 Maine, 481; *Adams v. Rivers*, 11 Barb. 390; *Adams v. Freeman*, 12 John. 408; *Jarrett v. Gwathmey*, 5 Blackf. 237; *Van Brunt v. Schenck*, 13 John. 414; 2 Greenl. Ev. § 615; *Kent v. Willey*, 11 Gray, 368; *Russell v. Hanscomb*, 15 Gray, 166; *McGough v. Wellington*, 6 Allen, 505.]

(*z*) 8 Co. 146; Bac. Abr. Trespass, B.; [*Smith v. Gates*, 21 Pick. 55; *Adams v. Adams*, 13 Pick. 384; *Sherman v. Braman*, 13 Met. 407; *Esty v. Wilmot*, 15 Gray, 168,

169, 170.] See the case of *Wilder v. Spier*, 8 Ad. & El. 547, where an action of trespass was brought for putting animals into a pound in an unfit state to remain there, whereby they were injured.

(*y*) 11 Geo. 2, c. 19; *Wallace v. King*, H. Bl. 13.

(*z*) See the cases and precedents, *post*, vol. ii. 503 *et seq.* It lies for distraining for more rent than is due, although the distress taken is not sufficient to pay the rent due, and although a notice of distress for more rent than is due is withdrawn, and the distress sold under a second and correct notice. *Taylor v. Henniker*, 4 P. & D. 242. [In Pennsylvania trespass is the proper form of action. *Kerr v. Sharp*, 14 Serg. & R. 399.]

(*a*) For law, &c. see *post*, vol. ii. 503 *et seq.* But case does not lie for detaining cattle distrained *damage feasant*, when tender of sufficient amends was made after the cattle had been impounded; *Sheriff v. James*, 1 Bin. 341; *Anscorn v. Shore*, 1 Taunt. 261; nor for refusing to restore goods distrained for rent, on tender of the rent, unless the tenders were made before the goods were impounded; *Thomas v. Harries*, 1 M. & Gr. 695; *Law v. Thomas*, 4 P. & D. 9; *Ellis v. Taylor*, M. & W. 415. See the note to the precedent, *post*, vol. ii. 511, Form 15.

(*b*) See *Wentworth v. Bullen*, 9 B. & 840.

(*c*) *Williams v. Mostyn*, 4 M. & W. 14; 7 Dowl. 38, S. C.; *Brunskill v. Roberts*, 2 P. & D. 269; *Jackson v. Hill*, 2 P. & 455.

nity; (*d*) or for not selling on a *fi. fa.* in a reasonable time, (*e*) and for a false return of *non est inventus* to mesne process, or of *nulla bona* to a writ of *fi. fa.*; (*f*) or for not levying under it when he had an opportunity, (*f*¹) or for not taking a replevin bond; or for taking *insufficient pledges in replevin; or for not assigning a bail-bond. (*g*) Case also lies for not delivering letters, &c.; (*h*) and against a witness for not obeying a writ of subpoena; (*i*) and for infringing the copy-right of a book, print, single sheet of music, or other work; (*j*) and for the infringement of a patent; (*k*) and for obstructing the proprietor of tithes from entering on land to take them away. (*l*) For injuries to any personal property in reversion, trespass or trover cannot be supported; and case is the only remedy. (*m*)

In some cases, though the injury be forcible and immediate, the plaintiff may waive the trespass and sue in trover or in case for the consequential damage, (*m*¹) and in this respect trover is in general a concurrent remedy with trespass, for the unlawful taking and conversion of goods; (*n*) and case is a good form of action for an excessive

(*d*) *Brown v. Jarvis*, 1 M. & W. 704; 1 T. & Gr. 1033, S. C.; *Curling v. Evans*, 1 M. & Gr. 349. Actual damage must be proved, per Lord Abinger C. B. *Brown v. Jarvis*, *supra*.

(*e*) *Jacobs v. Humphrey*, 4 Tyrw. 272; 2 Cr. & M. 413, S. C.; *Ayreton v. Davis*, 9 Bing. 741; *Rowe v. Amos*, 8 Dowl. 750.

(*f*) *Heenan v. Evans*, 1 Dowl. N. C. 204; *Wintle v. Freeman*, 11 Ad. & El. 539; 1 G. & D. 93, S. C. When right of action not waived, *Holmes v. Clifton*, 4 P. & D. 112.

(*f*¹) [If attached property, of which due care is taken by the officer or keeper, is lost by fire or theft, the officer is not liable for the loss; otherwise, if it be burned or stolen while due care to prevent such loss is omitted by the officer or keeper. *Starr v. Moore*, 3 McLean, 354; *Bridges v. Perry*, 14 Vt. 262; *Dorman v. Kane*, 5 Allen, 40.]

(*g*) See precedent and notes, *post*, vol. ii. An action on the case does not lie for not having money levied on *fi. facias* in court where the sheriff has not been ruled; *Moreland v. Leigh*, 1 Stark. 388; the proper remedy in such case being assumpnit, or debt for money had and received, see *Dale v. Birch*, 3 Campb. 347; *Morland v. Pellatt*, 8 B. & C. 727; 3 M. & R. 411, S. C.; *Swain v. Morland*, 1 B. & B. 370, 380; *Thurston v. Mills*, 16 East, 274. But the sheriff is liable to this action for refusing to replevy goods; *Sabourin v. Marshall*, 3 B. & Ad. 441; and for retaining more than his proper fees out of the amount levied; *Buckle v. Bewes*, 3 B. & C. 688; 5 D. & R. 495, S. C.; and for neglecting to deliver possession under a writ of *habere facias possessionem*; *Mason v. Paynter*, 1 G. & D. 381. [Case lies against ministerial officers for any breach of duty, whether intentional or malicious or not. *Keith v. Howard*, 24 Pick. 292; *Gates v.*

Neal, 23 Pick. 308; *Griffin v. Rising*, 11 Met. 339; *Spear v. Cummings*, 23 Pick. 224; *Abbott v. Kimball*, 19 Vt. 551.]

(*h*) *Rowning v. Goodchild*, 3 Wils. 443.

(*i*) *Pearson v. Iles*, Doug. 556-561; *Amey v. Long*, 9 East, 473; *Hallett v. Mears*, 13 East, 17, note a; *Lamont v. Crook*, 6 M. & W. 615; 8 Dowl. 737, S. C. Case also lies for a false return to a mandamus. *Bowles v. Neale*, 7 C. & P. 262.

(*j*) *Clementi v. Goulding*, 11 East, 244; *Roworth v. Wilkes*, 1 Campb. 94, 98. See *Moore v. Clarke*, 9 M. & W. 692. Case is a joint remedy with debt for the recovery of penalties for the infringement of the copy-right of designs for ornamental articles of manufacture. 5 & 6 Vict. c. 100, s. 8.

(*k*) *Post*, vol. ii. 587; Com. Dig. Patent; *Spilbury v. Clough*, 2 G. & D. 17; *Minter v. Mower*, 6 Ad. & El. 735; *Perry v. Skinner*, 2 M. & W. 471; *Morgan v. Seaward*, 2 M. & W. 544. So it lies for selling goods as the manufacture of another; *Blofield v. Payne*, 4 B. & Ad. 410; *Morrison v. Salmon*, 2 Scott N. R. 449; and for using the same mark for goods as another manufacturer; *Crawshaw v. Thompson*, 11 Law J. R. N. S. C. P. 301. It lies for withholding goods under a claim of lien which the party knew to be false. *Green v. Button*, 2 Cr., M. & R. 707.

(*l*) *Cobb v. Selby*, 2 New Rep. 466.

(*m*) *Gordon v. Harper*, 7 T. R. 9; *Hall v. Pickard*, 3 Campb. 187.

(*m*¹) [*Gilson v. Fisk*, 8 N. H. 404; *Frankenthal v. Camp*, 55 Ill. 169.]

(*n*) *Pitts v. Gaince*, 1 Salk. 10; *Branscomb v. Bridges*, 1 B. & C. 146; 2 D. & R. 256, S. C.; *Smith v. Goodwin*, 4 B. & Ad. 413. But to maintain trover there must be some exercise of ownership over the chattel taken, inconsistent with the owner's right of domin-

distress for rent, though the tenant has tendered the rent to his landlord before his distress was levied, and the distress was therefore void. (o) Various other instances will be found in which trespass and case are concurrent remedies; and in many cases the owner of goods may waive the tort in taking them, and recover the proceeds in an action for money had and received. (p)

* With respect to injuries to *real property corporeal* where the injury was immediate, and committed on land, &c. in the possession of the plaintiff, the remedy is trespass; (q) but for nonfeasance, as for not carrying away tithes; (r) or where the injury is not immediate but consequential, as for placing a spout near the plaintiff's land, so that water afterwards ran thereon, or for causing water to run from the defendant's land to that of the plaintiff; (s) or where the plaintiff's property is only in reversion, (t) and not in possession, the action should be in case; (t¹) and it has been considered that case and not trespass is the proper remedy for continuing holdfasts in the plaintiff's wall after he had recovered in trespass for the original driving in. (u) It appears, however, as already remarked, that the injury is sometimes considered to be immediate, if it be the natural and inevitable consequence of the act done; as if the defendant's servant by his order place rubbish so *near* the plaintiff's wall that some of it must fall naturally, or in all probability, roll against the wall, and it accordingly does so. (x) Case is the proper remedy for obstructing light and air through ancient windows by any erection on the adjoining land, and such action may be brought in the name of the tenant in possession, or of the person entitled to the immediate reversion, though the

plaintiff has no interest in the land over it, whilst the mere seizing, without any conversion, is sufficient to maintain trespass. *Foulds v. Willoughby*, 1 Dowl. N. S. 86. As to the right of a party who has sustained an injury which forms the subject of an action of trespass, and there is also consequential damage, to sue in trespass or case, at his election, see *Wells v. Ody*, 5 Dowl. 95, and note (t), *ante*, 144; *Weeton v. Woodcock*, 5 M. & W. 594, where the rule is thus laid down by Parke B. "there is no doubt that where there is a direct injury, and also a consequential damage, that may form the subject-matter of either case or trespass, but where there is a direct injury to the soil and freehold, there is no other remedy but trespass."

(o) *Branscomb v. Bridges*, 1 B. & C. 145; 2 D. & R. 251, S. C.; *Smith v. Goodwin*, 4 B. & Ad. 413.

(p) *Edwards v. Newman*, 1 B. & C. 418; 2 D. & R. 568, S. C.

(q) *Ante*, 142; *Shapcott v. Mugford*, 1 Lord Raym. 188.

(r) *Shapcott v. Mugford*, 1 Lord Raym. 187.

(s) *Ante*, 142; *Reynolds v. Clarke*, 1 Stra. 634, 635; 2 Lord Raym. 1399; *Haward v.*

Bankes, 2 Burr. 1114; *Reynolds v. Clarke*, 1 Fortesc. 212.

(t) Com. Dig. Action, Case, Nuisance, B. (t¹) [*Elliot v. Smith*, 2 N. H. 430; *Brook v. Dinsmoor*, 3 N. H. 103; *Randall v. Cleaveland*, 7 Conn. 328; *Lienow v. Ritchie*, 1 Pick. 235; *Tobey v. Webster*, 3 John. 46; *Hall v. Snowhill*, 14 N. J. (Law) 8; *Ayer v. Bartlett*, 9 Pick. 161; *Jackson v. Starr*, 1 Mass. 520; *Campbell v. Arnold*, 1 John. 511; *McGowen v. Chapen*, 2 Murphy, 6; *Hilliard v. Dortch*, 3 Hawks, 246; *Aldridge v. Stuyvesant*, 1 Hall, 210. An action on the case lies by a landlord against any person who so wrongfully and maliciously disturbs his tenants that they abandon his premises, and the landlord thereby loses his rent.]

(u) *Lawrence v. Obee*, 1 Stark. 22. But see *Holmes v. Wilson*, 10 Ad. & El. 50, which decides that trespass is the proper remedy for continuing buttresses on land where the plaintiff had recovered in trespass for the erection.

(x) *Gregory v. Piper*, 9 B. & C. 591; *M. & R. 500*, S. C.; [*Felch v. Gilman*, 2 Vt. 33.]

avertments in the declaration necessarily differ in the latter case. (y) So it lies for any other nuisance to houses or lands in possession, (z) and for injuries to water-courses where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water. (a)

Waste is either commissive, that is, wilful or permissive, that is, a neglect to repair whereby dilapidations occur. An action upon the case in the nature of waste, to the injury of the reversion, is certainly maintainable for *commissive* waste by a reversioner against his tenant, (a¹) * or a stranger. (b) And where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case, or of covenant, against the lessee for wilful waste done by him during the term. As where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term, the lessee during the term committed wilful waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous condition; afterwards the lessor brought an action on the case against the tenant for waste committed by him during the term, and it being objected at the trial that the plaintiff ought to have brought an action of covenant, and not on the case, a verdict was found for the plaintiff subject to that point; but the court of common pleas was clearly of opinion that an action on the case was maintainable as well as covenant; and the C. J. said "tenant for years commits waste, and delivers up the place wasted to the landlord, had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain. Because the landlord by the special covenant acquires a new remedy, does he therefore lose his old?" (c) And a landlord may sue a tenant holding over by *sufferance*, in case of wilful waste. (d) It was held, before the late repealing act, that a reversioner might sue the hundred on the 9 Geo. 1, c. 22, to recover damages for an injury done to the premises maliciously set on fire. (e)

(y) *Shadwell v. Hutchinson*, 2 B. & Ad. 97; [*Compton v. Richards*, 1 Price Exch. 27.] The building act, 14 Geo. 3, c. 78, s. 43, which authorizes the building or raising of a party-fence wall, does not protect a person from liability for any collateral damage resulting from such building, and therefore he is liable in case to the occupier of an adjoining house for darkening his windows. *Wells v. Ody*, 1 M. & W. 452.

(z) See instances, *Latw. 69*; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hall*, 4 Bing. N. C. 183; *Flight v. Thomas*, 2 P. & D. 531. It also lies for continuing a nuisance created before the possession, by the plaintiff, of the property in respect of which he sues; *Thompson v. Gibson*, 7 M. & W. 456; where see as to the right to enter upon land to remove a nuisance. So on the other hand, it lies against the party who continues; but did not create the nuisance; 5 Rep. 101 a; and the creator of the nuisance may be

sued, although the subject of the nuisance is in the occupation of his lessee. *Rusewell v. Prior*, Salk. 460; *The King v. Pedly*, 1 Ad. & El. 822.

(a) *Williams v. Morland*, 2 B. & C. 910; 4 D. & R. 583, S. C.; *Griffiths v. Marson*, 6 Price, 1. See *Shears v. Wood*, 7 Moore, 345; [*Radcliff v. Mayor &c. of Brooklyn*, 4 N. Y. (4 Comst.) 195; *Lindeman v. Lindsey*, 69 Penn. St. 93.]

(a¹) [See *Short v. Wilson*, 13 John. 33.]

(b) 1 Saund. 323 b; 2 Saund. 252 b. If trees be excepted from a demise, waste cannot be committed in cutting them down. *Goodright v. Vivian*, 8 East, 690. The injury would be a trespass. The tenant's remedy against a stranger is trespass. *ib.*; *Attersoll v. Stevens*, 1 Taunt. 194.

(c) *Kenlyside v. Thornton*, 2 Bl. Rep. 1111; 2 Saund. 252 a, b, note.

(d) *Burchell v. Hornsby*, 1 Campb. 360.

(e) *Pellew v. The Inhabitants of Wonford*,

With regard to *permissive* waste there seems to be some difficulty. It is laid down by great authority, (*f*) that the statute of Gloucester (*g*) (which extended the ancient law of waste by the writ of waste) applies to *permissive* waste by a tenant from year to year. In *Gibson v. Wells* (*h*) it was held, that case for permissive waste is not sustainable against a yearly tenant; and in *Herne v. Bembow* (*i*) it was decided, that case for such waste does not lie against a tenant for a term of years holding upon a lease, which does not contain a covenant to repair. In a subsequent case, *Jones v. Hill*, (*j*) it was determined that an action upon the case in the nature of waste cannot be supported against the assignee of a lease, in which the lessee had covenanted "from time to time, and at all times during the term, whenever need should require, sufficiently to repair the premises with all necessary reparations, and to yield up the same so well repaired at * the end of the term *in as good condition* as the same should be in when finished *under the direction of J. M.*" Upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of J. M.; the court did not decide that an action upon the case was not maintainable for permissive waste, but only that it was impossible it should be *waste* merely to omit to put the premises into such repair as A. B. had put them into; (*k*) in other words, the peculiar terms of the covenant were such, that a breach of them could not be considered so far within the technical doctrine of *waste*, as to justify an action upon the case, and therefore the covenant should have been the former action. It has been decided that if a lessee assign the term to another by *deed-poll*, "subject to the performance of the covenants in the lease," the lessee may maintain an action against the assignee for a breach of covenant in the lease committed after the assignment, *per quod* the lessee was damnified. (*l*) Assumpsit is the usual form of action against a tenant not holding by deed, upon his implied (or express) promise to cultivate a farm according to the rules of good husbandry, and to use the premises in a tenant-like manner. (*m*)

Case may be maintained upon the custom of the realm against the personal representatives of a rector, &c. at the suit of the successors for dilapidations; (*n*) and it lies for not repairing fences, whereby the

9 B. & C. 134; 4 M. & R. 130, S. C. See the present statutes, 7 & 8 Geo. 4, c. 31, and 2 & 3 W. 4, c. 72.

(*f*) 1 Saund. 323 b, note 7, cites 2 Inst. 302; Co. Litt. 54 b. See, however, the note in Co. Litt. 15th ed. citing Dyer, 198.

(*g*) 6 Edw. 1, c. 5.

(*h*) 1 New Rep. 290.

(*i*) 4 Taunt. 764.

(*j*) 7 Taunt. 392; 1 Moore, 100, S. C. In

the latter report the marginal note seems to be too general.

(*k*) Per Lord Tenterden, Burnett

Lynch, 5 B. & C. 603; 8 D. & R. 375, S. C.

(*l*) Burnett v. Lynch, 5 B. & C. 589;

D. & R. 368, S. C.; ante, 133.

(*m*) See the precedent and notes, post vol. ii. 187 et seq.

(*n*) Ante, 102.

plaintiff's cattle escaped from his land, or the cattle of the defendant got into the land of the plaintiff; (o) or whereby the cattle in the plaintiff's possession escaped and fell into a pit and were killed; (p) or a hay-stack in the defendant's close fell on and killed plaintiff's horses. (q) For the escape of the defendant's cattle into the plaintiff's close the plaintiff might support *trespass*, or distrain the cattle damage feasant.

We may remember that trespass cannot in general be supported where the matter affected is not substantial, or the estate therein is *incorporeal*. (r) Case therefore is the proper remedy for disturbance of common of pasture, turbary or estovers. (s) If the plaintiff's cattle be chased off the common, trespass may be supported for such chasing; and that form of action may in some instances be advisable, *in order that the right may be fully stated on the record. So case is the proper form of action for obstructing a private way, (t) or a public way, *per quod* the plaintiff was delayed on his journey, and obliged to take a more circuitous route, (u) or sustained some other special

(e) *Starr v. Bookesby*, 1 Salk. 335; *post*, vol. ii. [See *Little v. Lathrop*, 5 Greenl. 356, for the law of fencing against cattle. The owner of land, through whose neglect to repair a division fence, a stranger's cattle, at large in the highway, break into his neighbor's land, is not liable to an action by his neighbor for injuries thus occasioned. *Pool v. Alger*, 11 Gray, 489. The obligation to fence out animals, where it is imposed by law, applies only in favor of animals lawfully on the adjoining close. *Rust v. Low*, 6 Mass. 90; *Lawrence v. Coombs*, 31 N. H. 331; *Lord v. Wormwood*, 29 Maine, 282; *Holladay v. March*, 3 Wend. 142; *Stackpole v. Healy*, 16 Mass. 33; *McDonnell v. Pittsfield & North Adams R. R.* 115 Mass. 564; *Eames v. Salem & Lowell R. R.* 98 Mass. 560; *Keliber v. Connecticut River R. R.* 107 Mass. 411.]

(p) *Booth v. Wilson*, 1 B. & Ald. 59; *Powell v. Salisbury*, 2 Younge & Jerv. 391; [*Cleveland &c. R. R. Co. v. Elliott*, 4 Ohio St. 474; *Saxton v. Brown*, 31 Vt. 540; *Holden v. Rutland &c. R. R. Co.* 30 Vt. 297.]

(q) *Powell v. Salisbury*, 2 Younge & Jerv. 391. It lies for suffering a hay-rick, likely to ignite, to remain near the plaintiff's house, by which negligence the rick took fire and burnt the plaintiff's house. *Vaughan v. Menlove*, 4 Scott, 244; 3 Bing. N. C. 468, 8 C. [Case lies for carelessly and negligently kindling a fire on the defendant's own land, whereby the property of the plaintiff on adjacent land was burnt. *Barnard v. Poor*, 21 Pick. 378; *Webb v. Rome &c. R. R. Co.* 49 N. Y. 420; *Johnson v. Barber*, 10 Ill. 425; *Armstrong v. Cooley*, 10 Ill. 509; *Ayer v. Starkey*, 30 Conn. 304; *Conklin v. Thompson*, 29 Barb. 218; *Maull v. Wilson*, 3 Harr. 443; *Filliter v. Phippard*, 11 Q. B. 347; *Higgins v. Dewey*, 107 Mass. 494;

Perley v. Eastern R. R. Co. 98 Mass. 414; *Smith v. S. Western Ry. Co.* L. R. 6 C. P. 14; *Webb v. Rome &c. R. R. Co.* 49 N. Y. 420; *Sturgis v. Robbins*, 62 Maine, 289, 291, and cases cited; *Hanlon v. Ingram*, 1 Iowa, 108; S. C. 3 Iowa, 81; *Garrett v. Freeman*, 5 Jones (N. Car.) Law. 78; *Dewey v. Leonard*, 14 Minn. 153; *Calkins v. Burger*, 44 Barb. 424; *Ryan v. N. Y. Central R. R. Co.* 35 N. Y. 210; *Jordan v. Wyatt*, 4 Grattan, 151; *Tourtellot v. Rosebrook*, 11 Met. 460; *Batchelder v. Hengan*, 18 Maine, 32; *Finlay v. Langston*, 12 Missou. 120.]

(r) *Ante*, 147.

(s) Com. Dig. Action, Case, Disturbance, A. 1.

(t) Com. Dig. Action, Case, Disturbance, A. 2; [*Lambert v. Hoke*, 14 John. 383; *Osborne v. Butcher*, 26 N. J. (Law) 308; *Okeson v. Patterson*, 29 Penn. St. 22; *Wright v. Freeman*, 5 Harr. & J. 467; *Shafer v. Smith*, 7 Harr. & J. 67; *Smith v. Wiggin*, 48 N. H. 105. Case lies for obstructions to a right of way appurtenant to an estate leased at will, in favor of the lessor, on proof of actual damage. *Cushing v. Adams*, 18 Pick. 110.]

(u) *Greasly v. Codling*, 9 Moore, 489; or for obstructing the navigation of a river. *Rose v. Miles*, 4 M. & Sel. 101. A company maintaining a canal open to public use on payment of tolls, are bound at common law to take reasonable care to prevent damage to the navigation, and are liable in case for neglect. *Lancaster Canal Company v. Parnaby*, in error, 3 P. & D. 162. Where the defendants wrongfully kept a thoroughfare shut up, it was held that case lay against them by a bookseller for loss suffered in his business in consequence. *Wilkes v. Hungerford Market Company*, 2 Bing. N. C. 281; and the judgment of *Tindal C. J.* in that case, clearly shows when such an action may

damage. (*u*¹) So case is the proper remedy for disturbing a party the possession of a pew in a church; but no action for such disturbance can be maintained unless the pew were annexed to a house in the parish. (*v*) Perhaps trespass may be sustained if the pew to which the plaintiff is entitled as appurtenant to his messuage be broken; and that form of action may be adopted by the erector of a tombstone against a person who wrongfully removes it from the church-yard, and erases the inscription. (*x*)

Case is in general the remedy for disturbing a party in the enjoyment of an easement, (*y*) and it may be maintained in that instance although the right to the easement were conferred by a written agreement, which is stated in the declaration, and which stipulates for the enjoyment of the easement. (*z*) It lies for disturbance, obstruction or other injuries to offices, franchises, ferries, markets or tolls, or for not grinding at an ancient mill, &c. (*a*) And it may be maintained for disturbing and injuring the right to, and enjoyment of, an ancient decoy; (*b*) but no action is sustainable for frightening away game from a preserve (not being a franchise), or for disturbing a root-ery. (*c*)

An action on the case is frequently given by the express provision of some statute to a party aggrieved; (*d*) and it has even been decided that where a navigation act empowered the company to sue for *calls, &c. by action of debt or on the case, that an action on the case in tort might be supported, though the defendant were thereby deprived of the means of availing himself of a safe off. (*e*) Whenever a statute prohibits an injury to an individual or enacts that he shall recover a penalty or damages for such injury

be maintained and when not. He says, "The question is whether there is such a peculiar and private damage to the plaintiff beyond that suffered by the rest of his majesty's subjects as to enable him to sustain an action. The injury to the subjects in general is that they cannot walk in the same track as before, and for that cause alone an action on the case would not lie; but the injury to the plaintiff is the loss of a trade but which for this obstruction to the general right of way he would have enjoyed: and the law has said, from the Year Books downwards, that if a party has sustained any peculiar injury beyond that which affects the public at large an action will lie for redress."

(*u*¹) [Martin v. Bliss, 5 Blackf. 35; Washburn &c. Canal v. Spears, 16 Ind. 441; Weightman v. Washington, 1 Black. 39.]

(*v*) Mainwaring v. Giles, 5 B. & Ald. 356; Bryan v. Whistler, 8 B. & C. 294; 2 M. & R. 332, S. C.

(*w*) See 2 Rol. R. 140; Palm. 46; per Best C. J. Spooner v. Brewster, 3 Bing. 137, 138; [Gay v. Baker, 17 Mass. 435. See Howard v. North Bridgewater, 7 Pick. 138; Wentworth v. Canton, 3 Pick. 344; Daniel

v. Wood, 1 Pick. 102; Kimball v. Rowland, 24 Pick. 347.]

(*x*) Spooner v. Brewster, 3 Bing. 136.

(*y*) Mainwaring v. Giles, 5 B. & Ald. 356; Hewlins v. Shippam, 5 B. & C. 221; 7 D. R. 783, S. C.; Bryan v. Whistler, 8 B. & C. 288, 294; [Shafer v. Smith, 7 Harr. & 67; Wilson v. Wilson, 2 Vt. 68.] An easement can be granted by deed only. Mainwaring v. Giles, *supra*.

(*z*) Mast v. Goodson, 3 Wils. 348; Cobbett v. Packington, 6 B. & C. 273; 9 D. & 265, S. C.

(*a*) See Com. Dig. Action, Case, Disturbance, and Action, Case, Nuisance; Gay v. Callard, 6 M. & Sel. 69. See many instances of actionable obstruction or disturbance of a party in the exercise of a right put by Holt C. J. Keeble v. Hickeringill, 1 East, 576, note.

(*b*) Carrington v. Taylor, 11 East, 571; Campb. 258.

(*c*) Hannam v. Mockett, 4 D. & R. 518.

(*d*) Com. Dig. Action upon Statute, A. F. and Pleader, 2, s. 1-2, s. 30.

(*e*) The Huddersfield Canal Company v. Buckley, 7 T. R. 36.

though the statute be silent as to the form of the remedy, this action, or in some instances an action of debt, (*f*) may be supported; (*g*) as on the statute (*h*) at the suit of a landlord against a sheriff, for taking goods under an execution, without paying a year's rent; (*i*) or on different statutes relative to irregularities in making or disposing of a distress, (*k*) &c. In these and other instances case may be supported by implication; and if a statute give a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable by the common law, the party may sue at common law as well as upon the statute. (*l*) But in some instances a statute prescribes a particular remedy, in conferring a new right, or creating a liability; and in that case the remedy pointed out and no other can be pursued. (*m*) In many cases the common law remedy is altered

(*f*) *Ante*, 125.

(*g*) 10 Co. 75 *b*; 2 Inst. 486; *President and College of Physicians v. Salmon*, 2 Salk. 451.

(*h*) 8 Ann. c. 14.

(*i*) *Bristow v. Wright*, Dougl. 665. See *Arnitt v. Garnitt*, 3 B. & Ald. 440; *Andrews v. Dixon*, 3 B. & Ald. 645; *Lane v. Crockett*, 7 Price, 566; *Harrison v. Barry*, 7 Price, 690; *Reed v. Thoyts*, 6 M. & W. 410; *Forster v. Cookson*, 1 G. & D. 58.

(*k*) *Ante*, 155. So case is the proper form of action against the commissioners of a local act who have granted an annuity on the credit of the rates, in pursuance of the powers given by the act, if they neglect to pay the annuity when they have sufficient rates in their hands. *Cane v. Chapinan*, 1 N. & P. 104.

(*l*) Com. Dig. Action upon Statute, C.; *Adams v. Richardson*, 43 N. H. 212; *Rowe v. Addison*, 34 N. H. 306; *Coxe v. Robbins*, 9 N. J. (Law) 384; *Bearcamp River Co. v. Woodman*, 2 Greenl. 404; *Fryeburg Canal v. Frye*, 5 Greenl. 38; *Scidmore v. Smith*, 13 John. 322; *Almy v. Harris*, 5 John. 175; *Farmers Turnp. Co. v. Coventry*, 10 John. 389; *Colden v. Eldred*, 16 John. 220; *Selden v. D. & H. Canal Co.* 24 Barb. 362; *Bruce v. Hudson Canal Co.* 19 Barb. 371; *Baltimore v. Howard*, 6 Harr. & J. 483; *People v. Craycroft*, 2 Cal. 243.]

(*m*) See *ante*, 125; [*Babb v. Mackey*, 10 Wisc. 371; *Ward v. Severance*, 7 Cal. 126; *Roberts v. Landecker*, 9 Cal. 262; *Camden v. Allen*, 26 N. J. (Law) 398; *Weller v. Weyand*, 2 Grant (Pa.) Cas. 103; *Brown v. White Deer*, 27 Penn. St. 109; *Cole v. Muscatine*, 14 Iowa, 296; *Baile v. State*, 6 Ind. 165; *McCormack v. T. H. R. R. Co.* 9 Ind. 283; *Victory v. Fitzpatrick*, 8 Ind. 281; *Fuller v. Edings*, 11 Rich. (S. Car.) 239; *Henniker v. Contocook Valley R. R.* 29 N. H. 146. Where a statute authorizes the taking or injuring the property of another, and provides a remedy, that remedy must be followed, and no other can be made available: as where a statute authorizes the taking of

the land or other private property of an individual, under the right of eminent domain, for public uses, as for highways, railroads, canals, &c. or under the mill acts for flowage, and provides a remedy for the damages, no action at common law will lie for them. *Gedney v. Tewksbury*, 3 Mass. 307; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36; *Hazen v. Essex Company*, 12 Cush. 475; *Dodge v. County Commissioners of Essex*, 3 Met. 380; *Tower v. Boston*, 10 Cush. 235; *Flagg v. Worcester*, 13 Gray, 601; *Benjamin v. Wheeler*, 15 Gray, 486; *Mellen v. Western Railroad*, 4 Gray, 302; *Stowell v. Flagg*, 11 Mass. 364; *Wolcott Co. v. Upham*, 5 Pick. 292; *Leland v. Woodbury*, 4 Cush. 245; *McKinney v. Monongahela Nav. Co.* 14 Penn. St. 65; *Ash v. Cummings*, 50 N. H. 616; *Towle v. Eastern R. R.* 17 N. H. 519; *Osgood v. Blake*, 21 N. H. 550; *Dean v. Sullivan R. R.* 22 N. H. 321; *Henniker v. Contocook Valley R. R.* 29 N. H. 146; *Fletcher v. State Capital Bank*, 37 N. H. 369; *State v. Wilson*, 43 N. H. 419; *Stokes v. Sanborne*, 45 N. H. 276. This rule applies and extends to all acts necessarily incident to the execution of the power granted by the statute. *Dodge v. County Commissioners of Essex*, 3 Met. 380; *Ashby v. Eastern Railroad*, 5 Met. 371; *Babcock v. Western Railroad*, 9 Met. 553; *Brown v. Providence &c. Railroad*, 5 Gray, 35; *Curtis v. Eastern Railroad*, 14 Allen, 55; *Rowe v. Granite Bridge*, 21 Pick. 344. But if the damage done is not necessarily incident to the accomplishment of the public object, but is owing to the improper, negligent, or unskilful manner of doing it, such damage is not warranted by the authority, under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong for which an action of tort will lie. *Shaw C. J. in Perry v. Worcester*, 6 Gray, 547; *Mellen v. Western Railroad*, 4 Gray, 301; *Eastabrooks v. Peterborough & Shirley Railroad*, 12 Cush. 224; *Sprague v. Worcester*, 13 Gray, 193; *Thompson v. Moore*, 2 Allen, 350; *Carhart v. Au-*

by a statute. Thus the 43 Geo. 3, c. 141, enacts that in all actions against any justice of the peace for any conviction, &c. which may have been quashed, or for any matter done by him for carrying into effect, the plaintiff shall not recover more than the sum levied under the conviction, and 2*d.* damages, unless it be expressly alleged in the declaration, which shall be in an action *on the case* on that such acts were done maliciously, and without any reasonable cause. (*n*) We have seen that a common informer cannot sue upon an action be expressly given to him. (*o*)

The judgment of Lord Ellenborough C. J. in the case of *Godwin v. Radnidge*, (*p*) explains the advantages arising in many instances from the adoption of the action on the case, in preference to the action of assumpsit; viz. "there is no inconvenience in suffering the party to allege his gravamen as a breach of duty arising out of an employment for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire. By *allowing it to be considered in either way, according as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided; and the plaintiff, according as the convenience of his case requires, frames his principal count in such a manner, as either to join a count in trover therewith, if he have another cause of action other than an action of assumpsit, or to join with the assumpsit the common count, if he have another cause of action to which they are applicable. Other advantages may also sometimes ensue from the adoption of the case instead of assumpsit, viz. that in the former action the defendant cannot always plead in abatement the non-joinder of other parties or defendants; (*q*) and the plaintiff in case will in general be entitled to a verdict if he prove one of several defendants to be liable, whereas a different rule prevails in an action of assumpsit. (*r*) If a party has obtained goods upon a fraudulent contract whereby credit was to be allowed, he should be sued in case, at least before the expiration of the credit, as assumpsit cannot be maintained during its currency. (*s*) If a set-off be apprehended, (*t*) or the defendant's certificate would be pleadable in bar (*u*) to an action of assumpsit, it would in some

burn Gas Light Co. 22 Barb. 297; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 477; *Morris &c. R. R. Co. v. Newark*, 10 N. J. Eq. 352; *Thomasson v. Agnew*, 24 Miss. 93. If a statute merely authorizes an injury, without providing a remedy, an action at common law is proper. *Cogswell v. Essex Mill Corp.* 6 Pick. 94. So where a duty is imposed by statute, and no remedy prescribed, an action at common law lies. *Commissioners v. Duckett*, 20 Md. 468. So where a statute authorizes certain acts, and provides a remedy for the injury done by

only part of them, an action at common law lies for the residue. *Troy v. Cheshire R. Co.* 23 N. H. 83.]

(*n*) See *Massey v. Johnson*, 12 East, 67.

(*o*) *Ante*, 125.

(*p*) 3 East, 70.

(*q*) *Ante*, 97, 98.

(*r*) See *ante*, 51, 97, 98.

(*s*) *Ferguson v. Carrington*, 9 B. & C. 5 [ante, 154, note (*n*).]

(*t*) *Ante*, 112.

(*u*) *Ante*, 61, 112.

cases be most advisable, if possible, to avoid it, by suing in case. (*u*¹) And again, where there has been a fraud, and it is supposed that the statute of limitations will be set up as a defence, an action for the fraud is perhaps preferable to an action of assumpsit; as there is reason to contend that the statute only begins to run from the time the fraud is discovered. (*x*)

On the other hand, there were some *disadvantages* attending the action on the case, on account of the generality of the pleadings, and of the circumstance of the general issue being the usual plea, which put the plaintiff on proof of the whole of the allegations in his declaration, and left the defendant at liberty to avail himself of any matter of defence at the trial, without apprising the plaintiff by his plea of the circumstances on which it was founded. But this objection was removed by Reg. Gen. Hil. T. 4 W. 4. reg. 5, which now compels a defendant to plead specially almost every description of defence.

Where cattle of the defendant have trespassed in the plaintiff's land, in consequence of the defendant's neglect to repair his fences, the plaintiff has an election to proceed in case or in trespass, (*y*) or to distrain. It is not advisable to distrain where the title to the *locus in quo* is doubtful, but the party should proceed by action of trespass, or on the case, (*z*) and the same observations apply where a right of common is in dispute. (*a*)

*The *declaration* in an action on the case ought not in general to state the injury to have been committed *vi et armis*, nor should it conclude *contra pacem*; (*c*) in which respects it principally differs from the declaration in trespass. In other points the form of the declaration depends on the particular circumstances on which the action is founded, and consequently there is greater variety in this than any other form of action. The leading rules will be stated when we inquire into the form of the declaration in general. It is open to this commendation, that the statements are not fictitious as in trover, and that it truly and specifically discloses the grounds upon which the action is founded. The *plea* in this action until recently was principally the general issue, not guilty; and under it (except in an action for slander, and a few other instances) (*d*) any matter might be given in evidence, but the statute of limitations. But since the pleading rules, Hil. T. 4 W. 4, the general issue only

(^u) [See *Downer v. Eggleston*, 15 Wend. 51.]

(*x*) *Brown v. Howard*, 4 Moore, 508; 2 R. & B. 73; 3 D. & R. 322; S. C. See *Clarke v. Hougham*, 2 B. & C. 149; *Short v. McCarthy*, 3 B. & Ad. 626.

(*y*) *Starr v. Rookesby*, 1 Salk. 335.

(*z*) 1 Saund. 345 c, note (2).

(*a*) *Ib.*

(*c*) Com. Dig. Action on Case, C. 3, 4, A.

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(*d*) 1 Saund. 130, note (1); *Smith v. Richardson, Willes*, 20. When the declaration states a wrong which is the subject of an action of trespass, it is a good count in trespass after verdict, although it contains no allegation of *vi et armis*, and is in point of form framed in case for the consequential injury. *Hudson v. Nicholson*, 5 M. & W. 437.

puts in issue the wrongful act, and not the right, (e) and grounds of defence must be pleaded specially. The *judgment* is, the plaintiff do recover a sum of money ascertained by a jury his *damages* sustained by the committing of the grievances complained of. If the damages recovered are less than 40*s.*, the plaintiff is not entitled to costs unless the judge certify that the action was really brought to try a right, or that the grievance was wilful and malicious. (f)

II. TROVER.

The action of *trover* or *conversion* was, in its origin, an action in trespass on the case for recovery of damages against a person who had *found* goods, and refused to deliver them on demand to the owner, but *converted* them to his own use, from which word *finding* (*trouver*) the remedy is called an action of *trover*. The circumstance of the defendant not being at liberty to wage his law in this action, and the less degree of certainty required in describing the goods, gave it so considerable an advantage over the action of detinue (which, before the 3 & 4 W. 4, c. 42, was subject to the defence of law wager), that by a fiction of law actions of *trover* were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury lies in the conversion and deprivation of the plaintiff's property, which is the gist of the action, and the statement of the *finding* or *trover* is now immaterial, and not traversable; (g) and the fact of the conversion does not necessarily import an acquisition of property in the defendant. (h) It is an action for the recovery of *damages* to the extent of the value of the thing converted. (i) The object and result of the suit are not the recovery of the thing itself, which can only be recovered by action of detinue or replevin. (k) Lord Mansfield thus defined this action: (l) "In form it (*i. e.* the *trover*) is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the fiction supposes that the defendant might have come lawfully by it, and

(e) *Frankum v. Earl of Falmouth*, 1 Harrison, 1; 6 C. & P. 529.

(f) 3 & 4 Vict. c. 24; see Appendix.

(g) 3 Bl. Com. 152, 153; *Mills v. Graham*, 1 New Rep. 140; Bul. N. P. 32; *Rackham v. Jesup*, 3 Wils. 336.

(h) *Keyworth v. Hill*, 3 B. & Ald. 687.

(i) See *Mercer v. Jones*, 3 Campb. 477; *Greening v. Wilkinson*, 1 C. & P. 626.

(k) *Keyworth v. Hill*, 3 B. & Ald. 687; *Kettle v. Bromsall*, Willes, 120; *Dore v. Wilkinson*, 2 Stark. 288; [*Norris v. Beckley*, 2 Con. Ct. (S. Car.) 228.]

(l) *Cooper v. Chitty*, 1 Burr. 31; 1 Rep. 67, 68; and see 1 M. & P. 556. The old form of action in *trover* has been abolished in Massachusetts, Genl. Sta. c. § 2, div. 8, and the following form adopted: "And the plaintiff says the defendant converted to his own use one horse [if the case may be], the property of the plaintiff (or the goods mentioned in the schedule hereto annexed)." *Ib.* § 87. See *Winsham v. Neale*, 10 Gray, 382.]

he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary: 1st, *property in the plaintiff*; (1¹) 2dly, *a wrongful conversion* by the defendant." (2²) We will consider this action with reference, 1st, to the *thing converted*; 2dly, the plaintiff's *right or property* therein; and 3dly, the nature of the *injury*, and by whom committed. (3³)

This action is confined to the conversion of *goods or personal chattels*. It does not lie for *fixtures eo nomine*; nor for injuries to land or other real property, even by a severance of a part of what properly belongs to the freehold, unless there has also been an asportation; (4⁴) but the form of action in these cases should be trespass (m) (or case where the interest in the property is in reversion). (n) An incoming *tenant, though entitled to the growing crops, cannot support trover against the outgoing tenant for taking them away, nor is that form of action proper to try a right to land. (o) But if after the severance from the freehold, as in the case

1st. The property affected.

(1¹) [Hastler v. Skull, 1 Tayler, 152; Purdy v. M'Cullough, 3 Barr, 466.]

(2²) [Glaze v. M'Million, 7 Porter, 279; Taylor v. Howall, 4 Blackf. 317; Robinson v. Austin, 2 Gray, 564.]

(3³) [Trover will lie against different persons for successive conversions of the same property. But the plaintiff can receive but one satisfaction. Matthews v. Menadger, 2 McLean, 145.]

(4⁴) [Brown v. Wallis, 115 Mass. 156, 158. Trover lies for a building removed from the freehold, if it had been erected under an agreement that it should be treated as personal property. Smith v. Benson, 1 Hill, 176; Pullen v. Bell, 40 Maine, 314; Osgood v. Howard, 6 Greenl. 452. So against the owner of the land, if he refuses to permit the owner of the building, being personal property, to take it. Hinckley v. Baxter, 13 Allen, 139; Wansbrough v. Maton, 4 Ad. & El. 884; Russell v. Richards, 1 Fairf. 429; S. C. 2 Fairf. 376; Tapley v. Smith, 18 Maine, 12; Davis v. Taylor, 41 Ill. 495.]

(m) Bac. Ab. Trover, B.; Davis v. Jones, 2 B. & Ald. 167. The word *fixtures* does not necessarily mean something affixed to the freehold, and therefore a declaration in trover for fixtures is good after verdict. See Sheen v. Evans, 7 Dowl. 335. Trover lies for salt pans, though fixed in the floor of a building; and whenever the fixed instrument, engine, or utensil was an accessory to a matter of a personal nature, it is considered as personality; Elwes v. Mawe, 3 East, 53, 54, cites Fitzherbert v. Shaw, 1 H. Bl. 259; and see Davis v. Jones, 2 B. & Ald. 165. As to the right of a lessee during his term to maintain trover for fixtures, see

Boydell v. M'Michael, 1 Cr., M. & R. 177; Mackintosh v. Trotter, 3 M. & W. 184; Hitchman v. Walton, 4 M. & W. 416; Dalton v. Whittern, 12 L. J. R. N. S. Q. B. 55. The right of a tenant to remove fixtures continues only during his term, and if removed afterwards, the landlord may maintain trover; Weeton v. Woodcock, 7 M. & W. 14. Where the plaintiff demised salt springs to the defendant, who was to erect salt works on the premises, and pay a rent in proportion to the number of works erected, the defendant covenanted to leave the works in good repair at the end of the term, and it was held that iron salt pans placed by the defendant on a form of brick, and used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them. Earl of Mansfield v. Blackburne, 6 Bing. N. C. 426. For the right to fixtures generally, see Selwyn's N. P. 10th ed. and the notes to Elwes v. Mawe, 2 Smith's Leading Cases.

(n) Ante, 150.

(o) Boraston v. Green, 16 East, 77, 79; Davis v. Connop, 1 Price, 53. But where certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and the incoming tenant, it was held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover. Davis v. Jones, 2 B. & Ald. 165. As to removal after tenancy, see Colegrave v. Dias Santos, 2 B. & C. 78, 79; 3 D. & R. 257, 258, S. C.

of trees or fixtures, or earth, the property severed be taken away; (p) or if coals dug in a pit be afterwards thrown out, trover may be supported. (p) So if a tenant, during his tenancy, remove a dung-heap, and at the time of so doing dig into and remove virgin soil that lies beneath it, the landlord may maintain either trespass *de bonis aspectu* or trover, for the removal of the virgin soil. (q) It lies for a trover on an unstamped agreement; (r) and for a deed relating to land; (s) and for books of account; (t) but in these instances detinue is the more usual remedy, and often the preferable remedy. Where goods have been sold for money, and money has been paid by a debtor, in contemplation of his bankruptcy, by way of fraudulent preference to his creditor, it may be safer for the assignees to proceed for the recovery thereof in trover rather than by action of assumpsit for goods sold by the bankrupt, or money had and received to this use; because, by adopting

(o) [Cutting growing corn and carrying it away will be a conversion of it to sustain trover. *Nelson v. Burt*, 15 Mass. 204. Cutting of timber without carrying it away has been held to be a conversion. *Sanderson v. Haverstick*, 8 Barr, 294. So where wood has been converted and made into coal by the defendant, the owner may sustain trover for the coal. *Riddle v. Driver*, 12 Ala. 590. Trover lies against the *bonâ fide* purchaser of loads of earth unlawfully taken from the plaintiff's land. *Riley v. Boston Water Power Co.* 11 Cush. 11.]

(p) *Com. Dig. Biens, H.*; *Bac. Ab. Trover, B.*; *Gordon v. Harper*, 7 T. R. 13; *Bul. N. P.* 44; *Pitt v. Shew*, 4 B. & Ald. 206. When a landlord has no right to recover trees he wrongfully cuts down, *Channon v. Patch*, 5 B. & C. 897; 8 D. & R. 651, S. C. [The plaintiff may waive the wrongful taking and carrying away, and sue in trover for the conversion alone; since, where the whole merits of a case are discussed and determined in one action, the judgment may be pleaded and shown in evidence in bar to another. It is not for the defendant to complain that the plaintiff has waived some portion of his legal rights. He is certainly in no worse condition than if they had been insisted upon. *Fowler J. in Wadleigh v. Janvrin*, 41 N. H. 503, 520.]

(q) *Higgon v. Mortimer*, 6 Car. & P. 616. [An outgoing tenant at will of a farm has no right, in the absence of any express stipulation, to remove the manure made on the farm in the ordinary course of husbandry, and consisting of the collections from the stable and barnyard, or of compost formed by the admixture of these with other substances taken from the farm; and if he sell such manure to be removed, and the vendee have notice of the title of the landlord, the sale vests no property in the vendee, and trespass or trover will lie against him at the suit of the landlord, for taking and carrying away the manure. *Daniels v. Pond*, 21 Pick. 367; *Hill v. De Rochemont*, 48 N. H.

87, 88; *Perry v. Carr*, 44 N. H. 118, 119; *Sawyer v. Twiss*, 26 N. H. 345; *Core v. Bishop*, 48 N. H. 146, 148; *Pinkham v. Gear*, 3 N. H. 484; *Strong v. Doyle*, 5 Mass. 92; *Plumer v. Plumer*, 30 N. H. 52; *Needham v. Allison*, 24 N. H. 358; *Corwin v. Coffin*, 22 N. H. 541; *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Johnson*, 2 Hill, 142; *Wetherbee v. Ellison*, 19 Pick. 379; *Lewis v. Lyman*, 22 Pick. 442; *Sons v. Camp*, 11 Conn. 525; 1 Chitty Com. (11th Am. ed.) 509, note (o); *Fay v. Muzzy*, 13 Gray, 53.]

(r) *Scott v. Jones*, 4 Taunt. 865.

(s) *Yea v. Field*, 2 T. R. 708; *Harris v. Vallance*, 1 Bing. 45; 7 Moore, 304, S. C. [As to trover for the title-deeds of an estate, bonds, bills of exchange, &c. see *Towler v. Lovet*, 6 Mass. 394; *Kingman v. Pierce*, 5 Mass. 247; *Day v. Whitney*, 1 Pick. 5; *Jarvis v. Rogers*, 15 Mass. 389; *Sawyer v. Baldwin*, 11 Pick. 492; *Stebbins v. Jennings*, 10 Pick. 172; *Sudbury v. Stearns*, 21 Pick. 148; *Tilden v. Brown*, 14 Vt. 1; *Pierce v. Gilson*, 9 Vt. 216; *Ladd v. Hilditch*, 9 Vt. 164; *Mercer v. Jones*, 4 Vt. 477; *Closter v. Hawley*, 12 John. 484; *Murray v. Epling*, 10 John. 172; *Todd v. Crookshank*, 3 John. 432; *Comparet v. Burr*, 5 Blac. 419; *Moody v. Keener*, 7 Porter, 218; *Poultney v. Bonju*, 1 Missou. 64; *Besherer v. Swisher*, 2 Penn. 748.]

(t) *Dore v. Wilkinson*, 2 Stark. 287. A debtor who has made copies of his credit account against him, may, if the creditor obtain possession of such copies, and refuse to redeliver them to the debtor, sustain trover therefor against the creditor. *Fuller v. Cummings*, 16 Vt. 697. Trover may be maintained for a note which has been paid and by mistake left in the hands of the holder. *Pierce v. Gilson*, 9 Vt. 216.] [As to the conversion of fixtures, see *Long v. Meagoe*, 4 Nev. & Man. 211; *Hitchman v. Walton*, 4 M. & W. 409; and *ante*, 1 note (m).]

latter form of action, they might enable the defendant to avail himself of his original debt as a set-off; (*u*) but the set-off would not hold against a count for goods sold by the assignees as such, or money had and received to their use as assigness after the bankruptcy. (*x*) Trover is preferable to an action of assumpsit, when the defendant has converted the produce of a bill, &c. and has become bankrupt, and obtained his certificate; because to the former action the certificate could not afford a defence. (*y*)

The general rule is clear, that to support trover the plaintiff must have the right to some identical or specific goods. (*z*) Trover does not lie for money had and received generally; (*a*) but it may be maintained for so many pieces of gold or silver, though not in a bag; because damages, and not the goods or articles themselves in specie, are the object of the suit; (*b*) and in that case the plaintiff can only redeem *himself by tendering to the plaintiff the same specific pieces. (*c*) And trover lies for an undivided part of a chattel, as three fourths of a ship. (*d*) Although a contract for the sale of goods be complete and binding under the statute against frauds, yet the vendee acquires no property in them which can enable him to maintain trover, if any material acts remain to be done before the delivery to ascertain or distinguish the quantity or exact amount of the price to be paid by the purchaser. Thus, if a portion of an entire bulk of goods be sold, and be not in its nature ascertainable without weighing, or other act separating and distinguishing it from the rest; as in the case of the sale of ten out of twenty tons of flax, the same being in mats of an unequal size and quantity; (*e*) or of so many tons of a larger quantity of oil; (*f*) or of bark at so much per ton; (*g*) the vendee could not maintain trover until his portion had been ascertained and set apart. (*g*¹) The same rule holds in the case of

(*u*) *Smith v. Hodson*, 4 T. R. 211; *Cullen*, 201, 202. See *Fair v. M'Iver*, 16 East, 140; *Foster v. Stewart*, 3 M. & Sel. 199; *Groom v. Mealey*, 2 Bing. N. C. 138.

(*x*) See *Thomason v. Frere*, 10 East, 418; *Fair v. M'Iver*, 16 East, 135.

(*y*) *Parker v. Norton*, 6 T. R. 695; *Parker v. Crole*, 5 Bing. 63.

(*z*) *Orton v. Butler*, 5 B. & Ald. 654; 1 D. & R. 285, S. C. [As to the evidence by which a party will be estopped to say he has not the specific articles he has sold, see *Chapman v. Searle*, 3 Pick. 38.]

(*a*) *Orton v. Butler*, 5 B. & Ald. 652; 1 D. & R. 282, S. C.

(*b*) *Vin. Ab. Action, Trover*, K.; *Bac. Ab. Trover*, D. *Foreign Coin*; *Jackson v. Anderson*, 4 Taunt. 24.

(*c*) *Per Abbott C. J. Orton v. Butler*, 5 B. & Ald. 654, 655; 1 D. & R. 287, S. C.

(*d*) *Watson v. King*, 4 Campb. 272.

(*e*) *Busk v. Davis*, 2 M. & Sel. 397. See *Zagury v. Furnell*, 2 Campb. 240; *Shepley*

v. Davis, 5 Taunt. 617; *Austen v. Craven*, 4 Taunt. 644.

(*f*) *White v. Wilks*, 5 Taunt. 176; *Wallace v. Breeds*, 13 East, 522.

(*g*) *Simmons v. Swift*, 5 B. & C. 857; 8 D. & R. 693, S. C.; *Rohde v. Thwaites*, 6 B. & C. 388; 9 D. & R. 293, S. C.; *Atkinson v. Bell*, 8 B. & C. 277; 2 M. & R. 292, S. C.; *Boorman v. Nash*, 9 B. & C. 145. So a lord of a manor cannot maintain trover for a heriot of the best beast until he has made selection. *Abington v. Lipcombe*, 1 G. & D. 230.

(*g*¹) [See *Benj. Sales* (1st Am. ed.), § 308 et seq., § 311, note (*c*), 312, note (*d*), § 315, note (*f*), § 317, note (*b*), § 319, note (*c*), in which many American cases are stated, § 352; *Barrett v. Goddard*, 3 Mason, 107; *Arnold v. Delano*, 4 Cush. 40; 2 Kent, 496; *Crofoot v. Bennett*, 2 Comst. 260; *Dennis v. Alexander*, 3 Barb. 50; *Hyde v. Lathrop*, 2 Abb. N. Y. Court of App. Decis. 436; *Bailey v. Smith*, 43 N. H. 141; *Strauss v. Ross*, 25 Ind. 300; *Adams Mining Co. v. Senter*, 26

a contract to manufacture goods, as to build a carriage, &c. no property passes in the goods until finished, or considered and treated by both parties as finished, although the value has been paid. (*h*) In these cases assumpsit upon the contract is the remedy. (*h*¹)

Mich. 73, 79, 80; *Begole v. McKenzie*, 26 Mich. 470; *Southwestern Freight & Co. v. Stanard*, 44 Missou. 70; *McClurg v. Kelley*, 21 Iowa, 508; *Parker C. J. in Higgins v. Chessman*, 9 Pick. 7, 10; *Macomber v. Parker*, 13 Pick. 175, 183; *Mason v. Thompson*, 18 Pick. 305; *Riddle v. Varnum*, 20 Pick. 280; *Foster v. Ropes*, 111 Mass. 10; *Stone v. Peacock*, 35 Maine, 385; *Dyer v. Libby*, 61 Maine, 45; *Houdlette v. Tallman*, 14 Maine, 400; *Chase v. Willard*, 57 Maine, 157; *Gibbs v. Benjamin*, 45 Vt. 124; *Fuller v. Bean*, 34 N. H. 290, 300, 301; *Prescott v. Locke*, 51 N. H. 94; *Messer v. Woodman*, 22 N. H. 172; *Gilman v. Hill*, 36 N. H. 311, 320; *Morse v. Sherman*, 106 Mass. 430; *Dexter v. Norton*, 55 Barb. 272; *Bradley v. Wheeler*, 44 N. Y. 495; *Jones v. Pearce*, 25 Ark. 545; *Kaufman v. Stone*, 25 Ark. 336; *Keeler v. Vandervere*, 5 Lansing. 313; *Ormsby v. Machir*, 20 Ohio St. 295; *Frost v. Woodruff*, 54 Ill. 155; *Cooper v. Bill*, 3 H. & C. 722; *Gilmour v. Supple*, 11 Moore P. C. 551; *Bethel Steam Mill Co. v. Brown*, 57 Maine, 9; *Logan v. Le Mesurier*, 6 Moore P. C. 116; *Castle v. Playford*, L. R. 5 Exch. 165; 7 Exch. 98; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Langton v. Higgins*, 4 H. & N. 402; *Scudder v. Bradbury*, 106 Mass. 422; *Turley v. Bates*, 2 H. & C. 200; *Kershaw v. Ogden*, 3 H. & C. 717; *Young v. Matthews*, L. R. 2 C. P. 127; *Groat v. Gile*, 51 N. Y. 431; *Kimberly v. Patchin*, 16 N. Y. 330. It has been held in many American cases that a contract for the sale of specific goods, or of goods identified and appropriated to the purchaser with his consent, will, if such appears to be the intent of the parties, pass to the purchaser the title to the property without delivery, although something may remain to be done by the vendor, to put the property into the condition in which it is finally to be delivered to the purchaser. So, although something remains to be done for the purpose of testing the property, or to fix the amount to be paid, by weighing, measuring, counting, or the like. But, on the other hand, where by the intent of the parties, anything remains to be done before the sale is to be considered by them as complete, whether to be done by the vendor or purchaser, or by a third person, the right of property does not pass, although the property itself may be placed in the hands of the purchaser. *Benj. Sales* (1st Am. ed.), § 334, note (*t*) and cases cited; 1 *Chitty Contr.* (11th Am. ed.) 522, and note (*u*). Delivery to the purchaser is, however, regarded as very strong evidence of a completed sale — generally decisive — as against any presumption arising from the

mere fact that the goods sold have not been counted, weighed, measured, or the like. *Kelsea v. Haines*, 41 N. H. 246, 254; *Scudder v. Bradbury*, 106 Mass. 422; *Benj. Sales* (1st Am. ed.), §§ 331, note (*h*), note (*t*). When the agreement for sale of a thing not specified, as of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass. *Benj. Sales* (1st Am. ed.), § 352 *et seq.*; *Voren v. Buckminster*, 24 N. H. 336; *Scudder v. Worster*, 11 Cush. 573; *Browning v. Hamilton*, 42 Ala. 484; *Ropes v. Langton*, 502; *Hutchinson v. Hunter*, 7 H. & N. 140; *Rodeo v. Wade*, 47 Barb. 63; *Benj. Sales*, 41 Ill. 400; *Bailey v. Smith*, 43 H. 141; *Haldeman v. Duncan*, 51 Penn. 66, 70; *Gillett v. Hill*, 2 Cr. & M. 530; *Campbell v. Mersey Docks & Harbor Board*, 14 C. B. N. S. 412. But the law on this subject seems not to be entirely settled. *Chapman v. Shepard*, 39 Conn. 413; *Patchin v. Pendleton*, 6 Rand. (Va.) 473; *Vandron v. Chase*, 37 Maine, 414; *Kimberly v. Patchin*, 19 N. Y. 330; *Russell v. Carrington*, 42 N. Y. 118; *Olyphant v. Baker*, 5 De. 379; 1 *Chitty Contr.* (11th Am. ed.) and note (*e*), 525, note (*e*¹). As to sale of grain in elevators, see *Cushing v. Breed*, 37 Allen, 380; *Warren v. Milliken*, 57 Mass. 97; *Dole v. Olmstead*, 36 Ill. 150; 41 Ill. 344; *Young v. Miles*, 20 Wis. 615; 23 Wis. 643; *Burton v. Curyea*, 40 Ill. 320, 330; *Clark v. Griffith*, 24 N. Y. 595; *Russell v. Carrington*, 42 N. Y. 118; *Hall v. Boston Worcester R. R. 14 Allen*, 439, 443; *Vandron v. Chase*, 37 Maine, 514. Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the purchaser on delivery, until he performs the condition, or the seller waives it. *Benj. Sales* (1st Am. ed.), § 334, note (*d*) and cases cited.]

(*h*) *Mucklow v. Mangles*, 1 Taunt. 30; *Carruthers v. Payne*, 5 Bing. 270. See *Good v. Langley*, 7 B. & C. 26; 9 D. & R. 791; *C. v. Laidler*, 5 Burlinson, 2 M. & W. 6; *Atkinson v. Bill*, 8 B. & C. 277. But in cases otherwise where the bargain stipulates for advances which are to be regulated by the progress of the work. See *Woods v. Russell*, 5 B. & Ald. 947; *Clarke v. Spence*, Ad. & El. 448; 6 N. & M. 399; *Selw. N. 10th ed.* 1348. And where oats in a particular bin, which contained nothing else, were sold, and a bill accepted at the same time, the price, it was held that the property was vested in the buyer, for nothing remained

(*h*¹) [*Hunneman v. Grafton*, 10 Met. 454, 459.]

In other respects, trover in general lies for the conversion of any personal property in which the plaintiff has a general or special property; (i) but it does not lie for the conversion of a *record*, because a record is not private property; but it may be supported for the *copy* of a record, which is private property. (k)

In order to support this action the plaintiff must, at the time of the conversion, (l) have had a complete *property*, either *general or special*, *in the chattel; (l¹) and also the *actual possession*, (l²) or the *right to the immediate possession* of it. (m)

2dly. The plaintiff's interest.

be done for the purpose of ascertaining the identity or quality of the goods. *Swanwick v. Sothorn*, 9 Ad. & El. 895; 1 P. & D. 648. But where the defendants sold to the plaintiffs wheat, for which the plaintiffs were to pay by a draft on a London banker, the defendants delivered the wheat to a carrier, and sent the bill of lading to the plaintiffs, but took the wheat again and sold it before it came to the plaintiffs' possession, because the plaintiffs failed to send a draft on a London banker; it was holden that the plaintiffs could not sue the defendants in trover for the wheat. *Wilmshurst v. Bowker*, 5 Bing. N. C. 541; see *post*, 172, note (t). [The general rule of law is that under a contract for supplying labor and materials, and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This rule must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract. *Bigelow C. J.* in *Williams v. Jackman*, 16 Gray, 517; *Andrews v. Durant*, 1 Kernan, 35; *Briggs v. A Light Boat*, 7 Allen, 287, 292; *Holderness v. Rankin*, 2 De G., F. & J. 258; *Wright v. Tetlow*, 99 Mass. 297; *Sanford v. Wiggins's Ferry Co.* 27 Ind. 522; *Elliott v. Edwards*, 6 Vroom, 265; *M'Conihe v. N. Y. & Erie R. R.* 20 N. Y. 495; *Mount Hope Iron Co. v. Buffington*, 103 Mass. 62. Neither the manufacture of an article pursuant to the order of a customer, nor the tender of the article when manufactured, is sufficient to transfer the title. *Moody v. Brown*, 34 Maine, 107. There must be an acceptance of the article, either express or implied, before the title will pass. *Moody v. Brown*, *supra*; *Blasdell v. Souther*, 6 Gray, 149, 152; *Mixer v. Howarth*, 21 Pick. 205; *Veazie v. Holmes*, 40 Maine, 69; *Elliott v. Edwards*, 6 Vroom, 265; *The West Jersey R. R. Co. v. The Trenton Car Works*, 3 Vroom, 517; *Rider v. Kelley*, 32 Vt. 268; *McIntyre v. Kline*, 30 Miss. 361; *Gregory v. Stryker*, 2 Denio, 628; *Damage v. Alexander*, 14 Texas, 414; *Benj. Sales* (1st Am. ed.), § 335, note (x). Until such acceptance *indebitatus assumpsit* cannot be maintained for the price of the chattel. *Hunnehan v. Grafton*, 10 Met. 454, 459. But it has been held in a

late case in Massachusetts, that where the vendor has done everything he was to do under an executory agreement for the manufacture and sale of a specific chattel, which was to be manufactured in accordance with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk. *Goddard v. Binney*, 115 Mass. 450.]

(i) For what it lies in general, see Com. Dig. Action, Case, Trover, C.; Bac. Ab. Trover, D.; Vin. Ab. Action, Trover, K.; Bul. N. P. 32-49; Selw. N. P. Trover.

(k) *Hardw.* 111.

(l) *Horwood v. Smith*, 2 T. R. 750; *Philips v. Robinson*, 4 Bing. 106.

(l¹) [*Dillenback v. Jerome*, 7 Cowen, 294; *Odiome v. Colley*, 2 N. H. 66; *Debow v. Colfax*, 5 Halst. 128; *Hotchkiss v. M'Vickar*, 12 John. 403; *Sheldon v. Soper*, 14 John. 352; *Glaze v. M'Million*, 7 Porter, 179; *Taylor v. Howall*, 4 Blackf. 317; *Sevier v. Holliday*, 1 Hemp. 160.]

(l²) [Possession, though wrongfully obtained, is a sufficient title in the plaintiff in trover, as against a mere stranger. *Knapp v. Winchester*, 11 Vt. 351; *Swift v. Mosely*, 10 Vt. 208; *Coffin v. Anderson*, 4 Blackf. 397, 410; *Duncan v. Spear*, 11 Wend. 64; *Hall v. Amos*, 5 Monroe, 89; *Mount v. Cumberly*, 4 Harr. 124; *Barwick v. Barwick*, 11 Ired. 80; *Fairbanks v. Phelps*, 22 Pick. 535; *Allen v. Smith*, 10 Mass. 308; *Vining v. Baker*, 53 Maine, 544; *Burke v. Savage*, 13 Allen, 408. But it is otherwise where the defendant claims title to the property from the true owner, though under a defective instrument of conveyance, or by mere license. *Sherman v. Matthews*, 15 Gray, 508.]

(m) 2 Saund. 47 a, note (1); *Bloxam v. Sanders*, 4 B. & C. 941; 7 D. & R. 407, S. C.; [*Cook v. Howard*, 13 John. 276; *Dimick v. Chapman*, 11 John. 132; *Schermerhorn v. Van Volkenburgh*, 11 John. 529; *Aikin v. Buck*, 1 Wend. 466; *Redman v. Gould*, 7 Blackf. 361; *Danley v. Rector*, 5 Eng. 211; *Kemp v. Thompson*, 17 Ala. 9; *Purdy v. M'Cullough*, 3 Barr, 466; *Fulton v. Fulton*, 48 Barb. 581; *Fairbanks v. Phelps*, 22 Pick. 535; *Hunt v. Holton*, 13 Pick. 216; *Foster v. Gorton*, 5 Pick. 185.

First. It may be premised that it is not essential to the support of this action, that the absolute ownership and special property or interest should exist in the same person: either will suffice to support this action. (n) But we shall presently remark, that if there be an outstanding special property in another, the general owner should sue in case for the injury to his reversion, not in trover for the value of the goods. (o)

Without an absolute or special property, this action cannot be maintained. (o¹) A *right of immediate* possession before or at the time of the conversion is essential. (p) Therefore, as we have seen, trover cannot be supported by a party in a suit for a record. (q) Nor can a tenant in tail, expectant on the determination of an estate for life, without impeachment of waste, bring trover for timber which grew upon and was severed from the estate, for the tenant for life has a right to the trees immediately they are cut down. (r) And the trustees of an estate *pur autre vie* cannot maintain trover for trees felled upon the estate, for when felled the trees belonged to the owner of the inheritance. (s) A landlord has, generally speaking, in legal consideration, even during the term, the possession of the

In the case of a general, as well as special property, the action may, in most cases, be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other. *Smith v. James*, 7 Cowen, 328. A mortgagee in possession of chattels may sustain trover for their conversion. *Reynolds v. Shuler*, 5 Cowen, 323; *Wolf v. O'Farrel*, 1 Const. Ct. (S. Car.) 141. A mortgage of goods is a transfer which vests the general property in the mortgagee; and where there is no express stipulation to the contrary, the right of possession follows the right of property, and the mortgagee may maintain trespass or trover against one who wrongfully takes the goods away, although they may be actually in the possession of the mortgagor. *Snyder v. Hilt*, 2 Dana, 204; *Brckett v. Bullard*, 12 Met. 308; *Holly v. Huggeford*, 8 Pick. 73. A mortgagee may sustain trover against the mortgagor after the title of the mortgagee has become absolute, upon the refusal of the mortgagor to deliver. *Gifford v. Ford*, 5 Vt. 532. And so the mortgagee may sustain trover against the mortgagor before the title becomes absolute, where there is no agreement that the mortgagor shall retain possession. *Ripley v. Dolbier*, 18 Maine, 382. The mere removal of mortgaged property in good faith, at the request of the mortgagor, who was in possession, will not be a conversion of it. *Strickland v. Barrett*, 20 Pick. 415; *Burditt v. Hunt*, 25 Maine, 419; *Fouldes v. Willoughby*, 8 M. & W. 540. If the mortgagor of goods, who has them in his possession, intermix them, purposely or through want of proper care, with his own goods, so that they cannot be distinguished,

and consign them for sale to a third person who sells them, the mortgagee may recover of the consignee the value of the whole in trover. *Willard v. Rice*, 11 Met. 493. See *White v. Phelps*, 12 N. H. 382. Whether in this action the defendant may show title in a stranger paramount to that of the plaintiff, see *Kennedy v. Strong*, 14 John. 132; *Williams v. Bethany*, 2 Rep. Con. Ct. 415; *Jones v. Sinclair*, 2 N. H. 319.] In the case of a simple bailment of a chattel without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession. *Nicholls v. Bastard*, 2 Cr. M. & R. 659; [*Faulkner v. Brown*, 13 Wend. 63.]

(n) Per *Lawrence J. Webb v. Fox*, 7 T. R. 398.

(o) *Post*, 170; *ante*, 147.

(o¹) [*Hotchkiss v. M'Vickar*, 12 John. 403; *Sheldon v. Soper*, 14 John. 352; *Glas v. M'Million*, 7 Porter, 279; *Taylor v. Howall*, 4 Blackf. 317; *Barton v. Dunning*, 6 Blackf. 209.]

(p) *Bloxam v. Sanders*, 4 B. & C. 941; 2 D. & R. 407, S. C.; [*Burton v. Tannehill*, 6 Blackf. 470; *Caldwell v. Cowan*, 9 Yerger, 262; *Gage v. Allison*, 1 Brevard, 495; *Andrews v. Shaw*, 4 Dev. 70; *Grady v. Newby*, 6 Blackf. 442; *Redman v. Gould*, 7 Blackf. 361; *Lewis v. Mobley*, 4 Dev. & B. 323. But it is not necessary that the plaintiff's interest in the chattel should have continued until the commencement of the suit. *Barton v. Dunning*, 6 Blackf. 209; *Grady v. Newby*, 6 Blackf. 442.]

(q) *Hard*. 111.

(r) *Pyne v. Dor*, 1 T. R. 55.

(s) *Blaker v. Auscombe*, 1 New Rep. 25.

timber growing on the estate, if it be excepted in the lease; so that he may in such case maintain trespass even during the term, if it be cut down; and even if the timber be not excepted in the lease, the lessor has so far the possession of it when cut down by another, though cut pending the term, that if it be carried away, he may maintain trespass or trover; the interest of the lessee in the trees determining instantly they are cut down. (t) But where a landlord during the term wrongfully cut down oak pollards, unfit for timber, it was decided that, as the tenant for life or years would have been entitled to them if they had been blown down, and was entitled to the usufruct of them during the term, the lessor could not, by his own wrong, acquire a right to the pollards; and therefore could not, nor could his vendee, sue the tenant for taking them away. (u)

The property in title-deeds generally accompanies the ownership of the estate; and therefore the person who was entitled to the estate at the time of the wrongful detention of or injury to the deeds, should be the plaintiff. (x)

The absolute and general owner of goods may maintain trover, although he had sold or bailed them under a *void* contract, as to a married woman, because he still retains a present right. (y) But if the owner has bailed the goods to the defendant, and before a conversion of the goods by the latter the bailor sells them, or otherwise ceases to be the owner, the action should be brought in the name of the person who was the proprietor at the time of the conversion. (z) A party who purchases goods under a distress for rent, valid though irregular, may maintain trover; (a) and where A. sold goods to B. which were wrongfully in C.'s possession, and B. paid for them, and on the latter demanding the goods, and informing C. of the sale, the latter said he should not deliver them to any person; whereupon A. and B. rescinded the sale, and the price was repaid, it was held that A. might sue C. in trover. (b)

The *verbal gift* of a chattel, without actual delivery, is not sufficient to pass the property to the donee, so as to enable him to sue the donor; (c) although it may perhaps give the donee a sufficient special

(t) *Gordon v. Harper*, 7 T. R. 13; *Blackett v. Lowes*, 2 M. & Sel. 499, 500; 1 Saund. 322, note (5); *Vin. Ab. Trespass*, S. pl. 10; *Atter-soll v. Stevens*, 1 Taunt. 191; [*Mather v. Ministers of Trinity Church*, 3 Serg. & R. 509; *Baker v. Howell*, 6 Serg. & R. 476; *Shult v. Barker*, 12 Serg. & R. 272.]

(u) *Channon v. Patch*, 5 B. & C. 897; 8 D. & R. 651, S. C.

(x) *Atkinson v. Baker*, 4 T. R. 231; *Phillips v. Robinson*, 4 Bing. 106. A lessor cannot bring trover against the lessee on the termination of the lease by forfeiture for a counterpart of the lease, containing covenants by the lessor. *Hall v. Ball*, 3 M. & Gr. 242; 3 Scott N. R. 577, S. C. *Quære*,

whether an action of detinue is not the proper remedy for title-deeds. See the notes to the last-mentioned case.

(y) *Smith v. Plomer*, 15 East, 607; 2 Saund. 47 b, note (f), 5th ed.

(z) *Phillips v. Robinson*, 4 Bing. 106; *ante*, 76.

(a) *Lyon v. Weldon*, 2 Bing. 334.

(b) *Pattison v. Robinson*, 5 M. & Sel. 105.

(c) *Irons v. Smallpiece*, 2 B. & Ald. 551. See *Reeves v. Capper*, 5 Bing. N. C. 136; [1 Chitty Contr. (11th Am. ed.) 60, and cases in note (q)]; *Whiting v. Barrett*, 7 Lansing, 106; *Mahan v. United States*, 16 Wallace, 143; *Champrey v. Blanchard*, 39 N. Y. 111; *Wing v. Merchant*, 57 Maine, 383.]

interest to enable him to sue a mere wrong-doer. (d) Nor is it an award that a chattel should be delivered by A. to B., on the form being paid a sum of money sufficient, *per se*, to pass the property and entitle B. to maintain trover, although he tenders the money, being refused by A. (e) And we have already observed, (f) that in the case of a sale of goods there must be a *specific* right to some particular goods, severed and distinguished from others; and that there remain to be done upon the contract some act to ascertain the quantity or price, the vendee cannot maintain trover until that act be done. (g)

Where goods stolen were purchased in market overt, (h) and sold by the purchaser before the felon was convicted, it was decided that the owner prosecuting to conviction could not maintain trover against the purchaser under the statute, (i) which gives restitution to the owner * who prosecutes the felon to conviction, although he gave the purchaser notice of the robbery while they were in his possession. If for the property being altered by the sale in market overt, was not re-vested in the owner until the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. (j) But if the sale was not in market overt, then if the purchaser sell them again in market overt, before conviction of the felon, and such purchaser had notice of the felony whilst the goods were in his possession, he will be liable to an action of trover. (k) And if goods are obtained

(d) See 2 Saund. 47 a, and note (d), 5th ed.; Hunter v. Westbrook, 2 C. & P. 578.

(e) Hunter v. Rice, 15 East, 100. [See Scott v. Perley, 98 Mass. 511; Thorpe v. Eyre, 1 Ad. & El. 926, 932; Billings, Awards, 207.]

(f) Ante, 166.

(g) Ante, 166.

(h) A sale within the city of London in an open shop of goods usually dealt in there, is a sale in market overt, although the premises are described in evidence as a warehouse, and are not sufficiently open to the street for a person on the outside to see what passes within. Lyons v. Le Pass, 11 Ad. & El. 326. [It is generally true of the law in the American states that it does not recognize the effect of the English sale in market overt. Benj. Sales (1st Am. ed.) § 7, note (f), and cases cited; Bryant v. Whitcher, 52 N. H. 158; Coombs v. Gorden, 59 Maine, 111, 112; Ventress v. Smith, 10 Peters, 176; Dame v. Baldwin, 8 Mass. 521; 2 Kent, 344; Wheelwright v. Depeyster, 1 John. 480; Easton v. Worthington, 5 Serg. & R. 130; Griffith v. Fowler, 18 Vt. 390; Roland v. Gundy, 5 Ohio, 203; Browning v. Magill, 2 Harr. & J. 308; Robinson v. Skipworth, 23 Ind. 311.]

(i) 21 Hen. 8, c. 11, repealed by 7 & 8 Geo. 4, c. 27, s. 1. The 7 & 8 Geo. 4, c. 29,

s. 57, substitutes other enactments as to restitution, and extends them to the case of goods fraudulently obtained.

(j) Horwood v. Smith, 2 T. R. 750; [Cataqua Bank v. Turnley, Miles, 313; Horwood v. Minnick, 19 Ohio St. 462.] The pawnee of stolen goods is liable. Wilkinson v. Kilgus, 2 Campb. 336, note. The owner must always use his best endeavors to bring the offender to justice before he can sue the purchaser. 2 C. & P. 41. As to stolen horses, 2 P. & M. c. 7; 31 Eliz. c. 12; Selwyn's P. 10th edition, 1348. A condemnation of goods in the exchequer alters the property. Elkins v. Smith, Sir Thomas Raym. 35; Martin v. Wilsford, Carth. 327; Scott v. Shearman, 2 Bl. Rep. 981. The property in goods is not changed by the delivery of a writ of execution to the sheriff, although the goods are bound from that time, and the debtor may sell them subject to the rights of the execution creditor, to which they will be liable unless the sale took place in market overt. Payne v. Drew, 4 East, 523; Samuels v. Duke, 3 M. & W. 622; Woodland v. Fyler, 3 P. & D. 570.

(k) Peer v. Humphrey, 2 Ad. & El. 49; 1 Harr. & Woll. 28. [A person, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some special cases); and

by false pretences under color of a purchase, the vendee or his assignee acquires no property, and after demand may be sued in trover. (*l*) The action does not lie to recover the value of goods delivered by the plaintiff, under or in furtherance of an illegal contract, to which he is a party or privy. (*m*)

Secondly. So a person having a *special* property in the goods may support trover against a stranger who takes them out of his actual possession; (*m*¹) as a sheriff; (*n*) a carrier; (*o*) a factor; a warehouseman; (*p*) consignee, (*p*¹) pawnee, or

2dly. A special property or interest.

even if, in ignorance of the fact that the goods were lost or stolen, he resell them to a third person in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon. *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 198; *Crane v. London Dock Co.* 5 B. & S. 313; 2 Kent, 323; 1 Chitty Contr. (11th Am. ed.) 534; *Beazley v. Mitchell*, 9 Ala. 780; *Hoffman v. Carow*, 20 Wend. 21; S. C. 22 Wend. 285; *Herkle v. Lurvey*, 101 Mass. 344; *Gilmore v. Newton*, 9 Allen, 171; *Chapman v. Cole*, 12 Gray, 141; *Riley v. Boston Water Power Co.* 11 Cush. 11; *Browning v. Magill*, 2 Harr. & J. 308; *Morrill v. Moulton*, 40 Vt. 242; *Johnson v. Powers*, 40 Vt. 611; *West Jersey R. R. Co. v. Trenton & C. Co.* 3 Vroom, 517. Upon the principle above stated, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen, or a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person, is liable to the rightful owner in trover without a previous demand. *Hoffman v. Carow*, 20 Wend. 21; S. C. 22 Wend. 285; *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171; *Hills v. Snell*, 104 Mass. 177; *Williams v. Merle*, 11 Wend. 80; *Courtis v. Cane*, 32 Vt. 232. Yet even in the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. *Loring v. Mulcahy*, 3 Allen, 575. See, also, *Spooner v. Holmes*, 102 Mass. 503.]

(*l*) *Noble v. Adams*, 7 Taunt. 59; *Ferguson v. Carrington*, 9 B. & C. 60; *Anonymus*, 6 Mod. 114; but see *Sheppard v. Shoolbred*, 1 Car. & Marsh. 61. [Trover lies against a fraudulent purchaser, or his vendee, with notice, without a previous de-

mand, or a tender of a note given in payment before the time of trial. *Thurston v. Blanchard*, 22 Pick. 18; *Stevens v. Austin*, 1 Met. 557; *Greene v. Russell*, 5 Hill, 183; *Ryan v. Brant*, 42 Ill. 78; *Bruner v. Dyhall*, 42 Ill. 34. Where goods have been obtained under an invalid contract, trover will not lie for them while any action founded on the existence of the contract is pending. *Kimball v. Cunningham*, 4 Mass. 502; *Peters v. Ballister*, 3 Pick. 495. Neither can trover be maintained in case of a fraudulent exchange without a return of all the property received. *Kimball v. Cunningham*, 4 Mass. 502. Trover lies for goods which a creditor has received of his debtor by fraud with intent to apply them in satisfaction of his debt, the property not being changed. *Woodworth v. Kessain*, 15 John. 186. Goods were sold to be paid for on delivery, the agent of the owner delivered them without receiving payment, it was held that the owner could sustain either trover or assumption. *Kingman v. Hotelling*, 25 Wend. 423; *Centre Turnp. Co. v. Smith*, 12 Vt. 212.]

(*m*) *De Watz v. Hendricks*, 2 Bing. 314. Where the plaintiff, the owner of the goodwill and fixtures of a public-house, allowed A. to represent himself as the owner, and the landlord in consequence of that representation took A. as his tenant, who subsequently sold the lease and fixtures to the defendant, a *bona fide* purchaser, it was held that the plaintiff had estopped himself from recovering the fixtures from the defendants. *Gregg v. Wells*, 2 P. & D. 296; *Pickard v. Sears*, 6 Ad. & El. 469; 2 N. & P. 488. See *Sandys v. Hodgson*, 2 P. & D. 438.

(*m*¹) [The finder of goods has a special property in them, and may sustain trover against any one, except the true owner, who shall convert them. *M'Laughlin v. Waite*, 9 Cowen, 670; *Clark v. Malory*, 3 Harr. 68.]

(*n*) 2 Saund. 47; provided he remain in possession. *Blades v. Arundale*, 1 M. & Sel. 711; [*Dillenback v. Jerome*, 7 Cowen, 297; *Barker v. Miller*, 6 John. 195; *Catlin v.*

(*o*) 1 Roll. Abr. 4; *Arnold v. Jefferson*, 1 Lord Raym. 276; *Bull. N. P.* 33; 2 Saund. 47 b, note; [*Dillenback v. Jerome*, 7 Cowen, 297.]

(*p*) *Martini v. Coles*, 1 M. & Sel. 147.

(*p*¹) [*Smith v. James*, 7 Cowen, 329; *Everett v. Saltus*, 15 Wend. 474.]

trustee; or an agister of cattle; or a gratuitous bailee; (*q*); or any person who is responsible over to his principal; (*r*) a churchwarden; or the hirer of goods, however temporary the purpose for which they were hired may happen to be. (*t*) So a person who has goods on the terms of sale and return, may sue for any damage done to them by a wrong-doer whilst in his possession. (*u*) And a person who has the temporary property in goods, delivering them to the general owner for a special purpose, may, after * that purpose is answered upon a demand and refusal, maintain trover for them. (*x*) Where the consignor of goods, upon the insolvency of the consignee, indorses the bill of lading to the plaintiff without consideration, to enable him to stop the goods *in transitu*, it was held that the plaintiff had a sufficient property to maintain trover against the wharfingers. (*y*) So an executor *de son tort*, who has not obtained probate at the time of trial, may sue for a tort committed to the property of the deceased whilst in the plaintiff's possession. (*z*) And it is a general rule that the bare possession of goods, without any strict legal title, confers a right of action against a mere wrong-doer, having no right, and not clothed with any authority from the real owner. (*a*) And trover lies by the owner of a ship, though not registered. (*b*) The only exception to this which appears to exist is in the case of a mere servant (*b*¹) acting professedly as such, and having only the custody of goods. (*c*)

Jackson, 8 John. 548; Hotchkiss v. M'Vickar, 12 John. 403; Brownell v. Manchester, 1 Pick. 232; Caldwell v. Eaton, 5 Mass. 399; Blackley v. Sheldon, 7 John. 32; Pettes v. Marsh, 15 Vt. 454. But it has been held in New Jersey that a sheriff cannot maintain trover for goods taken on a *fiery facias* and a levy thereon, unless he has made a particular inventory of the goods, or has taken actual possession of them. Lloyd v. Wychoff, 6 Halst. 218; Brain v. Strait, Dudley, 19. See Dennie v. Harris, 9 Pick. 364; Amadon v. Myers, 6 Vt. 308; Lowry v. Walker, 5 Vt. 181. The receptor of property attached, who has the actual possession of it for safe keeping, may sustain trover for it against a third person, who, without color or right, takes it out of his possession. Thayer v. Hutchinson, 13 Vt. 504. But see Ludden v. Leavitt, 9 Mass. 104; Warren v. Leland, 9 Mass. 265; Poole v. Symons, 1 N. H. 289. And the sheriff may maintain this form of action against his receptor who refuses to redeliver the goods intrusted to him. Sibley v. Story, 8 Vt. 15; Cargill v. Webb, 10 N. H. 199; Holt v. Burbank, 47 N. H. 164.]

(*q*) Rooth v. Wilson, 1 B. & Ald. 59; [Faulkner v. Brown, 13 Wend. 63.]

(*r*) 2 Saund. 47 *b*; Stirling v. Vaughan, 11 East, 626; [Trovillo v. Tilford, 6 Watts, 472.]

(*s*) 2 Saund. 47 *c*.

(*t*) 2 Saund. 47, *b*, *c*, *d*; Rooth v. Wilson,

1 B. & Ald. 59; Croft v. Alison, 4 B. & Ald. 590; Dean v. Braithwaite, 5 Esp. 35.

(*u*) Colwill v. Reeves, 2 Campb. 575.

(*x*) Roberts v. Wyatt, 2 Taunt. 27. [Eaton v. Lynde, 15 Mass. 242; Faulkner v. Brown, 13 Wend. 63; Duncan v. Spear, Wend. 54; O'Connell v. Maxwell, 3 Black. 419.]

(*y*) Morrison v. Gray, 2 Bing. 260. See also, Brancher v. Molyneux, 3 M. & Gr. 3 Scott N. R. 332, S. C.

(*z*) Husband v. Smith, C. P. Hill. Ter. 1823, W. C. Smith, attorney for plaintiff. It is said that a landlord holding goods under a distress cannot maintain trover, &c., for an injury to them, or taking them wrongfully. Moneux v. Goreham, per Probyn, B. at Huntingdon, 29 MS. Sergt. Hill, 2 cited Selw. N. P. Trover; and see Whitcomb v. Roberts, 1 M'Clel. & Y. 112, 118; but this position seems to be doubtful. It is held down that a party who has distrained cattle *damage feasant* cannot maintain trover, if the cattle are in the custody of the law when impounded. 1 M'Clel. & Y. 118.

(*a*) 2 Saund. 47 *c*, *d*; and see instance *post*, in trespass; Graham v. Peat, 1 East, 246.

(*b*) Sutton v. Buck, 2 Taunt. 302.

(*b*¹) [Dillenback v. Jerome, 7 Cowen, 29; Faulkner v. Brown, 13 Wend. 63; Ludden v. Leavitt, 9 Mass. 104.]

(*c*) Bloss v. Holman, Owen, 52; 2 Saund. 47 *a*, 47 *b*, *c*, *d*.

Thirdly. In order to support this action, the plaintiff must, at the time of the conversion, have had the *actual possession*, or the *right to immediate possession*. (d) Therefore, where goods ^{8dly. A right of possession.} leased as furniture with a house were taken in execution, and absolutely sold by the sheriff, it was decided that the landlord could not maintain trover against the sheriff pending the lease, but should have declared specially in an action on the case. (e) So if A. pay a Bank of England note to B., who pays it to C., who presents it at the bank, where it is stopped, C. only can sue, and not A. (f) We have before observed, that a landlord has, in general, such an implied possession of timber wrongfully cut down during a lease as to enable him to support trover if it be removed; (g) and a remainder-man may support this action against a tenant for life, who does not hold without impeachment of waste, for taking away trees. (h) So if corn be sown by the outgoing tenant, and cut down and taken by him after the tenancy, under a mistaken claim to it as a way-going crop, the owner of the estate may support trover. (i)

The person who has the absolute or general, and not the mere special, property in a personal chattel may support this action, although he has never had the actual possession; for it is a rule of law, that the general property of personal chattels creates a constructive possession. (k) And where the plaintiff, as executor, declared on the possession of his testator, the court held it to be sufficient, because the property was vested in the executor, and no other person having the right of possession, the property drew after it the possession. (l)

(d) *Benjamin v. Bank of England*, 3 Campb. 417; *Bloxam v. Sanders*, 4 B. & C. 341; 7 D. & R. 407, S. C.; [*Winship v. Neale*, 10 Gray, 382; *Clark v. Draper*, 19 N. H. 419.] A surveyor of the highways quitting office (before statute 5 & 6 W. 4, c. 50), claimed a sum as due to him from the parish, and on the same being guaranteed to him, agreed to deliver up his books. The sum was afterwards paid. In pursuance of a resolution of vestry, the books were demanded of him for the then churchwardens; and in a subsequent year they were also demanded by the churchwardens of the latter year: held, that the churchwardens and overseers of the latter year were not entitled to maintain trover for the books; and *semble* that no parish officer of any year was so entitled. *Addison v. Round*, 4 Ad. & El. 799.

(e) *Gordon v. Harper*, 7 T. R. 94; *Hall v. Pickard*, 3 Campb. 187; *Pain v. Whittaker*, 1 R. & M. 99; *Parry v. Frame*, 2 B. & P. 451; *Smith v. Plomer*, 15 East, 607. [See *Wheeler v. Train*, 3 Pick. 255; *Fairbanks v. Phelps*, 22 Pick. 535; *Swift v. Mosely*, 10 Vt. 208; *Nations v. Hawkins*, 11 Ala. 859; *Caldwell v. Cowan*, 9 Yerger, 262; *Winship v. Neale*, 10 Gray, 383. The owner of cattle leased them with a farm for four years, un-

der an agreement that, at the expiration of the four years, the lessee might return the cattle or pay a stipulated price for them; and the lessee sold the cattle before the four years expired; this sale was held to determine the lessee's right of possession, and the owner was permitted to maintain trover for the cattle against both seller and purchaser. *Grant v. King*, 14 Vt. 367; *Turner v. Waldo*, 40 Vt. 514.]

(f) *Benjamin v. Bank of England*, 3 Campb. 417; *Horwood v. Smith*, 2 T. R. 750.

(g) *Ante*, 167; *vide* exceptions there.

(h) *Com. Dig. Biens, H.*; *Pyne v. Dor*, 1 T. R. 55; [*Shult v. Barker*, 12 Serg. & R. 272.]

(i) *Davies v. Connop*, 1 Price, 53.

(k) 2 Saund. 47 a, note (1); *Bac. Abr. Trover, C.*; 3 Wils. 136; *Fowler v. Down*, 1 B. & P. 47; *Gordon v. Harper*, 7 T. R. 12; [*Smith v. James*, 7 Cowen, 329; *Duncan v. Spear*, 11 Wend. 54. If an agent, having authority to take a note payable to his principal in discharge of a debt, take it payable to himself, the principal may waive the wrongful act, and claim to have the note delivered to him, and maintain trover for its conversion. *McNear v. Atwood*, 17 Maine, 434.]

(l) *Hudson v. Hudson, Latch*, 214; 3 *Bac*

And where a person has delivered goods to a carrier or other bailee who has not the right to withhold the possession from the general owner, and so parted with the actual possession, yet he may maintain trover for a conversion by a stranger; (*l*) for the owner has still the possession in law against the wrong-doer, and the carrier or other bailee is considered merely as his servant. (*m*) This rule prevails in the case of a gratuitous loan, but not where there has been a letting to hire; (*n*) and an executor or administrator is by legal construction possessed of the goods of the testator or intestate from the time of death. (*o*) So the trustee of goods may sue, although the goods are in the possession of the *cestui qui trust*. (*p*) Trover lies by a party entitled in remainder to plate, against a party to whom it was pledged by the *deceased tenant* for life, without notice of the limited title of the pawnor. (*q*) And the consignee of goods, who is also the vendee in general the person to sue for any injury to them whilst in the hands of the carrier, although they have never reached the consignee. And where everything has been done by the vendor of goods which he contracted to do, the property will in many cases pass to the vendee, and he may maintain trover, although the goods remain in the seller's possession. (*s*) But the vendee of undelivered goods who has not paid or tendered the price, and has not therefore acquired the right of possession, cannot maintain trover against the vendor, who wrongfully sells them. (*t*)

* If a person, in whose possession goods are, has a lien upon them for a debt due to him from the owner, the plaintiff must pay or tender the money before the action is commenced, in order to obtain the possessory right. But if a party, on being applied to for goods, refuses to deliver them on a different ground, and do not mention his lien, he cannot afterwards set it up as a defence to the action. (*u*)

Abr. 58; [Kirby v. Quinn, 1 Rice, 254; Hill v. Brennan, 1 Rice, 285. An administrator may declare in trover for a conversion before the death of the intestate, and add a count for a conversion after the death. French v. Merrill, 6 N. H. 456; Towle v. Lovet, 6 Mass. 394; Parrott v. Dubignon, Charl. 261; Kirby v. Clark, 1 Root, 389. So trover lies against an executor for a conversion in the lifetime of the testator. Decrow v. Moore, 1 Hayw. 21; Clark v. Kenan, 1 Hayw. 308; Avery v. Moore, 1 Hayw. 362; ante, 77, 80.]

(*l*) [Thorpe v. Burling, 11 John. 285.]

(*m*) Dewell v. Moxen, 1 Taunt. 391; Gordon v. Harper, 7 T. R. 12; 2 Saund. 47 b.

(*n*) Lotan v. Cross, 2 Campb. 462; Hall v. Pickard, 3 Campb. 187; Gordon v. Harper, 7 T. R. 9.

(*o*) Gordon v. Harper, 7 T. R. 13; Hudson v. Hudson, Latch, 214; 2 Saund. 47 b, 47 k; and may sue in trover for a conversion after the death of the intestate and be-

fore the probate or grant of letters of administration. Thorpe v. Stallwood, 12 J. R. N. S. Q. B. 241.

(*p*) Wooderman v. Baldock, 8 Taunt. 676.

(*q*) Hoare v. Parker, 2 T. R. 376.

(*r*) But see ante, 6, note (z).

(*s*) Ante, 166; Rugg v. Minett, 11 Es. 210; and Carruthers v. Payne, 5 Bing. 27.

(*t*) Bloxam v. Sanders, 4 B. & C. 94; 7 D. & R. 407, S. C. See ante, 166, n.

(*h*). On a contract for the sale of a specific chattel on credit, time without express stipulation is not of the essence of the contract, and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day. Martindale v. Smith, 1 G. & 1. See, also, Gurr v. Cuthbert, 12 L. J. N. S. Exch. 309.

(*u*) Boardman v. Sill, in note to Atterton v. Briant, 1 Campb. 410. An actual tender

It has been said that in the case of a *special* property, it must have been accompanied with possession, (*u*¹) in order to support trover; (*v*) but the general rule appears to be to the contrary; and it was observed by Eyre C. J. (*w*) "that it is not true, that in cases of special property the party must, once have had possession in order to maintain trover; for a factor, to whom goods have been consigned, and who has never received them, may maintain such an action." (*w*¹) And the indorsee of a bill of lading may maintain trover against the wharfingers, although the bill of lading was indorsed merely to enable the plaintiff to exercise the consignor's right of stopping the goods *in transitu*. (*x*)

With respect to the *nature of the injury*, we have already seen that a *conversion* is essential to the support of this action. (*y*) It may not be altogether foreign to our present inquiry to give ^{3dly. The} ~~injury.~~ some general account of the different instances of conversion. (*z*) They may be either, 1st, by *wrongfully taking* a personal chattel; 2dly, by some other *illegal assumption of ownership*, or by illegally *using or misusing* goods; (*z*¹) or 3dly, by a *wrongful detention*. (*z*²)

The *wrongfully taking*, if followed by a *carrying away* of the goods of another, who has the right of immediate possession, is of itself a conversion, and so is the compelling a party to deliver ^{1st. Wrong-} ~~ful taking.~~

is not necessary if it appear that the plaintiff was ready to pay, but the defendant refused to deliver the goods except on payment of an alleged old balance not really due. *Jones v. Tarleton*, 9 M. & W. 675.

(*u*¹) [*Hotchkiss v. M'Vickar*, 12 John. 407; *Polley v. Lenox Iron Works*, 4 Allen, 323.]

(*v*) *Coxe v. Harden*, 4 East, 214.

(*w*) *Fowler v. Down*, 1 B. & P. 47; 2 Saund. 47 d. See *Stirling v. Vaughan*, 11 East, 626.

(*w*¹) [*Smith v. James*, 7 Cowen, 329; *Everett v. Saltus*, 15 Wend. 474.]

(*x*) *Morison v. Gray*, 2 Bing. 260.

(*y*) *Ante*, 164; 2 Saund. 46 e.

(*z*) See 2 Saund. 47 e; Bac. Abr. Trover, B.

(*z*¹) [*Banfield v. Whipple*, 10 Allen, 27. Driving a hired horse a greater distance than is agreed, or in a different direction, is a conversion. *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Hart v. Skinner*, 16 Yt. 138; *Lucas v. Trumbull*, 15 Gray, 306. See *Campbell v. Stokes*, 2 Wend. 137; *Johnson v. Weedman*, 4 Scam. 495. *Banfield v. Whipple*, 10 Allen, 27, was a joint action against two for driving a horse to death. If property be bailed to an infant, and he use it for a different purpose or in a different manner from that for which it was bailed, the bailment is determined, and he is liable in trover. *Green v.*

Sperry, 16 Vt. 390; *Homer v. Thwing*, 3 Pick. 492; *Eaton v. Hill*, 50 N. H. 235; *ante*, 86, note; *Lewis v. Littlefield*, 15 Maine, 233.]

(*z*²) [*Glaze v. McMillion*, 7 Porter, 279; *St. John v. O'Connell*, 7 Porter, 466; *Glenn v. Garrison*, 2 Harr. 1; *Metcalf J. in Polley v. Lenox Iron Works*, 2 Allen, 183, 184. "To support trover," says Heath J. "there must be a positive tortious act." *Bromley v. Coxwell*, 2 B. & P. 439. Every tortious taking with intent to apply chattels to the use of the taker, or some other person than the owner, is a conversion. *McPartland v. Read*, 11 Allen, 231; *Coughlin v. Ball*, 4 Allen, 334. In *Fouldes v. Willoughby*, 8 M. & W. 544, 545, Lord Abinger C. B. said: "It is a proposition familiar to all lawyers, that a simple asportation of a chattel without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." "In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner." See per Gray J. in *Spooner v. Holmes*, 102 Mass. 506; *Dearborn v. Union National Bank*, 58 Maine, 273.]

up goods; and whenever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie. (a) But it has been considered that a *mere seizure* by a stranger, who afterwards relinquishes the possession, is no conversion. (b) Trover lies by a bankrupt against his assignees, if the plaintiff was not subject to the bankrupt laws. (c) And if goods be wrongfully seized as a distress, though they be not removed from the place in which they were, yet trover may be supported, because the possession in point of law is changed by their being * seized as a distress. (d) A sheriff who seizes and seizes goods after an act of bankruptcy committed by the defendant, against whom a *fiery facias* issued, and before the fiat issued, is, if the *fiery facias* be void against the assignees, liable to them in trover, although the sheriff was ignorant of the act of bankruptcy; (e) and a seizure of goods under a *fiery facias* after a party's bankruptcy, followed by removal of them to the brokers, is a sufficient conversion. (f) And this action may be supported after an acquittal of the defendant in the felonious taking of goods. (g) In the case of a conversion or wrongful taking, it is not necessary to prove a demand and refusal; and the intent of the party is immaterial; for, although the defendant acted under a supposition that he was justified in what he did, or as servant of, and for the benefit of, another person, he will be equally liable to this action. (i) But if the possession was obtained under color of a contract, trover cannot be sustained; (k) unless a case

(a) 2 Saund. 470; Bishop v. Viscountess Montague, Cro. Eliz. 824. The rule given in the text, cited from 2 Saund. 470, is now allowed to be too extensive. See Foulde v. Willoughby, 8 M. & W. 540. [Trover lies for goods taken by a wrongful distress. Drew v. Spaulding, 45 N. H. 472, 478, and cases there cited. Trover and trespass are generally concurrent remedies for the unlawful taking and conversion of personal property. Wadleigh v. Janvrin, 41 N. H. 503, 520; Drew v. Spaulding, *supra*. Whenever trespass *de bonis asportatis* lies trover will lie. Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. 356; but see Foulde v. Willoughby, 8 M. & W. 540; note (2^d) *supra*; post, 180, 191.]

(b) Samuel v. Norris, 6 C. & P. 620; [Loring v. Mulcahy, 3 Allen, 575; Foulde v. Willoughby, 8 M. & W. 540.]

(c) Summersett v. Jarvis, 3 B. & B. 2; 6 Moore, 56, S. C.

(d) Cooper v. Monke, Willes, 56.

(e) 1 M. & P. 541; 4 Bing. 597; 2 Y. & J. 101; Garland v. Carlisle, 2 Cro. & M. 31; but the 2 & 3 Vict. c. 29, renders valid executions *bonâ fide* executed and levied before the date and issuing of the fiat, notwithstanding a prior act of bankruptcy, provided the execution creditor had not at the time notice of any prior act of bankruptcy committed by the defendant.

(f) Wyatt v. Blades, 3 Campb. 396.

(g) Crosby v. Long, 12 East, 409; [Bosman v. Gore, 15 Mass. 336, 337; Adding v. Allen, 11 Wend. 382; Foster v. Tuck, 3 Greenl. 458; Boody v. Keating, 4 Greenl. 164; Grafton Bank v. Flanders, 4 N. H. 239; Pettingill v. Rideout, 6 N. H. 4; Morgan v. Rhodes, 1 Stewart, 70; M'Graw v. Cato, Minor, 8; Crowell v. Merrick, Maine, 392; ante, 169.]

(h) Baldwin v. Cole, 6 Mod. 212; [Eaton v. N. P. 44; Forsdick v. Collins, 1 Stark. 17; Summersett v. Jarvis, 3 B. & B. 2; 6 Moore, 56, S. C.; [post, 176, note (b).]

(i) Stephens v. Elwall, 4 M. & Sel. 20; Cranch v. White, 1 Bing. N. C. 414; 1 Sel. 314, S. C.; ante, 129; [Cummings v. Farnham, 1 Met. 555. A purchase of property from one who had no authority to sell, where the purchaser takes a delivery of it and retains possession claiming it under the sale, is a conversion of it. Hyde v. North, 13 N. H. 494; Gilmore v. Newton, 9 Allen, 171; Champney v. Smith, 15 Gray, 5; Riley v. Martin, 35 Geo. 136; Spraghtons v. Hawley, 39 N. Y. 441; Stanley v. Gaylord, Cush. 546, and cases cited; Riley v. Boston Water Power Co. 11 Cush. 11; Williams v. Merle, 11 Wend. 80; Rifford v. Montgomery, 7 Vt. 418; Curtis v. Cane, 32 Vt. 232; Carter v. Kingman, 103 Mass. 517.]

(k) Emanuel v. Dane, 3 Campb. 299. See Read v. Hutchinson, 3 Campb. 352; and

fraud can be proved. (l) So if assignees affirm the act of a party who wrongfully sold the bankrupt's goods, they cannot support trover against him. (m) And trover does not lie for an excessive levy of goods under a valid execution. And if a sheriff seize under a writ of *feri facias* more goods than was necessary, the proper remedy is *case* and not trover. (n) A party acting under a valid, and also under an unfounded authority, may protect himself by virtue of the former. (o)

So the *wrongful assumption of the property* in, or right of disposing of, goods, may be a conversion in itself, and render unnecessary a demand and refusal, (p) as well as any tender of charges. (q) It seems that the mere taking an assignment of goods from a person who has no right or authority to dispose of them, is a conversion; for this is an assumption by the assignee of a property in the goods. (r) Thus, the *sale of a ship, which was after-

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Wrongful
assumption
of property.

Hill v. Perrott, 3 Taunt. 274; Fairman v. Grimble, 2 C. & P. 266.

(l) Noble v. Adams, 7 Taunt. 59; Earl of Bristol v. Wilsmore, 1 B. & C. 514; 2 D. & R. 755, S. C.; [Thurston v. Blanchard, 22 Pick. 18; Stevens v. Austin, 1 Met. 557; Thompson v. Rowe, 16 Conn. 71; ante, 169; Baltimore & C. Ins. Co. v. Dalrymple, 25 Md. 269.]

(m) Brewer v. Sparrow, 7 B. & C. 310; 1 M. & R. 2, S. C. Where the assignees of a bankrupt lessee declined to accept the lease, and gave the lessor possession of the mill and machinery, the subject of the lease; but under a covenant in the lease the lessor was to pay for the improved value of the machinery, and on refusal the assignees brought trover for the machinery against the lessor, it was held that the action was properly brought, as covenant could not be maintained. Fairburn v. Eastwood, 6 M. & W. 679.

(n) Batchellor v. Vyse, 1 Mood. & Rob. 333; but, *semble*, the court doubted. [Trover will lie against an officer who takes, upon an execution, property which is exempt by law from attachment. Sanborn v. Hamilton, 16 Vt. 590. So it will lie against an officer when he has taken property, upon an execution, issued upon a judgment void for want of jurisdiction in the court rendering it, or against any one receiving the property from the officer. Martin v. England, 5 Yerger, 313.]

(o) Stiermold v. Holden, 4 B. & C. 5; 6 D. & R. 17, S. C.

(p) M'Combie v. Davies, 6 East, 540; Jackson v. Anderson, 4 Taunt. 24; Summervett v. Jarvis, 3 B. & R. 2; 6 Moore, 56, S. C.; [Lathrop v. Blake, 23 N. H. 46; Bristol v. Bart, 7 John. 254; Gibbs v. Chase, 10 Mass. 128; Jordan v. Shireman, 28 Ind. 136; Polley v. Lenox Iron Works, 2 Allen, 183, 184; Fifield v. Maine Central R. R. Co. 62 Maine, 82. Where a party received logs to be sawed into lumber on shares, and agreed to give the owner security for his

share at a stipulated rate payable on a future day, but before doing it disposed of the property; the owner was held to be entitled to maintain trover for his share; there being no change of property until the security was given. Rightmeyer v. Raymond, 12 Wend. 21; Whipple v. Gilpatrick, 19 Maine, 427; Turner v. Waldo, 40 Vt. 51. A. deposited a dock warrant for brandies with B., as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock warrant, and C. took actual possession of the brandies on the 30th. It was held that the sale on the 28th and the delivery of the dock warrant to the vendee on the 29th — A. having the whole of that day to redeem it — amounted to a conversion. Johnson v. Stear, 15 C. B. N. S. 330. See Chinery v. Viall, 5 H. & N. 288. See these cases as to the rule of damages in like circumstances, and also Jarvis v. Rogers, 15 Mass. 389; Brierly v. Kendall, 17 Q. B. 937. Forbidding the owner of personal property, lying upon the land of the defendants, to enter, for the purpose of removing it; withholding the property from him, and claiming it as the defendant's own, constitute a conversion. Woodis v. Jordan, 62 Maine, 490.] Discounting a lost bill after notice is a conversion. Lovell v. Martin, 4 Taunt. 799.

(q) Boardman v. Sill, in note to Attersol v. Briant, 1 Campb. 410; Whitaker, 75; Solly v. Rathbone, 2 M. & Sel. 298; Corlett v. Gordon, 3 Campb. 472, 473.

(r) Baldwin v. Cole, 6 Mod. 212; per Holt C. J. recognized by Lord Ellenborough in M'Combie v. Davies, 6 East, 540. And see Hurst v. Gwennap, 2 Stark. 306; Malla-lieu v. Laughier, 3 C. & P. 552, 553; [Everett v. Coffin, 6 Wend. 603; Rice v. Clark, 8 Vt. 109. But one who merely receives goods into his possession and control knowing that they were not lawfully in the possession of the person who brought them to

wards lost at sea, made by the defendant, who claimed under a fictive conveyance from a trader before his bankruptcy, was held a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without showing a demand and refusal. (s) where a person intrusted with the goods of another, puts them into the hands of a third person without orders, it is a conversion. Trover may be supported against a carrier, (u) or a wharfinger, who by mistake, (y) or under a forged order, (z) delivers goods to a wrong person; (z¹) or against a person who illegally makes use of a thing found or delivered to him; (a) or a bailee employed merely to keep or to carry the goods, and having no beneficial interest, who uses a chattel intrusted to him; (b) or against a carrier who draws out part of the contents of a vessel, and fills it with water; (c) or a carrier or wharfinger, &c. who improperly breaks open a box (c¹) containing goods, or sells them. (d) An irregularity in a distress for damage feasant may amount to a conversion; (e) but trover does not lie in the case of a distress for rent (which is valid), merely because a subsequent irregularity is committed. (f) But it may be sustained

against him, and afterwards allows them to be taken away by the same person, is not thereby guilty of conversion. *Loring v. Mulcahy*, 3 Allen, 575; *Fouldes v. Willoughby*, 8 M. & W. 540; *Simmons v. Lillystone*, 8 Exch. 442.]

(s) *Bloxam v. Hubbard*, 5 East, 407, 420.

(t) *Syeds v. Hay*, 4 T. R. 260-264. But trover cannot be maintained for a bill of exchange which the plaintiff gave to the defendant to get discounted, and to apply the proceeds in a particular way, and which he did get discounted, but appropriated a part of the proceeds to his own use; an action for money had and received being the proper remedy. *Palmer v. Jarman*, 2 M. & W. 282.

(u) *Youl v. Harbottle*, Peake C. N. P. 68; *Stephenson v. Hart*, 4 Bing. 476, 482, 483; *Wild v. Pickford*, 8 M. & W. 461.

(z) *Devereux v. Barclay*, 2 B. & Ald. 702.

(y) *Ib.*; *Stephenson v. Hart*, 4 Bing. 483; [*Hall v. Boston & Worcester R. R. Corp.* 14 Allen, 439, 443; *Lichtenhein v. Boston & Providence R. R.* 11 Cush. 70; *Polley v. Lenox Iron Works*, 2 Allen, 182; *Lawrence v. Simons*, 4 Barb. 354; *Esmay v. Fanning*, 9 Barb. 176.]

(z) *Lubbock v. Inglis*, 1 Stark. 104; *Stephenson v. Hart*, 4 Bing. 476.

(z¹) [*Packard v. Getman*, 4 Wend. 613; 6 Cowen, 757; *Moses v. Norris*, 4 N. H. 304; *Johlland v. Young*, 3 Stewart, 46; *Ludwig v. Meyre*, 5 Watts & S. 435; *Eskine v. The Thames*, 6 Missou. 371; *Hall v. Boston & Worcester R. R. Corp.* 14 Allen, 439, 443; *Cass v. Boston & Lowell R. R. Co.* 14 Allen, 453, 459. Misdelivery by a carrier of an article, intrusted to him to be carried, is a conversion. *Claffin*

v. Boston & C. R. R. Co. 7 Allen, 341; *Creux v. Barclay*, 2 B. & Ald. 704; *Huntress, Davies*, 82; *Hawkins v. Man*, 6 Hill, 586; *Bowlin v. Nye*, 10 C. 417, 418.]

(a) *Mulgrave v. Ogden*, Cro. Eliz. *Nicholson v. Chapman*, 2 H. Bl. 254; [*Johnson v. Weedman*, 4 Scam. 495; *Lipin Holmes*, 1 Kelly, 381.]

(b) *Ib. Ibid.*; [*Ripley v. Dolbier*, 18 M. 382; *Lockwood v. Bull*, 1 Cowen, 322; *v. Clark*, 8 Vt. 109; *Swift v. Mosely*, Vt. 208; *Norton v. Kidder*, 54 Maine, 18.]

(c) *Richardson v. Atkinson*, 1 Stra. [Dench v. Walker, 14 Mass. 500.] *And Granger v. George*, 5 B. & C. 149; 7 R. 729, S. C., where see as to a conversion by abuse of a trust, and when the statute of limitations begins to run. Where the defendant had charge of a pipe of wine and bottled part, the wine becoming deteriorated from remaining in the wood, it was held that this act did not necessarily amount to a conversion, and that the consumption of some of the wine would not amount to a conversion of the whole, and that therefore the defendant could not avail herself of the statute of limitations under a plea of the statute of limitations to an action of trover for the wine. *Per Patteson and Coleridge JJ. Phillips v. Kelley*, 3 Ad. & El. 106.

(c¹) [See *Tucker v. Housatonic R. R. Co.* 39 Conn. 447.]

(d) *Anonymous*, 2 Salk. 655; *Barton v. Williams*, 5 B. & Ald. 401.

(e) *Bagshaw v. Goward*, Cro. Jac. Bac. Ab. Trover, B.

(f) *Wallace v. King*, 1 H. Bl. 13; *Went v. Curtis*, 18 Pick. 227; *Nelson v. Latham*, 3 Pick. 249. Trover will not lie for goods seized by legal process and in the

by a party who pays money to redeem his goods from an illegal and unfounded distress for rent. (*g*) Trover cannot in general be supported for a mere omission or nonfeasance against a party who was lawfully possessed of the goods; (*h*) and therefore if a carrier, or other bailee, by negligence *lose goods* intrusted to his care, the remedy in general must be case or assumpsit. (*i*) A bare non-delivery of goods by a carrier is not a conversion, (*k*) unless the goods be in his possession, and he refuse to deliver them on demand. (*l*) His false assertion that he had delivered the goods to the consignee, is not * a conversion. (*m*) And the taking possession of a house and fixtures therein by the assignee of a term in the house, is not a conversion of the *fixtures*. (*n*) An agent, by the act of selling at an under price, is not liable to an action of trover; (*o*) and the retention of property under the decree of a court of competent jurisdiction, is no conversion. (*p*) But a sub-agent may be liable in trover for his conversion. (*q*) The cutting trees without removing them is not a conversion. (*r*)

The general rule is, that *one tenant in common* of goods cannot sue his cotenant if the goods remain in the possession of the latter, although he refuse to permit the former to participate in the use of the article. (*s*) The reason is, that in law the possession of one is the possession of both. But if one tenant in common *destroy* the chattel, or commit an act which is equivalent thereto, (*s*¹)

By and against a tenant in common.

to the law. *Jenner v. Joliffe*, 9 John. 381. It will not lie for goods taken from the plaintiff by virtue of a search warrant. *Pettigru v. Sanders*, 2 Bailey, 549. But it does lie against an officer who seizes property by virtue of process and sells without notice. *Wright v. Spencer*, 1 Stewart, 176. See *Perkins v. Thompson*, 3 N. H. 144; *Hall v. Moore*, Addis. 376. A person having authority by law to kill a dog, is liable in trover, if he converts him to his own use. *Cummings v. Perham*, 1 Met. 555.]

(*g*) *Shipwick v. Blanchard*, 6 T. R. 298.

(*h*) *M'Combie v. Davies*, 6 East, 540; *Devereux v. Barclay*, 2 B. & Ald. 704. [Conversion, when applied to the action of trover, imports an unlawful act, and not a mere nonfeasance. *Metcalf J.* in *Bowlin v. Nye*, 10 Cush. 417; *Cairnes v. Bleecker*, 12 John. 300; *Jenner v. Joliffe*, 6 John. 381; *Robinson v. Austin*, 2 Gray, 564, 565; *Cass v. Boston & Lowell R. R. Co.* 14 Allen, 459.]

(*i*) *Ross v. Johnson*, 5 Burr. 2825; 2 Saund. 47 *f*; [*Moses v. Norris*, 4 N. H. 304; *Packard v. Getman*, 4 Wend. 613; *Johnson v. Strader*, 3 Missou. 359; *Hawkins v. Hoffman*, 6 Hill, 586; *Bowlin v. Nye*, 10 Cush. 417. But see *Greenfield Bank v. Leavitt*, 17 Pick. 1.] So trover will not lie against a party who receives a parcel to be forwarded by a carrier, and loses it. *Williams v. Gense*, 3 Bing. N. C. 849; 5 Scott, 56, 57.

(*k*) *Severin v. Keppell*, 4 Esp. 157; [*Robinson v. Austin*, 2 Gray, 564.]

(*l*) *Dewell v. Moxon*, 1 Taunt. 391; [*Robinson v. Austin*, 2 Gray, 564; *Packard v. Getman*, 4 Wend. 613; *Lockwood v. Bull*, 1 Cowen, 322.]

(*m*) *Attetrol v. Briant*, 1 Campb. 409.

(*n*) *Longstaff v. Meago*, 4 Nev. & Man. 411.

(*o*) *Dufresne v. Hutchinson*, 3 Taunt. 117.

(*p*) *Hossack v. Masson*, 4 Moore, 361.

(*q*) *Cranch v. White*, 1 Bing. N. C. 414.

(*r*) *Mires v. Solebay*, 2 Mod. 245; Bul. N. P. 44; 2 Saund. 47 *a*.

(*s*) *Ante*, 89; 2 Saund. 47 *k*; *Holliday v. Cammell*, 1 T. R. 658; *Smith v. Stokes*, 1 East, 363; *Selw. N. P. Trover*, 11, 10th ed. 1364; [*Cowan v. Buyers*, Cooke, 83; *St. John v. Standing*, 2 John. 468; *Cole v. Terry*, 2 Dev. & B. 252; *Conover v. Earl*, 26 Iowa, 167.]

(*s*¹) [*Hoar J.* in *Delaney v. Root*, 99 Mass. 546, 547; *Lothrop v. Smith*, 1 Hayw. 255. Acts of one tenant in common of chattel property, *e. g.* a raft of logs, performed in the endeavor to save it from loss or depreciation, although they amount to preventing his cotenant from exercising ownership, and are against his consent, will not be deemed a conversion, nor warrant an action of trover by the cotenant. *Kilgore v. Wood*, 56 Maine, 150. But where the property owned in common is severable in its nature, like grain, where the share of each can be determined by measurement or weight, each

his companion may recover the value of his share in trover. (*t*) The where it appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him so that he knew not where it was carried, and changed the name of it; and it afterwards got into the hands of a third person, who sold it upon a foreign voyage, where it was lost; Lord King left it to the jury, whether, under the circumstances, the destruction was not by the means of the tenant in common (the defendant); and the jury finding in the affirmative, the court refused to set aside the verdict. (*u*) It seems to be questionable whether the mere sale by one of two joint owners of a ship is a sufficient conversion to enable his companion to maintain trover against him, for such sale could not in law affect or pass more than the interest of the seller. (*x*) Where one of two tenants in common of a whale refused to deliver a moiety of it to the other, and cut it up, and expressed the oil, it was held that this was not a destruction which would subject him to an action of trover; for it was an application of the whale to its only profitable purpose. (*y*) In general if a defendant insist that he was tenant in common with the plaintiff in the chattel, he must plead that matter specially. (*z*)

The cases in which trover is or is not the proper remedy in relation to *husband and wife* have been already mentioned. (*a*)

* In most of the preceding instances, proof of the wrongful act of the defendant is sufficient to establish a conversion, without evidence of a demand of the goods, and a refusal to restore.

3dly. Of a wrongful detention;

owner has the right to sever, take, and sell his own share; and where one of such owners is in possession of the whole, a refusal by him to permit another owner to sever and take his own share is equivalent to a conversion, and an action of trover will lie. *Channon v. Lusk*, 2 Lansing, 211.]

(*t*) 2 Saund. 47 *h*; *Martyn v. Knowllys*, 8 T. R. 146; *ante*, 89, [and note (*i*) and cases there cited; *Tubbs v. Richardson*, 6 Vt. 442; *Hurd v. Darling*, 14 Vt. 214; *Ladd v. Hill*, 4 Vt. 164; *Lucas v. Wasson*, 3 Dev. 398; *Campbell v. Campbell*, 2 Murph. 65.]

(*u*) *Bernardiston v. Chapman*, C. B. Hil. T. 1 Geo. 1, cited in *Heath v. Hubbard*, 4 East, 121; Bull. N. P. 34, 35; 2 Saund. 47 *h*.

(*x*) *Heath v. Hubbard*, 4 East, 121; 2 Saund. 47 *h*, note (*s*), 5th ed. *Sed vide* *Barton v. Williams*, 5 B. & Ald. 395, and the observations of Parke B. *Farrar v. Beswick*, 1 M. & W. 685. [It has been held in many American cases, that if one tenant in common assume to own and sell the chattel holden in common, the other may sustain trover against him. *Wilson v. Reed*, 3 John. 175; *Hyde v. Stone*, 2 Wend. 354; *White v. Osborn*, 21 Wend. 72; *Waddell v. Cook*, 2 Hill, 47; *Nowlen v. Colt*, 6 Hill, 461; *Thompson v. Cook*, 2 South. 580; *Weld v. Oliver*, 21 Pick. 559; *Dewey J. in Burbank v. Crooker*, 7

Gray, 159, 160; *Wheeler v. Wheeler*, Maine, 347; *Dain v. Cowing*, 22 Mai. 347; *Smith v. Tankersley*, 20 Ala. 212; see *Tubbs v. Richardson*, 6 Vt. 442; *Sturtevant v. Morrill*, 15 Vt. 700. "It is settled in Massachusetts that one tenant in common of a chattel may maintain an action of trover, or tort in the nature of trover, against his cotenant, who has converted the chattel to his own use; and that such conversion may be proved by the destruction of the chattel, by its sale, or by such an act of appropriation as will, by its nature, finally preclude the other party from any future enjoyment of it." Hoar J. in *Delaney v. Root*, Mass. 547; 2 Greenl. Ev. § 646, note (*d*). *Daniels v. Daniels*, 7 Mass. 135. If a cotenant of one tenant in common of a personal chattel attach and sell, on his debt, the entire chattel, it is a conversion of the interest of the cotenant, for which trover will lie. *Ladd v. Hill*, 4 Vt. 164; *Bradley v. Arnold*, 16 Vt. 382.]

(*y*) *Fennings v. Lord Grenville*, 1 Taunt. 241. And see *ante*, 89, as to tenancy in common of realty.

(*z*) It cannot be given in evidence under the general issue. See *Stancliffe v. Hawwicke*, 3 Dowl. 762.

(*a*) *Ante*, 104.

them. (b) In other cases, a *demand and refusal* are essential to the support of the action; in every instance it is judicious to demand the restitution of the goods, or if they cannot be returned, a recompense equivalent to their value and the amount of the damages sustained, previously to the commencement of proceedings. The frequent occurrence of this subject in practice renders it worthy of minute attention, and it is proposed to consider it in the following order: 1st, *when* a demand and refusal are necessary; 2dly, *by* whom the demand must be made; 3dly, *upon* whom it is to be made; 4thly, the *manner* of making the demand; 5thly, the *time* of making the demand; and, 6thly, *what refusal* is sufficient.

1st. A *demand and refusal* are necessary in all cases where the defendant became, in the first instance, lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct actual conversion. (c) As where a trader on the eve of his bankruptcy made a collusive sale of his goods to the defendant, it was decided that the assignees could not maintain trover without proving a demand and refusal, for the parties contracting were competent at the time; and if the assignees disaffirm the contract, they should give notice by a demand. (d) So where goods are delivered under a contract, as to do something with them, and return them when completed, the mere omission to perform the contract is no conversion, and a demand and refusal must be made in order to support trover. (e) Where bills of exchange were delivered by a trader, in contemplation of bankruptcy, to a creditor, with a view of giving him preference, and the amount of the bills was received by the creditor after the bankruptcy, it was held that a demand and refusal to deliver up the bills before they became due, were necessary to enable

and herein
of a demand
and refusal.

1. When a
demand is
neces-
sary.

(b) *Lovell v. Martin*, 4 Taunt. 801; [Kyle v. Gray, 11 Ala. 233; *Matheny v. Johnson*, 9 Misson. 232. A demand and refusal are unnecessary if the taking is tortious, or if an actual conversion is otherwise shown. *Davis v. Webb*, 1 McCord, 213; *Jones v. Dugan*, 1 McCord, 428; *Farrington v. Payne*, 15 John. 231; *Woodbury v. Long*, 8 Pick. 543; *Tompkins v. Haile*, 3 Wend. 406; *Earle v. Van Buren*, 2 Halst. 244; *Newsom v. Newsom*, 1 Leigh, 86; *Jewett v. Patridge*, 3 Fairf. 242; *Riford v. Montgomery*, 7 Vt. 411; *Hews v. McKinnery*, 3 Misson. 362; *Foshay v. Ferguson*, 5 Hill, 154; *Gilmore v. Newton*, 9 Allen, 171. If property wrongfully taken is put into the hands of a third person for keeping, the bailee is liable to the owner in trover, after a demand and refusal, and he cannot refer the owner to the person under whom he claims to justify the detention. *Doty v. Hawkins*, 6 N. H. 247. See *Houston v. Dyche*, 1 Meigs, 76.]

(c) 2 Saund. 47 c; [Vincent v. Cornell, 13 Pick. 294; *Yeager v. Wallace*, 57 Penn. St. 365; *Edwards v. Hooper*, 11 M. & W. 366;

Carleton v. Lovejoy, 54 Maine, 445; *Farley v. Lincoln*, 51 N. H. 580; *Stanley v. Gaylord*, 1 Cush. 536; *Hyde v. Noble*, 13 N. H. 594; *Cooper v. Newman*, 45 N. H. 339; *Lovejoy v. James*, 30 N. H. 169. If the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice and demand of his goods, and a refusal or delay of the officer to redeliver them. *Bond v. Ward*, 7 Mass. 123.]

(d) *Nixon v. Jenkins*, 2 H. Bl. 135; 2 Esp. Rep. 96. See *Bloxam v. Hubbard*, 5 East, 407; *Lovell v. Martin*, 4 Taunt. 799. [The seizure, on a regular process, of goods fraudulently purchased, in favor of a creditor of the vendee, is not a tortious act; and a demand by the vendor, accompanied by a statement of his title, is necessary to entitle him to sustain trover against the officer. *Thompson v. Rose*, 16 Conn. 71.]

(e) *Severin v. Keppell*, 4 Esp. Rep. 156. See *Fairman v. Grimbale*, 2 C. & P. 266.

the assignees to bring an action of trover for the bills, as the receipt of the money by the creditor was not of itself a conversion. (*f*) demand and refusal are likewise necessary in order to maintain trover against an excise officer for the detention of the goods after the payment of the penalty for which the goods were levied, (*g*) or against a carrier, who, having the goods in his possession, omits to deliver them. (*h*)

The demand and refusal do not necessarily amount to a conversion but are only *prima facie* evidence of it, (*h*¹) and therefore a finding of a special verdict that the plaintiff demanded the goods, and the defendant refused them, will not warrant the court in considering that there was a conversion; (*i*) and if it be apparent that there really was a conversion, as if the party being a carrier had lost the goods, (*k*) or having felled trees, had left them on the ground, (*l*) the demand and refusal are inoperative.

2dly. The demand should be made by *the person* entitled at the time to receive the goods; and it seems that if goods are bailed, and during the bailment they are sold to or otherwise become the property of another, the demand on the bailee, to create a conversion, should be made by the new owner, and the action brought in his name, if after a proper demand the bailee improperly refuse to part with them. (*m*) If goods are deposited with one person with the authority of another, and received by the bailee to keep on the joint account of the two, a demand by one alone is not sufficient without the authority of the other, so as to maintain trover against the bailee for refusing to deliver the goods. But it may appear that the bailee in such a case had no notice that he held the goods on the joint account, or had not accepted them on any such trust, the party depositing the goods may alone make the demand, although it had been previously agreed between the two parties that the bailee should receive the goods on their joint account. (*n*) The demand may be made by an agent duly authorized; (*o*) but such demand will not be sufficient if the defendant *bond fide* refuse to deliver the goods in consequence of his not being reasonably satisfied

(*f*) Jones v. Fort, 9 B. & C. 764; 4 M. & R. 547, S. C.

(*g*) Hutchings v. Morris, 6 B. & C. 464; 9 D. & R. 499, S. C.; [Fryer v. M'Rea, 8 Porter, 187.]

(*h*) Dewell v. Moxon, 1 Taunt. 391; [Brown v. Cook, 9 John. 361. As to an innkeeper, Hollenbake v. Fish, 8 Wend. 547.]

(*h*¹) [Lockwood v. Bull, 1 Cowen, 322; Irish v. Cloyes, 8 Vt. 33; Thompson v. Rose, 16 Conn. 71; 2 Greenl. Ev. § 644; Jacoby v. Laussat, 6 Serg. & R. 300; Delano v. Curtis, 7 Allen, 470. Proof of demand and refusal does not preclude the introduction of other evidence tending to show a conversion. Clark v. Hale, 34 Conn. 398.]

(*i*) 10 Co. 56 b, 57 a; 2 Saund. 4 [Huxley v. Hartsell, 54 Missou. 370.]

(*k*) Ante, 174.

(*l*) Mires v. Soleby, 2 Mod. 245; Bull. P. 44.

(*m*) Philips v. Robinson, 4 Bing. 106.

(*n*) May v. Harvey, 13 East, 197.

(*o*) Mills v. Ball, 2 B. & P. 457. Sometimes the agent has a power of attorney to demand and receive the goods; but this may not be necessary especially if the demand be in writing, signed by the owner, and require the delivery of the goods to him or the bearer. It is usual to have a written demand, signed by the owner or attorney.

that the person who applies is properly empowered to receive them. (p) Where the plaintiff sold goods to T., who paid for them, and was to take them away, but defendant becoming possessed of the place in which they were deposited, the plaintiff's attorney, accompanied by T., demanded them of defendant, telling him that they belonged to plaintiff, and that he had sold them to T., to which defendant replied that he would not deliver them to any person whatsoever, and afterwards plaintiff repaid the price of the goods to T. and brought trover, it was held that this demand of the plaintiff's attorney was sufficient. (q)

3dly. The demand should of course be in general made upon the party who at the time has the possession of the goods by himself, or his servant or agent, or the general controlling power over them. (q¹) If after the party has received the goods, though legally, he sell or otherwise part with them tortiously, no demand is necessary, for his subsequent act is in itself a conversion. (r) If a party, in some way *apparently concerned in the detention, be applied to for the restoration of the goods, and by his answer induce the owner to believe that he, the person applied to, has the possession and power to deliver them up, and refuse to do so; and thereby the owner is induced to sue him; he cannot, it seems, defend at the trial, on the ground that he had not, when applied to, the control and disposition of the goods. (s)

8. Upon whom the demand should be made.

It is not necessary that the demand should be made upon the defendant personally. A demand in writing left at the defendant's house is sufficient. (t)

4thly. The demand in trover being only for the purpose of giving the defendant an opportunity of either restoring the goods in specie or of making satisfaction to the party to whom they belong, (u) it is not necessary to adhere to any particular form or manner of making the demand, provided it be distinctly notified to

4. Demand, how made.

(p) *Solomons v. Dawes*, 1 Esp. Rep. 83. See, also, *Coore v. Callaway*, Ib. 115; *Mills v. Bell*, 2 B. & P. 464, note (a); *Guntton v. Nurse*, 5 Moore, 259; and *Smith v. Young*, 1 Campb. 439; where the demand appears to have been made by an agent.

(q) *Pattison v. Robinson*, 5 M. & Sel. 105; [*Delano v. Curtis*, 7 Allen, 470, 475.]

(q¹) [If goods are bailed to two, a demand on one is not sufficient to charge the other in trover, though it may be sufficient to charge him in an action *ex contractu*. *Nicoll v. Glennie*, 1 M. & Sel. 588; *White v. Demary*, 2 N. H. 546; *Griswold v. Plumb*, 13 Mass. 296; *Mitchell v. Williams*, 4 Hill, 13. In an action against a sheriff for an attachment of goods by law exempt from attachment, the plaintiff may prove a demand upon the indemnifying creditor for a restoration of them and a refusal by him. *Mannan v.*

Merritt, 11 Allen, 382; *Bayley v. Bryant*, 24 Pick. 198.]

(r) [*Grant v. King*, 14 Vt. 367.] There cannot be an effectual demand and refusal unless the party upon whom the demand is made has possession of the goods at the time, and is able to deliver them up. Per Parke B. *Edwards v. Hooper*, 12 L. J. R. N. S. Ex. 304; [*Knapp v. Winchester*, 11 Vt. 351; *Traylor v. Horrall*, 4 Blackf. 317; *Yale v. Saunders*, 16 Vt. 243; *Morris v. Thompson*, 1 Rich. 65.]

(s) *Hall v. White*, 3 C. & P. 136.

(t) *Logan v. Houlditch*, 1 Esp. Rep. 22. So, as to a notice to quit, *Jones dem. Griffiths v. Marsh*, 4 T. R. 464; and notice of the dishonor of a bill of exchange, *Chitty on Bills*, 7th ed. 220.

(u) Per Lord Kenyon, *Thompson v. Shirley*, 1 Esp. 33.

the defendant who is the claimant, and what goods are demanded. (y) Where the plaintiff, the vendor of a house, brought trover for various articles, some of them being goods, and the remainder being fixtures which he had left in the house on delivering it up to the defendant, the vendee, and demanded them all as *fixtures*, and the refusal was "of the fixtures demanded," this demand was held to be insufficient to enable the plaintiff to recover the articles which were *not* fixtures; having been decided upon other grounds that the fixtures were not recoverable. (y) A demand of payment for goods of which there had been no regular sale, is a good demand to support an action of trover for them; (z) so a demand of "*satisfaction*" has been adjudged to be sufficient for this purpose. (a) If two *distinct* demands be made, one verbally, and the other in writing, at the same time; proof of the verbal demand alone will be sufficient, and no evidence of the written request need be given. (b) A demand in writing, left at the defendant's house, may be sufficient. (c)

5thly. The demand, when necessary, must in general be made ** before the action is brought.* (c¹) Where a declaration is intituled generally of the term, whereby it had implied reference to the first day of the term, and the demand was made subsequently to that day, but before the issuing of the writ, evidence was received of the prior issuing, in order to show that the demand was made previously to the suing out of the writ. (d) But as the refusal is not *of itself* a conversion, but is merely presumptive evidence of it, it ought to be left to the jury whether a refusal upon a demand made after the action is brought is evidence of a prior conversion. (e) There must be evidence that the defendant received or had possession of the

(x) The demand should be *absolute*, and not qualified with *conditions*. Thus in trover for a gun, where the demand required a delivery of the gun "in the same plight as it was in when delivered to the defendant;" and the defendant in answer said the gun had burst, and he would rather pay ten times the value than repair it; it was held that this demand and answer was not evidence of a conversion. *Rushworth v. Taylor*, 12 L. J. R. N. S. Q. B. 80. Neither should the demand be too large, and of more things than could be rightfully claimed, as of seven horses for heriots, when only five were due; although if the *refusal* was not on that ground, but on a denial of the lord's right to *any* heriot, the demand might perhaps be sufficient. *Abington v. Lipscombe*, 1 G. & D. 233. In considering the sufficiency of the demand, the nature of the refusal, and the conduct of the defendant, is to be taken into consideration. *Ib.* [The person making the demand need not exhibit his title to the property as a part of his demand. *Ratcliffe v. Vance*, 2 Rep. Const. Ct. 239.]

(y) *Colegrave v. Dias Santos*, 2 B. & C. 76; 3 D. & R. 255, S. C.

(z) *Thompson v. Shirley*, 1 Esp. 31.

(a) *Rokeby's case*, Clayt. 122, mentioned in *Thompson v. Shirley*, 1 Esp. 31.

(b) *Smith v. Young*, 1 Campb. 439.

(c) *Logan v. Houlditch*, 1 Esp. 22.

(c¹) [*Storm v. Livingston*, 6 John. 44; if the defendant on the demand delivers the property held by him lawfully, no damages can be recovered of him in an action of trover. *Chandler v. Partin*, 2 Rep. Const. Ct. 72; *Quay v. M'Ninch*, 2 Rep. Const. Ct. 78. The demand to be effectual must have been made after the plaintiff's right to possession has accrued. *Hagar v. Randall*, Maine, 439.]

(d) *Morris v. Pugh*, 3 Burr. 1242. declarations are now entitled of the day on which they are filed or delivered, and the date of the writ appears on the nisi per record.

(e) Per Lord Mansfield, *Morris v. Pugh*, 3 Burr. 1243; *Wilton v. Grindlestone*, 5 Ald. 847; 1 D. & R. 488, S. C.; [*Jessey v. Miller*, 2 Abb. (N. Y.) App. Dec. 449.]

goods before the commencement of the action, and the plaintiff show that they then were his property, it is perhaps not an unfair *presumption* that the refusal to restore the goods, though after the action brought, was but a reassertion of a preëxisting adverse claim to them; and, therefore, until rebutted, even such refusal may be evidence that the defendant originally took or held the goods tortiously, or upon a claim of ownership inconsistent with and opposed to the plaintiff's right.

6thly. The refusal to deliver goods upon demand thereof will not necessarily in all cases constitute a conversion, unless the party refusing *have it in his power* to deliver up the goods detained, and the refusal be made in a distinct unqualified manner. (e¹) Where a deed was demanded from the defendant, who said he would not deliver it up, but that it was then in the hands of his attorney, who had a lien upon it, this refusal was held to be not sufficient evidence of a conversion; and Lord Ellenborough said, that the defendant would have been guilty of a conversion if it had been in his power, but the intention was not enough. (f) So likewise a refusal upon demand is no evidence of conversion, if the party *bond fide* and reasonably refuse, on the ground of his not being satisfied that the party making the demand is the real owner of the goods, (g) or properly authorized by the real owner to receive then; (h) nor is

6. Of the refusal.

(e¹) [2 Greenl. Ev. §§ 644, 645; Johnson v. Couillard, 4 Allen, 446; Bowen v. Sanborn, 1 Allen, 389; Gilmore v. Newton, 9 Allen, 171; Wellington v. Wentworth, 8 Met. 548; Simpson v. Carleton, 1 Allen, 109; Davies v. Vernon, 6 Ad. & El. N. S. 443; Cancee v. Spanton, 7 M. & G. 903; Robinson v. Hartidge, 13 Florida, 501; Hagar v. Randall, 62 Maine, 439; Boobier v. Boobier, 39 Maine, 406. The refusal to be effectual must be of a demand made after the plaintiff's right to possession has accrued; a refusal to comply with a premature demand of an article is no evidence of an intention to convert it. Hagar v. Randall, 62 Maine, 439. But an unconditional refusal to deliver up a chattel, upon the demand of a person having an immediate right of possession, is such evidence of a conversion that trover will lie although the chattel is at a great distance from the place of demand. Clark v. Hale, 34 Conn. 398. See Fifield v. Maine Central R. R. Co. 62 Maine, 77.]

(f) Smith v. Young, 1 Campb. 439. See Canot v. Hughes, 2 Bing. N. C. 448. But setting up a *jus tertii*, or keeping goods in order to maintain the title of a third party, is evidence of a conversion. Per Parke B. Atkinson v. Marshall, 12 L. J. R. N. S. Ex. 117. See, also, Catteral v. Kenyon, 2 G. & D. 546. Detaining goods under a pretext which, if just and true, would not amount to a justification, is a conversion. Per Lord Abinger C. B. Atkinson v. Marshall, *supra*.

(g) Green v. Dunn, 3 Campb. 215; Isaack v. Clark, 2 Bulst. 312; Mills v. Ball, 2 B. & P. 464; [Sargent v. Gile, 8 N. H. 325; Leighton v. Shapley, 8 N. H. 359; Robinson v. Burleigh, 5 N. H. 225; Fletcher v. Fletcher, 7 N. H. 452; Dowd v. Wadsworth, 2 Day, 130; Carroll v. Mix, 51 Barb. 212; Blakenship v. Berry, 28 Texas, 448; O'Connell v. Jacobs, 115 Mass. 21; McEntee v. New Jersey Steamboat Co. 45 N. Y. 34.] If the defendant refuse to deliver the goods on the ground that they are in the custody of the law under a process against a third party, this is no evidence of a conversion. Verral v. Robinson, 2 Cr., M. & R. 495. As to the refusal of a pawnbroker to return pledges on the ground of a declaration under the pawnbrokers' act (39 & 40 Geo. 3, c. 99, s. 16), see Vaughan v. Watt, 6 M. & W. 492.

(h) Solomons v. Dawes, 1 Esp. 83; Gunton v. Nurse, 5 Moore, 259; [Dent v. Chiles, 5 Stew. & P. 383; Watt v. Porter, 2 Mason, 77.] Where a deputy vice admiral, who received an anchor and hawser, alleged to have been *left* at sea, from the finder, refused on application by the real owner to deliver them up until the salvage was paid, or security given for the payment of it, it was held that this was a conversion; but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. Clark v. Chamberlain, 2 M. & W. 78.

it sufficient evidence of a * conversion by a servant of the owner of goods demanded, that he refused to give them up until he could consult his master, and obtain his directions to deliver them. (i) Where the vendor of goods shipped the same on board a ship by the order of the vendee, and the captain by his bill of lading undertakes to deliver them to the consignee; and the vendee having become bankrupt, the vendor demanded the goods of the captain; the refusal by the latter, who alleged that he had signed a bill of lading to deliver the goods to another, was held to be sufficient evidence of a conversion. (k) And where tobacco was pledged by an agent who had purchased in his own name for his principal, the refusal of the pawnbroker to deliver the tobacco to the principal upon demand made by him was deemed a conversion.

If the demand be not made upon the defendant himself, but merely left at his house during his absence, it appears that a reasonable time and opportunity to restore the goods should be suffered to elapse, before the defendant's non-compliance with the demand can be treated as a refusal amounting to a conversion. (m) The non-compliance with the demand after a reasonable opportunity to obey it has been afforded, is tantamount to a refusal, and is presumptive evidence of conversion, and throws upon the defendant the burden of rebutting the presumption, and explaining that the omission to deliver up the goods is not in law a conversion: as that being a carrier the defendant lost the goods, &c. (m')

When it is doubtful whether the evidence will establish a conversion so as to support a count in trover, a count in case for negligence &c. should be added, if there be any proof to support it. If there have been a conversion, trover lies, although the goods converted afterwards restored to the owner, for the restoration only goes in mitigation of damages. (n)

We have seen that for a wrongful taking of goods trover is in general

(i) *Alexander v. Southey*, 5 B. & Ald. 247; [*Shotwell v. Few*, 7 John. 302; 2 Greenl. Ev. § 645; *Carey v. Bright*, 58 Penn. St. 70; *Hager v. Randall*, 62 Maine, 439.]

(k) *Thompson v. Trail*, 6 B. & C. 36; 8 D. & R. 31, S. C.

(m) See *Gibbs v. Stead*, 8 B. & C. 528; [*White v. Demary*, 2 N. H. 546.]

(m') [See *Thompson v. Rose*, 16 Conn. 71. "If a man has possession of my chattel and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use, which at all times and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether." Alderson

B. in *Fouldes v. Willoughby*, 8 M. & 548, 549.]

(n) 1 Rol. Abr. 5, L. pl. 1; *Baldwin v. Cole*, 6 Mod. 212; Bul. N. P. 46; *Bac. Trover*, D. Accord, A.; *Wyatt v. Blad*, Campb. 396; [*Murray v. Burling*, 10 J. 172; *Bristol v. Burt*, 7 John. 154; *Shotwell v. Wendover*, 1 John. 65; *Green v. Bank v. Leavitt*, 17 Pick. 1; *Gibbs v. Ch*, 10 Mass. 125, 128; *Wheelock v. Wright*, 5 Mass. 104; *Yale v. Saunders*, Vt. 243; *Rank v. Rank*, 5 Barr, 211. If the taking of the property was wrongful, and action of trover has been commenced, plaintiff cannot be compelled to receive back the property in mitigation of damages. *Green v. Sperry*, 16 Vt. 390; so if the property be essentially injured. *Hart v. Skinner*, 16 Vt. 168.]

eral a concurrent remedy with trespass; (o) but the converse does not hold, for trover may often be brought where trespass cannot; as where goods are lent or delivered to another to keep, and he refuse to deliver them on demand, trespass does not lie, but the proper remedy is trover. (p) So where the taking is lawful or excusable, trespass cannot in general be supported, but the action must be trover; as where a sheriff, after a secret act of bankruptcy, seizes and sells goods under an execution against the bankrupt. (q)

When optional to bring trover or trespass.

* The declaration in this action should state that the plaintiff was possessed of the goods (q¹) (avoiding repetition and unnecessary description) *as of his own property*, (q²) and that they came to the defendant's possession by *finding*, (q³) but the omission of the former words is not material after verdict; (r) and the finding is not traversable. (s) As the *conversion* is the gist of the action, it must necessarily be stated in the declaration. It is simply averred that the defendant "converted the goods to his own use." The usual *plea* was the general issue, not guilty of the premises; (t) under which any defence upon the merits, except the statute of limitations, might formerly be given in evidence. But the pleading rules, Hil. T. 4 W. 4, now require a *special plea* in almost every case. (u) The points relating to the pleadings in this action will be more fully stated hereafter. The jury may, in trover against the sheriff for a wrongful sale, allow him expenses of sale if reasonable. (x) The judgment (x¹) is

(o) *Ante*, 172; *Bishop v. Vicountess Montague*, Cro. Eliz. 824; 2 Saund. 47 o; but see note (c), *ante*, 172, and the case of *Fouldes v. Willoughby*, 8 M. & W. 540, there referred to *contra*.

(p) *Put v. Rawsterne*, Sir T. Raym. 472; 2 Saund. 47 p.

(q) *Cooper v. Chitty*, 1 Burr. 20; *Smith v. Miles*, 1 T. R. 475; 2 Saund. 47 p; *Wyatt v. Blades*, 3 Campb. 396; *Stephens v. Elwall*, 4 M. & Sel. 260; 1 M. & P. 556; *Price v. Helyar*, 4 Bing. 597.

(q¹) [In trover for bank bills, a description of them as "certain current bank bills representing in all one hundred and fifty dollars in money, and of the value of one hundred and fifty dollars," is good after verdict. *Colebrook v. Merrill*, 46 N. H. 160.]

(q²) *Swier v. Holliday*, 1 Hemp. 160.]

(q³) [This form of declaring in trover is abolished in Massachusetts, Genl. Sta. c. 129, § 2, div. 8; *ante*, 164, note.]

(r) *Maynard v. Bassett*, Moore 691; *Jones v. Winckworth*, Hardr. 111; *Hudson v. Hudson*, Latch, 214; 2 Saund. 47 n. *Aliter*, on judgment by default, *Swallow v. Ayncliff*, B. R. Mich. T. 2 Geo. 2, MS.; *Salw. N. P. Trover*, III. note (11).

(s) *Ante*, 164; *Mills v. Graham*, 1 New R. 140.

(t) *Bul. N. P.* 48.

(u) See *post*, chapter on Pleas.

(x) *Clark v. Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 5 Tyrw. 233, S. C.

(x¹) [An unsatisfied judgment in trover does not pass the property, and is a mere assessment of damages on payment of which the property vests in the defendant. *Brinsmead v. Harrison*, L. R. 6 C. P. 584; 2 Kent, 388; *Parker C. J.* in *Hyde v. Noble*, 13 N. H. 494, 502; *Lovejoy v. Murray*, 3 Wallace, 1, 16; *Hepburn v. Jewell*, 5 Harr. & J. 211; *Osterhout v. Roberts*, 8 Cowen, 43; *Jones v. M'Neil*, 2 Bailey (S. Car.), 466; *Prentiss J.* in *Sanderson v. Caldwell*, 2 Aiken, 203; *Sharp v. Gray*, 5 B. Monr. 4; *Benj. Sales* (1st Am. ed.) § 49; *Chinery v. Viall*, 5 H. & N. 288. But there are cases which hold the contrary, viz. that a judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff against another person, for taking the same goods. *White v. Philbrick*, 5 Greenl. 147; *Floyd v. Browne*, 1 Rawle, 121; *Fox v. Northern Liberties*, 3 Watts & S. 107. Such judgment transfers the title in the property converted to the defendant. *Foreman v. Neilson*, 2 Rich. Eq. 287. The defendant's title under satisfaction of a judgment in trespass for a conversion of chattels takes effect by relation from the time of the conversion. *Smith v. Smith*, 51 N. H. 571.]

for *damages*, (y) and costs if the verdict be for more than 40s. but the plaintiff is not, it seems, entitled to costs unless he covers 40s. damages or the judge certifies that the action was really brought to try a right, or that the grievance was wilful and malicious. (z)

III. REPLEVIN. (a)

By *replevin* the owner of goods unjustly taken and detained from him (a¹) may regain possession thereof (a²) through the medium of and upon application to the sheriff, upon giving

(y) The damages to be recovered are to be equal to the value of the article converted at the time of the conversion; *Mercer v. Jones*, 3 Campb. 477; or it seems the jury may give as damages the value at any subsequent time. *Greening v. Wilkinson*, 1 C. & P. 626. Special damage may be recovered, if laid in the declaration. *Davis v. Oswell*, 7 C. & P. 804; [2 Greenl. Ev. § 649; *Bodley v. Reynolds*, 10 Jur. 310.] And the jury may give damages in the nature of interest, above the value of the goods, from the time of conversion, 3 & 4 W. 4, c. 42, s. 29. [It is now well established that the measure of damages in trover is the value of the property converted at the time of the conversion, with interest from that period. *Pierce v. Benjamin*, 14 Pick. 356; *Parks v. Boston*, 14 Pick. 198, 206, 207; *Stone v. Codman*, 15 Pick. 297, 300; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Weld v. Oliver*, 21 Pick. 550; *Johnson v. Sumner*, 1 Met. 172; *Barnes v. Bartlett*, 15 Pick. 71, 78; *Kennedy v. Whitwell*, 6 Pick. 463; *Watt v. Porter*, 2 Mason, 77; *Lillard v. Whittaker*, 3 Bibb, 92; *Matthews v. Menedger*, 2 McLean, 145; *Washington Ice Co. v. Webster*, 62 Maine, 362; *Hepburn v. Sewell*, 5 Harr. & J. 212; *Burney v. Pledger*, 3 Rich. 191; *Kingsbury v. Smith*, 13 N. H. 109; *Robinson v. Hartridge*, 13 Florida, 501; *Stollenwerck v. Thacher*, 115 Mass. 224; *Robinson v. Burrows*, 48 Maine, 188. The rule of damages for the conversion of a horse and carriage, which have been returned to the owner and received by him, is their market value at the time of the conversion, less their market value at the time of the return. *Lucas v. Trumbull*, 15 Gray, 306. In trover for a note the measure of damages is the amount due on its face unless it is proved to be of less value, *Ingalls v. Lord*, 1 Cowen, 240; and interest from its maturity to the time of conversion, and interest on the aggregate from that time to the time of the verdict. *St. John v. O'Connell*, 7 Porter, 466. See *Romig v. Romig*, 2 Rawle, 241. In measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the

pawnee in the pledge ought to be taken into the account. *Erle C. J.* in *Johnson v. Stiles*, 15 C. B. N. S. 330, 335, and note at the end of the case; *Chinery v. Viall*, 5 H. & N. 288; *Jarvis v. Rogers*, 15 Mass. 389; *Bridges v. Kendall*, 17 Q. B. 937; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Buck v. Welch*, 31 Conn. 339; *Stollenwerck v. Thacher*, 115 Mass. 224. But in New York the rule of damages in trover is the highest value of the property, at any time between the conversion and the day of trial. *Matthews v. Coe*, 56 Barb. 430.]

(z) 3 & 4 Vict. c. 24. See Appendix.

(a) From *re* and *plegiare*, Co. Litt. 146.

(a¹) [In New York the former action of replevin is abrogated, and its place is supplied by an action in the nature of replevin under the Code, § 206 *et seq.*; *Robertson v. Randel*, 3 Sandf. 707; S. C. 5 How. 3; *Nichols v. Michael*, 23 N. Y. 269; *Rock v. Saunders*, 19 Barb. 481. But the former practice may be resorted to in all cases where no provision is made by the code. *Bray v. Burnap*, 16 Barb. 314; *Wilson v. Wheeler*, Code R. N. S. 402; S. C. 6 E. Pr. 49. Under the provisions of the Code (§ 206 *et seq.*), an action of this character may be maintained against a party defendant, notwithstanding he may have wrongfully parted with the possession of the property claimed before the action was commenced. *Nichols v. Michael*, 23 N. Y. In such a case, the plaintiff can recover the value of the goods. *Ellis v. Lerner*, 56 Barb. 539. An unlawful interference with the property of another, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain the action. *Latimer v. Wheeler*, 1 Keyes, 468; S. C. 6 Barb. 485. The action may be maintained by the owners of chattels, against one who has no possession or connection with the other than having directed a sheriff to take an execution in his favor upon them. *Knapp v. Smith*, 27 N. Y. 277. In Massachusetts and some other states, replevin lies for wrongful detention as well as for a wrongful taking of personal property. Badger

(a²) [Replevin is strictly a possessory action. *Foster J.* in *Mitchell v. Roberts*, 50

N. H. 488; *Stephenson v. Taylor*, 2 Mass. N. P. 95.]

him security to prosecute an action against the person who seized. It is principally used in cases of distress, but it seems that it may be brought in any case where the owner has goods taken from him by another. (b) Replevin was formerly commenced by writ issuing out of the court of chancery, directed to the sheriff. In modern practice, however, the course adopted is to make a plaint to the sheriff upon the statute of Marlbridge, to have the goods replevied, that is, re-delivered, upon giving security to prosecute an action against the distrainer, for the purpose of trying the legality of the distress; and if the right be determined in favor of the distrainer, to return the goods; and in cases of distress for rent, also giving a bond with two sureties

Phinney, 15 Mass. 359; Baker v. Fales, 16 Mass. 147; Marston v. Baldwin, 17 Mass. 606; Hiley v. Stubbs, 5 Mass. 284; Esson v. Tarbell, 9 Cush. 407; Rich v. Ryder, 105 Mass. 310. So in Mississippi. Burrage v. Nelson, 48 Miss. 237. In Ohio, Logan v. Stoutenburgh, 7 Ohio, 133. In Maine, replevin lies wherever trespass or trover would lie for the unlawful conversion of goods. Seaver v. Dingley, 4 Greenl. 306; Sawtelle v. Rollins, 23 Maine, 196; Galvin v. Bacon, 2 Fairf. 28. In Pennsylvania replevin lies wherever a man claims goods in possession of another. Weaver v. Lawrence, 1 Dall. 156; Mead v. Kilday, 2 Watts, 110. So in Maryland. Cullum v. Beavans, 6 Harr. & J. 469; and in Delaware, Clark v. Adair, 3 Harr. 113. In Indiana this action lies whenever any person tortiously takes and unlawfully detains, or unlawfully acquires and unlawfully detains, the goods of another. Chinn v. Russell, 2 Blackf. 174; Daggett v. Robbins, 2 Blackf. 415; Walpole v. Smith, 4 Blackf. 304. In Missouri replevin is an action strictly in tort, and can be sustained only where trespass will lie for a wilful and tortious taking. Rector v. Chevalier, 1 Misson. 345; Crocker v. Mann, 3 Misson. 472; but see Skinner v. Stense, 4 Misson. 93. So in Illinois, Wright v. Armstrong, Breece, 130. As to Wisconsin, Dudley v. Ross, 27 Wisc. 679. It lies in New Jersey where goods are so taken as to entitle the owner or possessor to an action of trespass. Bruen v. Ogden, 6 Halst. 370. To sustain replevin in South Carolina, the plaintiff must prove a clear and unequivocal possession and an actual taking. Byrd v. O'Hanlin, 1 Const. Ct. Rep. 401. In Vermont replevin lies only under statute, and not as a suit to try the right to property. Miller v. Warner, Brayt. 168; Taggart v. Hart, Brayt. 215; Bulkly v. Smith, Brayt. 38. In Kentucky it will not lie for taking property held adversely to the plaintiff. Dillon v. Wright, 7 J. J. Marsh. 10. In Alabama, see Smith v. Crocket, Minor, 277. The operation of this writ is regulated entirely by statute, and very much restricted, in Connecticut. Watson v. Watson, 9 Conn.

140; Howard v. Crandall, 30 Conn. 213. It is regulated by statute in Iowa, Revision of Laws, 1860, c. 142. In Massachusetts replevin will not lie for goods which have been attached by the defendant as the property of the plaintiff in replevin. Flagg v. Tyler, 3 Mass. 303. So in Indiana, Chinn v. Russell, 2 Blackf. 174; Daggett v. Robbins, 2 Blackf. 415. Nor will it lie in Massachusetts unless the defendant has wrongfully taken or wrongfully detained the goods. Simpson v. M'Farland, 18 Pick. 427. It cannot be sustained against a person who has no possession of the goods to be replevied; replevied goods cannot be restored and returned to a person from whom they were never taken; and such person cannot rightfully be made a defendant, sole or joint, in an action of replevin. Metcalf J. in Richardson v. Reed, 4 Gray, 444; Haughton v. Newberry, 69 N. Car. 436; Grace v. Mitchell, 31 Wisc. 533; Hall v. White, 106 Mass. 599; Mitchell v. Roberts, 50 N. H. 486, 490; Johnson v. Garlick, 25 Wisc. 705; but see Allen v. Crary, 10 Wend. 349; Stewart v. Wells, 6 Barb. 79; Nichols v. Michael, 23 N. Y. 269; Ellis v. Lerner, 48 Barb. 539; Knapp v. Smith, 27 N. Y. 277; Dunham v. Troy Union R. R. Co. 1 Abb. (N. Y.) App. Dec. 565. A creditor at whose suit an attachment is made of goods not the property of his debtor, is not liable in replevin for the goods attached, either alone or jointly with the attaching officer. Richardson v. Reed, 4 Gray, 444; Tripp v. Leland, 42 Vt. 487. Nor is a pound-keeper who merely receives from a field driver and impounds cattle taken up by him illegally as going at large without a keeper, although the pound-keeper refuses to give them up until his fees and those of the field driver are paid. Folger v. Hinckley, 5 Cush. 264. Where one is interested jointly with another in the detaining and impounding of a cow taken *damage feasant*, as a mode of recovering damage done by her, his assent to such detention for that purpose is sufficient to make him liable in replevin. Riley v. Noyes, 44 Vt. 455.]

(b) See *post*, 183.

to the same effect. (c) *In the first instance, the plaint is levied in the sheriff's county court, in pursuance of the condition of the replevin bond, but the action is usually removed into and prosecuted in one of the superior courts. (c¹)

The action of replevin, it is said, is of two sorts, namely, in *detinet*, or the *detinuit*; the former, where goods are still detained by the person who took them, to recover the value thereof and damages; and the latter, as the word imports, when the goods have been delivered to the party. (d) But the former is now obsolete, and there does not appear in any of the books any proceeding of replevin which has not commenced by writ, requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by the plaintiff in the sheriff's court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint: both which modes of proceeding are *in rem*, i. e. to have the goods again. (e) Therefore replevin is not an action within the statute (f) which protects constables, &c. acting under a magistrate's warrant, from any action, until demand made or left at their usual place of abode, &c. by the party intending to bring such action. (g) In the present action in the *detinuit*, the plaintiff can only recover damages for the taking of the goods, and for the detention till the time of the replevy, not the value of the goods themselves. (h) We will consider this action with reference, 1st, to the *thing* taken; 2dly, the *property* therein; and, 3dly, the nature of the *injury*.

Replevin can only be supported for taking personal chattels, not for taking things attached to the freehold, (h¹) and which

(c) Bl. Com. 147, 148. See, generally, Wilkinson on Replevin.

(c¹) [In *Maxham v. Day*, 16 Gray, 214, 215, Bigelow C. J. said: "Replevin at common law is founded on the wrongful taking of personal property; and is a remedy, by which the person from whom goods or chattels are taken, may be restored to the possession of them until the question of title can be judicially tried and determined." "In our practice it is often resorted to, instead of an action of trespass or trover, as a simple and convenient method of trying the title to goods and chattels. It is purely a personal action." "Its peculiar and distinguishing characteristic is, that it takes the property in controversy from him who by his possession of it is *prima facie* its owner, and places it in the hands of the plaintiff, substituting in its stead a personal security in the form of a bond to the defendant for its return if such shall be the final judgment of the court." In *Lathrop v. Cook*, 14 Maine, 415, Shepley J. said: "The object of the writ of replevin is to redeliver

goods and chattels, or to restore the possession of them, to the person who has the legal or special property in them."]

(d) 1 Saund. 347 b, note (2); Bull. 52; Com. Dig. Pleader, 3 K. 10; [Pierce v. Van Dyke, 6 Hill, 613.]

(e) Per Lord Ellenborough C. J. *Fletcher v. Wilkins*, 6 East, 286. [In *Pennsylvania* replevin is not altogether a proceeding *in rem*, but against the defendant in the person, with a summons to appear. *Bower v. Tallman*, 5 Watts & S. 556. In New Hampshire it is a proceeding *in rem*. *Foster J. in Mitchell v. Roberts*, 50 N. H. 489.]

(f) 24 Geo. 2, c. 44.

(g) *Fletcher v. Wilkins*, 6 East, 283.

(h) 1 Saund. 347 b, note (2); *Peterson v. Duke*, Lutw. 1150, 1151.

(h¹) [Vause v. Russel, 2 McCord, De Mott v. Hagerman, 8 Cowen, 220; *son v. Stout*, 17 John. 116; *Brown v. Wallis*, 115 Mass. 156, 158; *Huebner v. McHenry*, 29 Wisc. 655.]

in law considered fixtures, (i) and cannot be delivered to the distrainer upon a writ of *retorno habendo*. Hence it does not lie for trees or timber growing, (i¹) but it lies for removable or tenant's fixtures; (j) and the general rule appears to be, that replevin lies for anything that may by law be distrained. (k) Whether it lies for personal property which cannot be distrained (as title-deeds, money not in a bag, or a bill of exchange, &c.), seems to depend upon the question whether the remedy by replevin extends to all unlawful takings. (l)

1st. The property affected.

To support replevin, the plaintiff must, at the time of the caption, have had either the general property in the goods taken, or a special property therein. (m) Several persons having separate and distinct *interests in the property distrained, as

2dly. The plaintiff's interest.

(i) 2 Saund. 84; [Brown v. Wallis, 115 Mass. 156, 158.]

(i¹) [But if they be cut down by a stranger, who convert them into posts and rails, the action may be maintained. Snyder v. Vaux, 2 Rawle, 423; Cresson v. Stout, 17 John. 116. See Powell v. Smith, 2 Watts, 126; Johnson v. Hunt, 11 Wend. 137; Nichols v. Dewey, 4 Allen, 386; Raymond v. Andrews, 6 Cush. 265. So where timber trees are cut for sale by the tenant for life only on the land, they become the personal property of the remainder-man, and he may replevy them. Richardson v. York, 14 Maine, 216. Replevin lies for hay wrongfully cut by the defendant on the plaintiff's premises. Nichols v. Dewey, 4 Allen, 386. So for logs so cut. Stearnes v. Raymond, 26 Wisc. 74.]

(j) *Quere*, see Darby v. Harris, 1 G. & D. 234, which decides that fixtures cannot be distrained for rent; and see the next note; but see post, 183.

(k) Bac. Abr. Replevin and Avowry, F.; Com. Dig. Replevin, A.

(l) See post, 183; and see notes to Roberts v. Snell, 1 M. & Gr. 578. [Replevin lies for the recovery of a book of parish records. Sawyer v. Baldwin, 11 Pick. 492; Sudbury v. Stearns, 21 Pick. 148. But an article of personal ornament cannot be taken on a writ of replevin from the person of the defendant without his consent. Maxham v. Day, 16 Gray, 213.]

(m) Co. Litt. 145 b. [See Wilson v. Royston, 2 Pike, 315; Walpole v. Smith, 4 Blackf. 304; Broadwater v. Doane, 10 Missou. 277; Tracy v. Warren, 104 Mass. 377; Waterman v. Robinson, 5 Mass. 303; Hallett v. Fowler, 8 Allen, 93. In replevin the title and right of possession of the property are the matters to be tried and determined; its value is not in issue. Thomas v. Spofford, 46 Maine, 408. The plaintiff must maintain his action on the strength of his own title; and if he fails to show title in himself, it is immaterial whether the defendant has or has not any title. Johnson v.

Neale, 6 Allen, 227; Stanley v. Neale, 98 Mass. 343.] What is considered a general or special ownership or interest to enable a party to maintain trover, ante, 167, 169. The same rules hold in replevin in this respect. *Quere*, whether mere possession is enough to support replevin. Templeman v. Case, 10 Mod. 25. [Replevin lies only in behalf of one entitled to possession, against one having at the time the suit is begun, actual or constructive possession and control of the property. Mitchell v. Roberts, 50 N. H. 986; Richardson v. Reed, 4 Gray, 442; Brockway v. Burnap, 12 Barb. 347; Knapp v. Smith, 27 N. Y. 281; King v. Orser, 4 Duer, 431; Roberts v. Randel, 3 Sandf. 707; Coffin v. Gephart, 18 Iowa, 256. A mere deposit by a person who has himself no property in the goods, does not give the depositary any right to replevy them; and it is said to appear very questionable, whether, on a mere naked bailment for safe keeping, the bailee can maintain replevin in Harrison v. M'Intosh, 1 John. 380. In other cases it has been directly held that a receiptor to an officer, or any other bailee, for safe keeping merely, or a mere servant, who has charge of goods as such only, has not sufficient interest to maintain replevin. Warren v. Leland, 9 Mass. 265; Perley v. Foster, 9 Mass. 112; Waterman v. Robinson, 5 Mass. 303; Harris v. Smith, 3 Serg. & R. 20; Dunham v. Wyckoff, 2 Wend. 280; Miller v. Adsit, 16 Wend. 335. But an officer may maintain replevin against a receiptor who refuses to deliver up the goods intrusted to him. Dezell v. Odell, 3 Hill, 215. Replevin lies by the mortgagee of a chattel against one tortiously taking it from the possession of the mortgagor, default in payment having been made by the mortgagor. Fuller v. Acker, 1 Hill, 473; Esson v. Tarbell, 9 Cush. 412. See M'Isaacs v. Hobbs, 8 Dana, 268. But where it is agreed that the mortgagor shall retain possession for a stipulated time, the mortgagee cannot maintain replevin therefor

if the goods of A. together with other goods of B. be distrained, c. not join in this action; (n) but joint tenants and tenants in common may and should join. (o) If the goods of a *feme sole* be taken, and afterwards she marry, her husband alone may have a replevin; (p) and if the goods be taken after marriage, and the husband and wife join in replevin, and after verdict a motion is made in arrest of judgment on the ground of their joining, it will be presumed, if nothing appear upon the record to the contrary, that the husband and wife were jointly possessed of the goods before marriage, and that the goods were taken before marriage, in which case they might join. (q) In replevin an avowry for rent admits the property of the goods to be in the plaintiff; but if the plaintiff's plea shows property in a third person, the action cannot be supported. Therefore, if to an avowry for rent in replevin, the plaintiff pleads that she was a married woman when the rent accrued due, she cannot maintain replevin because it must be intended that the husband continued alive until the time of the distress taken, and that therefore the goods could not be the plaintiff's but her husband's, and so she has no ground of action. (r) The husband and wife may join in replevin of goods where the wife has as executrix, (s) but in this, as in all other instances where the wife is joined, the declaration must show the wife's interest in the property as the reason for joining her in the action. (t) Executors may have replevin of goods taken in the lifetime of the testator. (u) If the plaintiff has not the immediate right of possession, (u¹) replevin cannot be supported, but the party must proceed by action on the case. (x) The defendant cannot, under the general

until such time has expired. *Ingraham v. Martin*, 15 Maine, 373; *Eason v. Tarbell*, 9 Cush. 412. An auctioneer has an interest sufficient to maintain replevin. *Tyler v. Freeman*, 3 Cush. 261; *Rich v. Ryder*, 105 Mass. 310.]

(n) Co. Litt. 145 b.

(o) Bul. N. P. 53. [One joint owner of a chattel cannot maintain replevin against his co-owner. *M'Elderry v. Flannagan*, 1 H. & Gill, 308; *Prentice v. Ladd*, 12 Conn. 331; *Barnes v. Bartlett*, 15 Pick. 71; *Wills v. Noyes*, 12 Pick. 324; *Rich v. Ryder*, 105 Mass. 308. See *Newton v. Gardner*, 24 Wisc. 232; *Hart v. Fitzgerald*, 2 Mass. 509, that replevin will not lie for part of a chattel; *Gardner v. Dutch*, 9 Mass. 427; *D'Wolf v. Harris*, 4 Mason, 515; *M'Arthur v. Lane*, 15 Maine, 245; but see *Bostick v. Brittan*, 25 Ark. 482; *Smith v. Wood*, 31 Md. 293.]

(p) F. N. B. 69; [ante, 32, 82.]

(q) *Bourn v. Mattaire*, Ca. temp. Hardw. 119; ante, 83.

(r) *Clarke v. Davies*, 7 Taunt. 72.

(s) *Bro. Baron and Feme*, pl. 85.

(t) *Serres v. Dodd*, 2 New Rep. 405; ante, 82, 83.

(u) *Bro. Rep.* 59; *Arundell v. Trevill*, Sid.

82; [*Maxham v. Day*, 1c Gray, 213, 215].

(u¹) [*Wheeler v. Train*, 5 Pick. 255; *Collins v. Evans*, 15 Pick. 63; *Wade v. Mason*, 12 Gray, 335. The plaintiff must have a right to the possession of the property at the time of the taking or detention. *Gates v. Gates*, 15 Mass. 310; *Collins v. Evans*, 15 Pick. 63; *Chinn v. Russell*, 2 Blackf. 1; *Walpole v. Smith*, 4 Blackf. 304; *Ingraham v. Martin*, 15 Maine, 373; *Wade v. Mason*, 12 Gray, 335; *Smith v. Williamson*, 1 Harv. J. 147; but see *Pratt v. Parkman*, 24 Pick. 42. But possession itself is not necessary. *Baker v. Fales*, 16 Mass. 147; *Pratt v. Parkman*, 24 Pick. 42. It is sufficient if the plaintiff have a right to immediate possession. *Bostick v. Brittan*, 25 Ark. 482. The party to whom the property is to be delivered by terms of a bill of lading has the legal right to possession, and may maintain replevin therefor. *Powell v. Bradlee*, 9 Gill & 220. A person having only an equitable title cannot maintain replevin for it against the legal owner. *Clapp v. Shepard*, 2 Mass. 127.]

(x) *Gordon v. Harper*, 7 T. R. 9.

issue, *non cepit*, dispute the plaintiff's property, which must be denied by a special plea. (y)

With respect to the *nature of the injury*, it has been said that replevin lies only in one instance of an unlawful taking, ^{3ally. The} namely, that of a wrongful *distress* of cattle damage feasant, ^{injury.} or of chattels for rent in arrear; (z) but, as before observed, it appears that this action is not thus limited, and that if goods be taken illegally, (z¹) though not as a distress, replevin may be supported; (a) and it is often judicious to adopt it, or an action of detinue, in order to obtain possession of the * goods themselves. (b) Replevin is, however, now seldom brought but for distresses for rent, damage feasant, *poor's rate*, &c. (c) It may be brought to try the legality of a distress for rent, provided there were no sum whatever in arrear; (d)

(y) Bul. N. P. 54 a; [Mitchell v. Roberts, 50 N. H. 486; Pangburn v. Partridge, 7 John. 140; Simpson v. McFarland, 18 Pick. 427; Chase v. Allen, 5 Allen, 599; McFarland v. Barker, 1 Mass. 135. At common law special justification cannot be shown under a plea of *non cepit*. McFarland v. Barker, 1 Mass. 153.]

(z) 3 Bl. Com. 146; [Reist v. Heilbrenner, 11 Serg. & R. 131; Talvande v. Cripps, 2 McCord, 164.]

(z¹) [Pangburn v. Partridge, 7 John. 140; Isley v. Stubbs, 5 Mass. 283, 284; Haythorn v. Rushforth, 4 Harr. 16; Cummings v. McGill, 2 Murph. 357. A person obtaining goods by false pretences is guilty of a tortious taking, and no demand is necessary to enable the person defrauded to maintain replevin. Ayres v. Hewett, 19 Maine, 281; Wingate v. Smith, 20 Maine, 287; Browning v. Bancroft, 8 Met. 278; Bussing v. Rice, 2 Cush. 48; Blanchard v. Child, 7 Gray, 155; Thurston v. Blanchard, 22 Pick. 18; Farley v. Lincoln, 51 N. H. 577, and cases cited. Replevin is often said to be a remedy coextensive with trespass, but this is not universally true. Pangburn v. Partridge, 7 John. 143; Thompson v. Button, 14 John. 87; Allen v. Cray, 10 Wend. 349; Buffington v. Gerrish, 15 Mass. 156; Badger v. Phinney, 15 Mass. 359, 363; Richardson v. Reed, 4 Gray, 441, 443; Sharp v. Whittenhall, 3 Hill, 576; Brockway v. Burnap, 12 Barb. 351. As to cases where demand is necessary before suit, see White v. Brown, 5 Lansing, 78; Stone v. Perry, 60 Maine, 48; King v. Fitch, 2 Abb. (N. Y.) App. Dec. 508; Appleton v. Barrett, 29 Wisc. 221. A refusal by the owner of a building wherein is furniture belonging to another, to allow the owner to enter the building for the purpose of taking it away, if accompanied by an offer to deliver the furniture at a future time, on demand, is not such a refusal as will form a basis for an action of replevin. Bent v. Bent, 44 Vt. 633. No previous demand is necessary in replevin against one holding

property under a trespasser. Ballou v. O'Brien, 20 Mich. 304. See Homan v. Laboo, 1 Neb. 204. In Lynch v. Beecher, 38 Conn. 490, it was held that, although no demand before suit is necessary to sustain replevin against one who bought the property in controversy fraudulently, or against one who acquired it in bad faith, and without parting with value, from such a purchaser, yet, as against the title of a *bona fide* purchaser for value, a demand before suit must be shown.]

(a) Ex parte Chamberlain, 1 Scho. & Lefr. 320, 324; Vin. Abr. Replevin, B. pl. 2; Le Mason v. Dixon, Sir W. Jones, 173, 174; 6 H. 7, 8, 9; Bishop v. Viscountess Montague, Cro. Eliz. 824; Cro. Jac. 50; Com. Dig. Replevin, A. Action, M. 6; Co. Litt. 145 b. See Wilkinson on Replevin, 2, 3. See the notes to Roberts v. Snell, 1 M. & Gr. 577. See, also, the observation of Lord Ellenborough, in 2 Stark. 288. Replevin lies for *detaining*. See observation of Patteson J. in Evans v. Elliott, 5 Ad. & El. 146. [Replevin will not lie in New Hampshire unless there has been a tortious taking. Woodward v. Grand Trunk Railway Co. 46 N. H. 524; Dame v. Dame, 43 N. H. 37; Smith v. Huntington, 3 N. H. 76; Melcher v. Lamprey, 20 N. H. 403; Osgood v. Green, 30 N. H. 210, 216; Mitchell v. Roberts, 50 N. H. 486; Farley v. Lincoln, 51 N. H. 519. This action will not lie in that state for a mere detention by a common carrier, of goods that came lawfully into his possession. Woodward v. Grand Trunk Railway, *supra*. In Massachusetts, to sustain replevin, there must have been either a tortious taking or tortious detention of the property replevied. Page v. Crosby, 24 Pick. 215; Simpson v. McFarland, 18 Pick. 427; Thayer v. Turner, 8 Met. 551, 552.]

(b) Dore v. Wilkinson, 2 Stark. Rep. 288.

(c) Com. Dig. Action, M. 6; Gins v. Dams, Lutw. 1179. See Sabourin v. Marshall, 3 B. & Ad. 440.

(d) Harrison v. Barnby, 5 T. R. 248, note (c); Cobb v. Bryan, 3 B. & P. 348.

but if any sum, however small, were due, and the distress were for a greater sum, or excessive, in regard to the quantity of goods taken, or otherwise irregular, the remedy must be by action on the case. Replevin lies also for an illegal distress taken damage feasant; when the party in possession of the land has no title thereto this action is preferable to trespass for seizing the cattle, in order to prevent the issue of the title of the party distraining. (*f*) It is also maintained to try the legality of a distress for poor rates; (*g*) or for severalty; (*h*) or for a heriot, &c. (*i*) If a tenant's cattle are wrongfully distrained, and they afterwards return back to the tenant, he may still maintain replevin against the landlord. (*k*) If a superior court award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution, (*k*¹) and if any person should pretend to take out a replevin, the court would commit him for a contempt of their jurisdiction. (*l*) So where goods are taken by way of levy, as for a penalty on a conviction under a statute, generally in the nature of an execution, and unless replevin be granted by the statute, this action will not lie, the conviction being conclusive and its legality not questionable in replevin; (*m*) as on a conviction for deer-stealing. (*n*) So replevin does not lie for goods taken under a warrant of distress granted under the 20 Geo. 2, c. 19, s. 1, for non-payment of laborers' wages. (*o*) Where, however, a special inferior jurisdiction is given to justices, &c. and they exceed it, in some cases replevin lies: as where a magistrate granted a warrant of distress against a person for rates, in respect of lands which the latter did

(*e*) *Ante*, 155.

(*f*) 1 Saund. 346 *e*, note (2).

(*g*) *Dewell v. Marshall*, 3 Wils. 442; 1 Salk. 205; *Milward v. Caffin*, 2 Bl. Rep. 1330; *Pearson v. Roberts*, Willes, 672, note (b); and see *Fawcett v. Fowles*, 7 B. & C. 398; *Cortis v. The Kent Waterworks Company*, 7 B. & C. 338; *Sabourin v. Marshall*, 3 B. & Ad. 440.

(*h*) *Pritchard v. Stephens*, 6 T. R. 522; *Papillon v. Buchner*, Hardr. 478; *Com. Dig. Pleader*, 3 K. 26; *Pearson v. Roberts*, Willes, 672, note (b); and for a highway rate, *Morrell v. Martin*, 6 Bing. N. C. 373; 8 Scott, 688, S. C.

(*i*) *Bishop v. Viscountess Montague*, Cro. Jac. 50.

(*k*) F. N. B. 69.

(*k*¹) [Replevin will not lie in Massachusetts for goods which have been attached by the defendant as the property of the plaintiff in replevin. *Flagg v. Tyler*, 3 Mass. 303; *Perry v. Richardson*, 3 Gray, 216. And the same rule prevails in other states. See *Reynolds v. Sallee*, 2 B. Mon. 18; *Saffell v. Wash*, 4 B. Mon. 92. But it may be maintained by statute in Massachusetts by all persons whose goods are attached on mesne process or taken on execution, except the de-

fendant in the suit. *Genl. Sta. c. 143*, *Tracy v. Warren*, 104 Mass. 377; *Howe v. Freeman*, 14 Gray, 566; *Ilseley v. Stone*, 104 Mass. 230. And the same rule prevails in other states. See *Thompson v. Butt*, 104 Mass. 84; *Hall v. Tuttle*, 2 Wend. 475; *Williams v. Welch*, 5 Wend. 290; *Dunham v. Wyckoff*, 3 Wend. 280; *Hopkins v. Ives*, 44 Miss. 619; *Coombs v. Gordon*, 59 N. H. 111; *Jackson v. Hubbard*, 36 Conn. 111. Replevin will not lie against a receipt for goods, who became such at the request of the defendant in execution, although such goods were taken under the circumstances of the case, and have been maintained against the same. *Chapman v. Andrews*, 3 Wend. 240. The action of replevin is a creature of the statute regulation in Connecticut; and in that state can property levied upon be replevied. *Howard v. Croft*, 39 Conn. 213.]

(*l*) *Gilb. Rep.* 161; *Winnard v. Foster*, 1190; *Cannon v. Smalwood*, 304.

(*m*) *Bac. Abr.* 5th ed. vol. vi. 58, *Replevin*; *Com. Dig. Action*, M. 6.

(*n*) *Rex v. Monkhouse*, 2 Stra. 1184.

(*o*) *Wilson v. Weller*, 1 B. & B. Moore, 294, S. C.

occupy. (p) This action is maintainable for goods distrained under a warrant from commissioners authorized by act of parliament to levy rates for specific local purposes, with power of distress. (q)

* In this action both the plaintiff and defendant are considered as actors; the defendant, in respect of his having made the distress (being a claim of right, and the avowry in the nature of a declaration); (r) and the plaintiff in respect of his action; on which ground principally the distinctions between the pleadings in this action and in that of trespass depend. (s)

The *declaration* in this action, which is local, (s¹) requires certainty in the description of the place, (s²) where the distress was taken; and the description, number, and value of the goods (s³) also must be stated with certainty, although the same strictness does not prevail as formerly. (t) Where the distress was taken for rent, a general *avowry* is given by statute; (u) but in avowries for distresses, taken damage feasant, more certainty is necessary than in a justification in trespass, as the defendant cannot in the former rely on mere possession of the *locus in quo*, but must state his title. (x) The plaintiff cannot *plead in bar de injuriâ* generally, (x¹) but must take issue upon some particular allegation in the avowry. (y) The statute of Anne (z) provides that the plaintiff in

(p) *Pearson v. Roberts*, Willes, 673, note (b); *Milward v. Caffin*, 2 Bl. Rep. 1330.

(q) *Att'y Gen. v. Brown*, 1 Swanst. 304; and see *Fenton v. Boyle*, 2 New Rep. 399.

(r) *English v. Burnell*, 2 Wils. 260; 1 Saund. 347 c, note (7); *Lambert v. Stroother*, Willes, 221.

(s) 1 Saund. 347 b, note (3).

(s¹) [*Sleeper v. Osgood*, 50 N. H. 331; *Robinson v. Mead*, 7 Mass. 353; *Williams v. Welch*, 5 Wend. 290.]

(s²) [*Gardner v. Humphrey*, 10 John. 53; *Strong v. Lawler*, 37 Conn. 177; *Stoker v. Crane*, 46 Missou. 264.]

(s³) [It was held not to be necessary in a writ of replevin, which is directed to a deputy sheriff, to allege the value of the goods to be replevied, in *Pomeroy v. Trimper*, 8 Allen, 398; *Thomas v. Spofford*, 46 Maine, 408.]

(t) 2 Saund. 74 b; *Pope v. Tillman*, 7 Taunt. 642; 1 Moore, 386, S. C. A declaration defective in these particulars is cured by an avowry justifying the taking of the said goods and chattels in the said close in which, &c. *Banks v. Angell*, 3 N. & P. 94; [*Magee v. Siggerson*, 4 Blackf. 70; *Gardner v. Lane*, 9 Allen, 492, 500, 501; *Pomeroy v. Trimper*, 8 Allen, 398; *Onstatt v. Ream*, 30 Ind. 259; *Sayer v. Blain*, 44 N. Y. 443; *Waldron v. Leach*, 9 R. I. 588. A declaration in replevin for sundry goods described in a schedule annexed is improper. *Parsons C. J. in Kinder v. Shaw*, 2 Mass. 398; *Parker C. J. in Rider v. Robbins*, 13 Mass. 285; *Seeley v. Gwillim*, 40 Conn. 106.

If mill logs be fraudulently converted into boards before the writ of replevin is sued out, the owner should describe the property as boards, in his writ. He cannot describe it as mill logs and recover boards. *Wingate v. Smith*, 20 Maine, 287; *Snedekar v. Quick*, 6 Halst. 179. If in such a case the defendant has intermixed the boards with a pile of his own, so that they cannot be distinguished, with the fraudulent intent of thereby depriving the plaintiff of his property, the owner of the logs thus taken may maintain replevin for the whole pile of boards. *Wingate v. Smith*, 20 Maine, 287. See *Stearnes v. Raymond*, 26 Wisc. 74; *Schulenburg v. Harri-man*, 2 Dill. 398; *Simpson v. Carleton*, 1 Allen, 109. A writ of replevin should not include any property not taken under it. *Sanderson v. Marks*, 1 Harr. & J. 252. The declaration should allege a general or special ownership. *Schofield v. Whitelegge*, 12 Abb. Pr. N. S. 320; S. C. 49 N. Y. 259; *Sturman v. Stone*, 31 Iowa, 115.]

(u) 11 Geo. 2, c. 19, s. 22; 2 Saund. 284 c, note (3). [See *Harrison v. M'Intosh*, 1 John. 384.]

(x) *Hawkins v. Eckels*, 2 B. & P. 359; 1 Saund. 347 b, note (3); [*Hopkins v. Hopkins*, 10 John. 369. So at common law, where the defendant avows for rent in arrear. *Harrison v. M'Intosh*, 1 John. 380.]

(x¹) [*Hopkins v. Hopkins*, 10 John. 369; *Rogers v. Arnold*, 12 Wend. 30.]

(y) *Jones v. Kitchin*, 1 B. & F. 76.

(z) 4 Anne, c. 16, s. 4.

replevin, in any court of record, may, with leave of the court, plead several pleas in bar; which frequently renders this action preferable to trespass or any other action, in which the plaintiff can have only one replication to each plea. The other particulars of the pleadings in this action will be stated hereafter. The *judgment* for the plaintiff is, that he recover his damages on occasion of the taking and unjustly detaining the cattle, (z¹) &c. together with *full* costs of suit, to which the plaintiff is entitled, though he recover less than his damages, unless the judge certify under the 43 Eliz. c. 6; and under the 19th section of this act, the defendant in replevin is entitled to treble damages, with single costs also. (a) The judgment for an avowant or person making cognizance, varies in different cases, and may be at common law *pro retorno habendo*, (a¹) or founded on a statute. (b) If the plaintiff were nonsuited, (b¹) or discontinued his action, or had judgment against him, the defendant was entitled under the 22d section of 11 Geo. 2, c. 19, to double costs; but under the 5 & 6 Vict. c. 97, s. 2, the defendant will be entitled in lieu of such double costs to "such full and reasonable indemnity to all costs, charges, and expenses" incurred in the suit, as shall be taxed by the officer.

* IV. TRESPASS.

The term *trespass*, in its most extensive signification, includes every description of *wrong*, (d) on which account an action in general. on the case has been usually called "trespass on the case," but technically it signifies an injury committed *vi et armis*, the meaning of which words is explained in Co. Litt. (e) The action of *trespass* (e¹) only lies for injuries committed with force, and generally only for such as are immediate. (f) Force, we have seen, may be either actual or implied; and the distinctions between immediate and consequential injuries have already been considered. (g) The *writ contra pacem* should uniformly accompany the allegation of the fact of injury, and in some cases are material to the foundation of the action. An action of trespass to land not within our queen's dominions

(z¹) [Washington Ice Co. v. Webster, 62 Maine, 341, where the subject of damages in replevin is fully and ably considered. An omission to allege damage in a writ of replevin was held fatal to the writ in *Faget v. Brayton*, 2 Harr. & J. 350.]

(z²) [Where the plaintiff recovers for only part of the goods replevied, costs were allowed to both parties in *Seeley v. Gwillim*, 40 Conn. 106, 111, note, and the mode of dividing is there directed. See, also, *Powell v. Hinsdale*, 5 Mass. 342; *Arnold v. Brackett*, 5 Mass. 343, note.]

(a) *Butterton v. Furber*, 4 Moore, 296; *Lawson v. Story*, 1 Lord Raym. 19; *Cone v. Bowles*, 1 Salk. 205.

(a¹) [Under the plea of *non cepit* alone the

defendant cannot have judgment for a return. *Simpson v. M'Farland*, 18 Pick. 25; *Whitwell v. Wells*, 24 Pick. 25.]

(b) Hen. 8, or Car. 2. See the cases *Saund. 195*, note (3); 2 *Saund. 286*, (5); [*Loomis v. Tyler*, 4 Day, 141; *E. v. Worthington*, 5 Serg. & R. 132; *W. v. Roseberry*, 13 Serg. & R. 178.]

(b¹) [See *Smith v. Winston*, 10 Missou.

(d) *Wilson v. Knubley*, 7 East, 134, Co. Litt. 57 a.

(e) 161 b; 3 Bl. Com. 118, 398, 399.

(e¹) [As to the history of this action, see *Reeves's Hist. E. L. 263*, 266, 340, 3; *Reeves's Hist. E. L. 84*, 89.]

(f) *Ante*, 140.

(g) *Ibid*.

not be sustained; (*h*) for the venue in trespass to realty is local, and there is not therefore any county into which the writ can in such case be issued. (*i*) It has been doubted whether trespass for an assault committed out of the queen's dominions can be supported; (*k*) though as the fine, in strictness of law payable to the queen for the violation of the public peace, is no longer regarded, (*l*) and the words *contra pacem* are not traversable; (*m*) and the venue is transitory; it should seem that an action for such injury or for an injury to goods in a foreign country, might be supported. The intention of the wrong-doer is in general immaterial in this action; (*n*) and where the defendant has been acquitted of a felonious taking he may be sued for the trespass. (*o*)

This action cannot be sustained where the wrong complained of was a *nonfeasance*, as for not carrying away tithes, &c.; (*p*) or where the matter affected was not tangible, and consequently could not be immediately injured by force, as reputation, health, &c.; (*q*) or where the right affected is incorporeal, as a right of common or way, &c.; (*r*) or where the plaintiff's interest is in reversion, and not in possession; (*s*) or where the injury was not immediate but consequential. (*t*) We will consider the particular applicability of this remedy to the different injuries *committed by force to the *person*, or *personal* or *real property*; and as there are material distinctions between the remedy for these injuries when committed under color of suit or process, and when not, we will consider the action of trespass under the following heads:

I. When it lies for injuries not committed under color of legal proceedings.

1. For the parties own act.

- 1. Injuries to the person.
- 2. To personal property.
- 3. To real property.

2. For the acts of others, and of cattle, &c.

II. When trespass lies for injuries under color of legal proceedings. (*u*)

(*k*) *Doulson v. Matthews*, 4 T. R. 503; *De Grey C. J. Rafael v. Verelst*, 2 Bl. Rep. 1058.

(*i*) *Stephen on Pleading*, 306, 1st ed.

(*k*) *Mostyn v. Fabrigas*, Cowp. 176; *Rafael v. Verelst*, 2 Bl. Rep. 1058; *Finch's Law*, 198. See *Pisani v. Lawson*, 8 Dowl. 57, as to the right of aliens to sue in personal actions, where the cause arose in the queen's dominions.

(*l*) 3 Bl. Com. 118, 399.

(*m*) *Com. Dig. Pleader*, 3 M. 8; *Vin. Abr. Trespass*, Q. a.

(*n*) *Covill v. Laming*, 1 Campb. 497; *Lotan v. Cross*, 2 Campb. 465; *Leame v. Bray*, 3 East, 593; *ante*, 145.

(*o*) *Crosby v. Leng*, 12 East, 409; *Dawkes v. Coveleigh*, Sty. 346; 2 Rol. Abr. 557;

Higgins v. Butcher, Yelv. 90; *Cooper v. Witham*, 1 Sid. 375; *ante*, 145. It is no bar to an action for an excessive distress, that between distress and sale of the goods distrained the parties come to an arrangement respecting the sale. *Sells v. Hoare*, 1 Bing. 401.

(*p*) *Ante*, 141, 147.

(*q*) *Ibid.*

(*r*) *Ante*, 157.

(*s*) *Ward v. Macauley*, 4 T. R. 489; *Gordon v. Harper*, 7 T. R. 9.

(*t*) *Ante*, 157. And *semble*, that, after a recovery in trespass, the proper remedy for a continuance of the injury is case. *Lawrence v. Obee*, 1 Stark. 22; but see *Holmes v. Wilson*, 10 Ad. & El. 503, *contra*.

(*u*) *Belk v. Broadbent*, 3 T. R. 185.

FIRST, FOR INJURIES NOT UNDER PROCESS.

Trespass is the only remedy for a menace to the plaintiff, attended with consequent damages; (*x*) and for an illegal assault, battery, and wounding, or imprisonment, when not under process. (*y*) It lies also when the battery, imprisonment, &c. were in the first instance lawful, but the party by an unnecessary degree of violence became a trespasser *ab initio*; (*z*) for a wrongful imprisonment after the process is determined; (*a*) for an assault after an acquittal for a felonious assault and striking. (*b*) So it lies for an injury to the relative rights occasioned by force, as for menacing tenants, servants, &c. and beating, wounding, and imprisoning a wife or servant, (*c*) whereby the landlord, master, or servant, hath sustained a loss; though the injury, the loss of service, &c. were consequential, and not immediate. It lies for criminal conversation; (*d*) seducing away a wife, (*e*) or servant; (*f*) for debauching the latter; (*g*) force being implied, and the wife or servant being considered as having no power to consent; and a count for beating the plaintiff's servant, *per quod servitium amisit*, may be joined with other counts in trespass; (*h*) and though it has been used to declare in case for debauching a daughter, (*i*) it is now considered to be preferable to declare in trespass. (*k*)

* The action of trespass, in its application to injuries to personal property, may be considered with reference, 1st, to the nature of the *thing* affected; 2dly, the plaintiff's *right* therein; 3dly, the nature of the *injury*; and the *situation* in which the *defendant* stood, as whether tenant in common, bailee, &c.

(*x*) 3 Bl. Com. 120.

(*y*) Bourden v. Alloway, 11 Mod. 180, 181.

(*z*) Com. Dig. Trespass, C. 2; Bac. Abr. Trespass, B.; *post*, 191, 193; [Pease v. Burt, 3 Day, 485; Elliott v. Brown, 2 Wend. 497; Bennett v. Appleton, 25 Wend. 371; Boles v. Pinkerton, 7 Dana, 453; Hannen v. Edes, 15 Mass. 347; Sampson v. Smith, 15 Mass. 365. In the case of an assault and battery, both parties may be guilty of a breach of the peace, and may be indicted; but a civil action cannot be brought by each against the other. Although the defendant may have been the aggressor, yet if the plaintiff had used not only more force than was necessary for self-defence, but had unnecessarily abused the defendant, he cannot recover damages, but must pay damages. Elliott v. Brown, 2 Wend. 497.]

(*a*) Wythers v. Henley, Cro. Jac. 379.

(*b*) Crosby v. Leng, 12 East, 409.

(*c*) Ditcham v. Bond, 2 M. & Sel. 436; 9 Co. 113; 10 Co. 130.

(*d*) Rigaut v. Galisard, 7 Mod. 81; 2 Salk. 552, S. C.; Macfadzen v. Olivant, 6 East, 387. In Chamberlain v. Hazlewood, 5 M. & W. 517, Lord Abinger C. B. in speak-

ing of this action, says: "It was more usual formerly to bring trespass than case, because a notion at one time rather prevailed that a married woman was, from her situation in law, incapable of giving her consent.

(*e*) Fitz. N. B. 89; Macfadzen v. Olivant, 6 East, 387.

(*f*) Weedon v. Timbrell, 5 T. R. 361; 1 Mod. 81; 2 Salk. 552; 20 Vin. Abr. 476.

(*g*) Bac. Abr. Trespass, C. 1; Tullidge v. Wade, 3 Wils. 18, 19; Woodward v. Walton, 2 New Rep. 476; Ditcham v. Bond, 2 M. & Sel. 436.

(*h*) Ditcham v. Bond, 2 M. & Sel. 436; Woodward v. Walton, 2 New Rep. 476.

(*i*) Bennett v. Alcot, 2 T. R. 167, 168; Vin. Abr. 470; Macfadzen v. Olivant, 6 East, 387.

(*k*) Woodward v. Walton, 2 New Rep. 476; Ditcham v. Bond, 2 M. & Sel. 436; [Hubbell v. Wheeler, 2 Aiken, 359; Aiken v. Haines, 2 Caines, 292.] The plaintiff has the option to bring trespass for the direct injury to his servant, *per quod servitium amisit*, or case for the consequential damage. Parke B. Chamberlain v. Hazlewood, 5 M. & W. 517.

And *first*, as to the *nature of the thing affected*: trespass lies for taking or injuring all inanimate personal property, and certain domiciled and tame animals, of which the law takes notice, as dogs, &c. (l) and all animals usually marketable, as parrots, monkeys, &c. (l') and in which case it is not necessary to show in the pleadings that they have been reclaimed. (m) In the case of a hawk, pheasant, hare, rabbit, fish, or other animals *feræ naturæ*, and not generally merchandisable, it should be shown in the pleadings that the same were reclaimed or dead, or at least that the plaintiff was *possessed* (m¹) of them. (n) So it lies in some cases for taking animals *feræ naturæ*, and not reclaimed; as if a hare or rabbit be *killed* on the land of another, he, having a local property *ratione soli* in such hare or rabbit, may support trespass for taking it, though the wrong-doer did not enter on the land; (o) and if game be started on the land of A. and pursued and killed on the land of B., A. may support trespass for taking the hare, if *he* also pursued the same, for by the pursuit he prevented an abandonment of his local

1st. The nature of the personal property.

(l) 1 Saund. 84, notes (2), (3); Com. Dig. Action, Trover, C.; Fitz. N. B. 86; Edwards v. Engleton, Hob. 283; Ireland v. Higgins, Cro. Eliz. 125; Dand v. Sexton, 3 T. R. 37, 38; [Sinnickson v. Duncan, 3 Halst. 226. But if a man is so annoyed by the dog of another, that the peace and quiet of his family are disturbed, and there is no other mode of preventing it, he may lawfully kill the dog. Brill v. Flagler, 23 Wend. 354; King v. Kline, 6 Barr, 318. So, a man is justified in killing an enraged bull, in the necessary defence of himself, or of his family, and such facts, if properly pleaded, constitute a defence to an action of trespass for the killing. Russell v. Barrow, 7 Porter, 106. But where the defendant, to prevent the plaintiff's fowls from trespassing on his land as they had done before, spread poisoned food upon the land, having given the plaintiff previous notice that he should do so, and the fowls coming afterwards on the defendant's land, ate the poisoned food, in consequence of which some died, it was held that previous notice, in contradistinction to notice after the fact, was sufficient; but that, notwithstanding such notice, the defendant was not justified in the use of the means he had employed, and was liable in damages. Johnson v. Patterson, 14 Conn. 1. As to the form of action for killing a dog by poison, see Dodson v. Mack, 4 Dev. & B. (Law) 146. Case lies for killing animals by running over them on a railroad through carelessness. Price v. New Jersey R. R. Co. 22 N. J. (Law) 229. See Wales v. Ford, 8 N. J. (Law) 267; Spencer v. Campbell, 9 Watts & S. 32. Where the injury consisted in driving the plaintiff's beast upon a fence, whereby its death was caused, it was held that either case or tres-

pass would lie. Waterman v. Hall, 17 Vt. 128; James v. Caldwell, 7 Yerger, 38.] See Williams's Executors, 3d ed. where the particulars of personal property are stated. Com. Dig. Trespass, A. 1.

(l') [See Commonwealth v. Chase, 9 Pick. 15. The owner of bees, which have been reclaimed, may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees, and takes the honey. Goff v. Kilts, 15 Wend. 550.]

(m) Grymes v. Shack, Cro. Jac. 262; 1 Saund. 84, note (2).

(m¹) [Oysters planted in a bed clearly designated and marked out in a bay or arm of the sea, which is a common fishery to all the inhabitants of the town in which the bay is situated, are the property of him who planted them, and for a taking of them by another trespass lies. Fleet v. Hegeman, 14 Wend. 42.]

(n) Bac. Abr. Trespass, 1, and Trover, D.; Grymes v. Shack, Cro. Jac. 262; Pollexfen v. Crispin, 1 Vent. 122; Dyer, 306 b; Child v. Greenhill, Cro. Car. 554. As to fish, see Bul. N. P. 79; The Duke of Somerset v. Fogwell, 5 B. & C. 879. Case for disturbing a decoy, &c.; ante, 160.

(o) Sutton v. Moody, 2 Salk. 556; 1 Lord Raym. 251, S. C.; Coney's case, Godb. 123; Churchward v. Studdy, 14 East, 249. [It seems that the owner of land may, in like manner, have a property *ratione soli* in bees, although they have not been hived or reclaimed by him. Gillet v. Mason, 7 John. 16; Ferguson v. Miller, 1 Cowen, 243; Idol v. Jones, 2 Dev. 162. But see Wallis v. Mease, 3 Binney, 546.]

property. (*p*) The same rules prevail in the case of fish. (*q*) actions of trespass for taking or killing animals *feræ naturæ* reclaimed, it is advisable in pleading to state also an entry, if any, the plaintiff's land; (*r*) and it is said that trespass for killing rabbit without complaining of such entry, cannot be supported. (*s*)

Secondly, With respect to the plaintiff's interest in the property affected, he must, at the time when the injury was committed, have had an *actual* or a *constructive possession*, and also a general or qualified *property* therein, which may be either, first, in the case of the *absolute* or general owner, entitled to immediate possession; 2dly, * the *qualified* owner coupled with an interest, and also entitled to immediate possession; (*x*) 3dly, a *bailee* with a mere naked *authority*, unaccompanied with any interest, except as to remuneration for trouble, &c. but who is in actual possession; or 4thly, *actual possession*, though without the consent of the real owner, and even adverse.

These rules have been considered in detail in explaining the nature of the action of trover. (*y*) It may, however, be useful to note them here, particularly in those cases in which they have more immediate reference to the action of trespass.

In the *first* instance the person who has the absolute or general property may support this action; although he has never had actual possession, or although he has parted with his possession to

(*p*) Ibid. [Mere pursuit of a wild animal does not, independent of title *ratione soli*, vest any property in the pursuer; manucaption is not, however, necessary; it is sufficient if the pursuer have rendered it impossible for the animal to escape. *Pierson v. Post*, 3 Caines, 175; *Buster v. Newkirk*, 20 John. 75.]

(*q*) *Child v. Greenhill*, Cro. Car. 554.

(*r*) 43 Edw. 3, p. 24, 2; *Sutton v. Moody*, 1 Lord Raym. 250; *Keble v. Hickringill*, 11 Mod. 74; *Sutton v. Moody*, 2 Salk. 556; *Child v. Greenhill*, Cro. Car. 554; *Fitz. N. B.* 86, 87 m. note (*a*), A.

(*s*) 43 Edw. 3, p. 24, 2; *Fitz. N. B.* 87, A. c.; *Child v. Greenhill*, Cro. Car. 553, 554.

(*t*) See *ante*, 69, 147, as to who may sue in general in this action.

(*u*) *Smith v. Milles*, 1 T. R. 480; *Ward v. Macauley*, 4 T. R. 490; *Gordon v. Harper*, 7 T. R. 9; [*Winship v. Neale*, 10 Gray, 382; *Putnam v. Wiley*, 8 John. 432; *Carter v. Simpson*, 7 John. 535; *Lunt v. Brown*, 13 Maine, 236. Hence, if a vessel has been seized by an officer of the customs, as forfeited to the United States, and is afterwards acquitted, the owner cannot maintain trespass for an injury intermediate between the seizure and acquittal, since he has neither the actual possession, nor the right to reduce her into possession. *Van Brunt v. Schenck*,

11 John. 377. But where a deputy sheriff attached goods in Massachusetts, carried them into Rhode Island, and delivered them to a bailee, taking his receipt, and the bailee put them into the hands of another person for safe keeping, it was held that the owner might maintain trespass, and recover damages against mere strangers who took them away from the keeper in Rhode Island. *Brownell v. Manchester*, 1 Pick. 232. And in such case, the bailee might also, as it has been held in New Hampshire, maintain the action. *Poole v. Simonds*, 1 N. H. 101. But a different decision has been made in Massachusetts. *Ludden v. Leavitt*, 9 Mass. 104; *Warren v. Leland*, 9 Mass. 265.]

(*x*) *Ante*, 69; *Fowler v. Down*, 1 B. & C. 44; *Gordon v. Harper*, 7 T. R. 9; [*Brainin v. Burton*, 5 Vt. 97; *Fisher v. Cobb*, 6 Vt. 622; *Parsons v. Dickinson*, 11 Pick. 30; *Hoyt v. Geltsen*, 13 John. 141, 561; *Danforth v. Pond*, 21 Pick. 367; *Clark v. Carlisle*, 11 N. H. 110; *Barron v. Cobleigh*, 11 N. H. 557; *Daniel v. Holland*, 4 J. J. Marsh. 30; *Cannon v. Kinney*, 3 Scam. 10; *Rochester v. Chandler*, 10 Wend. 110; *Hume v. Tufts*, 13 Blackf. 136; *M'Farland v. Smith*, Wall. 172; *Bell v. Monahan*, *Dudley* (S. Car.), 10; *Dallam v. Fidler*, 6 Watts & S. 323; *Fisher v. Rankins*, 21 Maine, 446.]

(*y*) *Ante*, 167.

carrier, servant, &c. giving him only a bare authority to carry or keep, &c. not coupled (*y*¹) with any interest in the thing; (*z*) it being a rule of law that the general property of personal chattels *prima facie*, as to all civil purposes, draws to it the possession. (*a*) Therefore the owner of tithe may support trespass against the occupier of the land where it has been set out, for turning in cattle and injuring it. (*b*) So the grantee of waifs, estrays, and wreck, within a manor, or of felon's goods within a hundred, may, before seizure by him, maintain trespass against a wrong-doer; (*c*) and the owner of a ship has, notwithstanding a charter-party, a sufficient possession thereof to support trespass. (*d*) This rule holds by relation; as in case of executors and administrators, &c. who may support trespass for an injury to personal property committed after the death of the testator or intestate, and before the probate or administration was granted; (*e*) so may a legatee, after the executor has assented to the legacy, for a trespass committed before such assent. (*f*) But if the general owner part with his possession, and the bailee, at the time when the injury was committed, have a right exclusively to use the thing, the inference of possession is rebutted, and, the right of possession being in reversion, the general owner cannot support trespass, (*f*¹) but only an action on the case, for an injury done by a stranger while the bailee's right continued. (*g*) Nor can the general owner in such case support this action even against such bailee for mere abuse; though if a bailee *destroy the thing, trespass may be supported if the injury were forcible. If, however, the general owner merely permit another gratuitously to use the chattel, such owner may sue a stranger in trespass for an injury done to it while it was so used. (*h*)

In the *second* case also, that of the bailee who has an authority coupled with an interest, it should seem that trespass may be supported, though he never had actual possession, for any injury done during his interest; (*i*) as in the case of a factor, or consignee of

(*y*¹) [Putnam v. Wyley, 9 John. 435; Wilkins v. Lewis, 3 Day, 498; Thorp v. Burling, 11 John. 285.]

(*z*) Gordon v. Harper, 7 T. R. 9; Bertie v. Beaumont, 16 East, 33.

(*a*) 2 Saund. 47 *a*, *b*, *d*. See, further, *ante*, 171; [Bird v. Clark, 3 Day, 272; Bulkley v. Dolbeare, 7 Conn. 235.] When not so in criminal cases, see Coust's argument in *Baseley's case*, 2 Leach C. L. 838-843, 4th ed.

(*b*) Williams v. Ladner, 8 T. R. 72.

(*c*) F. N. B. 91 *b*, 91 *d*, 91 *F*; Smith v. Milles, 1 T. R. 480.

(*d*) Christie v. Lewis, 5 Moore, 211; 2 B. & B. 410, S. C.; Lucas v. Nockells, 2 Y. & J. 310, 318.

(*e*) Smith v. Milles, 1 T. R. 480; Bac. Abr. Executors, H. 1; 2 Saund. 47 *a*; *Tharpe v. Stallwood*, 12 L. J. R. N. S. C. P. 241.

(*f*) Bro. Abr. Trespass, pl. 25.

(*f*¹) [Putnam v. Wyley, 8 John. 432; Van Brunt v. Schenck, 11 John. 377; Bulkley v. Dolbeare, 7 Conn. 235; Soper v. Sumner, 5 Vt. 294; Hart v. Hyde, 5 Vt. 328; Cannon v. Kinney, 3 Scam. 10; Orser v. Storms, 9 Cowen, 687; Lunt v. Brown, 13 Maine, 236; Muggridge v. Eveleth, 9 Met. 233; Fidler v. Shotwell, 7 Watts & S. 14.]

(*g*) Ward v. Macauley, 4 T. R. 489; Gordon v. Harper, 7 T. R. 9; Bedingfield v. Onslow, 3 Lev. 209; Hall v. Pickard, 3 Campb. 187; Smith v. Plomer, 15 East, 607; *ante*, 171.

(*h*) Lotan v. Cross, 2 Campb. 464; Hall v. Pickard, 3 Campb. 187; Bertie v. Beaumont, 16 East, 33.

(*i*) *Ante*, 171; Fowler v. Down, 1 B. & P. 45; 2 Saund. 47 *d*.

goods in which he has an interest in respect of his commission, &c. (l) The quantity or certainty of the interest is not material, and therefore a shopkeeper may maintain trespass for taking goods sent to him on sale or return. (l) So a tenant for years has a qualified property in trees whilst growing, and may support trespass for cutting them down unless they were excepted in the lease; though he cannot support this action merely for carrying the trees away; (m) and if a person have a right to cut all the thorns in such a place, he may sustain trespass against any one who cuts them down, even against the grantor; but if he have only a right of estovers, and the grantor cuts the whole, the remedy is case, and not trespass; (n) and a mere gratuitous bailee, (o) or an executor *de son tort*, (p) may support the action. Other instances have been before given. (q)

In the *third* instance, that of a bailee, &c. with a mere naked authority coupled only with an interest as to remuneration, he may support this action for an injury done while he was in the actual possession of the thing; as a carrier, factor, pawnee, a sheriff, &c.; but it is otherwise in the case of a mere servant; (s) and if a sheriff omit to continue in possession of the goods under an execution, he cannot maintain the action. (t)

An instance of the *fourth* description is the finder of any article who may maintain trespass or trover against any person but the true owner; (u) and even a person not having a strict legal right, being in possession, may, it seems, support this action against any person but the legal owner. (x) So a person in possession under

(k) *George v. Claggett*, 7 T. R. 359; *Grove v. Dubois*, 1 T. R. 113; *Williams v. Millington*, 1 H. Bl. 81; *Bul. N. P.* 33; *ante*, 171, 172.

(l) *Colwill v. Reeves*, 2 Campb. 575. (m) *Evans v. Evans*, 2 Campb. 491; *Blackett v. Lowes*, 2 M. & Sel. 499. See, further, as to trees, *ante*, 171.

(n) 2 Salk. 638; *Blackett v. Lawes*, 2 M. & Sel. 499; *Welch v. Nash*, 8 East, 394.

(o) *Rooth v. Wilson*, 1 B. & Ad. 59.

(p) *Ante*, 170.

(q) *Ante*, 72, 170.

(r) 2 Saund. 47 b; 1 Rol. Abr. 551; *Wood's Inst.* 93; [*Brownell v. Manchester*, 1 Pick. 232; *Knapp v. Miller*, 6 John. 195; *Gibbs v. Chase*, 10 Mass. 125; *ante*, 182, 183, note.]

(s) *Blos v. Holman*, Owen, 52; 3 Inst. 103; 2 Bl. Com. 396; 2 Saund. 47 b, c, d.

(t) *Blades v. Arundale*, 1 M. & Sel. 711. See *Swale v. Paynter*, 1 D. & R. 307; *Earl of Bristol v. Wilmore*, 2 D. & R. 755.

(u) 2 Saund. 47 d; *Catteris v. Cowper*, 4 Taunt. 547. In regard to the liability of a finder, if he, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful

title, and the true owner may maintain trespass, per *Parke B. Merry v. Green*, 7 M. & W. 632, which case see as to the right of a purchaser of an article of furniture to appropriate to his own use money afterwards covered in it.

(x) *Rackham v. Jesup*, 3 Wils. 3; *Woodson v. Nawton*, 2 Stra. 777; *Brown v. Hedges*, 1 Salk. 290; 2 Saund. 47 c; [*Hubbard v. Lyman*, 8 Allen, 520; *Cook v. Hubbard*, 13 John. 276; *Demick v. Chipman*, 13 John. 132; *Schermerhorn v. Van Valburgh*, 11 John. 520; *Aiken v. Bucher*, 1 Wend. 466; *Butts v. Collins*, 13 Wend. 1; *Hoyt v. Geltson*, 13 John. 141, 561; *Hart v. Wiley*, 17 Wend. 91; *Seymour v. Brown*, 19 John. 44; *Horton v. Hensley*, 1 John. 163; *Jones v. McNeil*, 2 Bailey, 466; *Fletcher v. Cobb*, 6 Vt. 622; *Potter v. Washburn*, Vt. 558; *Edwards v. Edwards*, 11 Vt. 2; *Barker v. Chase*, 24 Maine, 230; *ante*, note (2). Possession of personal property under claim of title is sufficient to enable the possessor to maintain an action for conversion against any one who does not show a better title. *Burke v. Savage*, 8 Allen, 408; *Adams v. O'Connor*, 100 Mass. 515; *Hubbard v. Lyman*, 8 Allen, 520; *son v. Prater*, 6 Cold. (Tenn.) 565.]

assignment fraudulent as against creditors, may support trespass against a person who cannot show that he was justified in what he did as a creditor. (y)

Assignees of a bankrupt, though they have a constructive possession from the time of the act of bankruptcy, cannot support *trespass* against a sheriff or any other officer acting in obedience to the process of a court of competent jurisdiction, for seizing goods after a secret act of bankruptcy, because such officers ought not for such act to be liable as trespassers. (z)

As to the *third* point, *the nature of the injury*, it may be either by an unlawful taking of the personal chattel, or by injuring it whilst in the possession of the general owner, or of a person having a special property in it, as a bailee.

Saly. The nature of the injury to the personal property, and of the person committing it.

Trespass is a concurrent remedy with trover for most illegal takings. (a) Thus, even in the case of a distress for rent, where there has been an illegal taking, as for distraining when no rent was due, or taking implements of trade, or beasts of husbandry, when there was sufficiency of other property; (b) or a horse while his rider was upon him; (c) or if a distress be made, the outer door being shut, or if the party expel the tenant, or continue in possession, without leave, more than five days, trespass lies; (d) for the statute (e) which enacts that a party distraining for rent shall not be a trespasser *ab initio*, (f) only relates to irregularities after a lawful taking. There is no doubt that trespass lies for any forcible malfeasance after *legal entry* to distrain, and that the tenant's remedy is not at all affected by the statute. But the statute is clear that no subse-

(y) *Young v. Wright*, 2 Marsh. 233.

(z) *Cooper v. Chitty*, 1 Burr. 20; *Smith v. Mills*, 1 T. R. 480; *ante*, 145, 146, 173; *Pice v. Helyar*, 1 M. & P. 541; 4 Bing. 597, 8 C.

(a) *Rackham v. Jesup*, 3 Wils. 336; *ante*, 180; [*Wadleigh v. Janvrin*, 41 N. H. 503, 520; *Drew v. Spaulding*, 45 N. H. 472, 478, and cases there cited.] As to what is a sufficient taking to maintain trespass, see *Hartley v. Moxham*, 12 L. J. R. N. S. Q. B. 41. ["It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making a further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." Lord Abinger C. B. in *Fouldes v. Willoughby*, 8 M. & W. 544, 545. In this case trespass will lie where trover will not. On the other hand, trover will lie, and trespass will not where the original taking was lawful, and the ground of proceeding is based on a demand and refusal to deliver. *Ante*, 180, *post*, 192.]

(b) *F. N. B.* 88; *Gorton v. Falkner*, 4 T. R. 545; *Hitchins v. Chambers*, 1 Burr. 579; *ante*, 155. Trespass lies against a landlord for distraining goods fraudulently and

clandestinely removed from the premises before the rent becomes due, as the statutes 8 Anne, c. 14, and 11 Geo. 2, c. 19, do not apply to such a removal. *Rand v. Vaughan*, 1 Bing. N. C. 767; 1 Scott, 670, S. C.

(c) *Storey v. Robinson*, 6 T. R. 138; *Gorton v. Falkner*, 4 T. R. 569.

(d) *Etherton v. Popplewell*, 1 East, 139; *Winterbourne v. Morgan*, 11 East, 395; *Messing v. Kemble*, 2 Campb. 115; *Ladd v. Thomas*, 12 Ad. & El. 117; 4 P. & D. 9, S. C. *ante*, 138. See, also, *Newton v. Harland*, 1 M. & G. 644; 1 Scott N. R. 474, S. C.; [*Van Brunt v. Schenck*, 13 John. 417; *Kerr v. Sharp*, 14 Serg. & R. 399.] So trespass will lie if a tender of satisfaction be made before the goods, &c. are impounded, but not if made after; and the rule applies to goods seized for rent as well as to cattle taken damage feasant. *Ladd v. Thomas*, *supra*; *Ellis v. Taylor*, 8 M. & W. 415. See *ante*, 155. What amounts to an impounding in such case, see *Thomas v. Harries*, 1 M. & G. 695; 1 Scott N. R. 524, S. C.

(e) 11 Geo. 2, c. 19.

(f) *Wallace v. King*, 1 H. Bl. 13.

quent irregularity shall render a legal distress a trespass *ab initio*, and confines the tenant's action to that only which is irregular. (*g*) The proper course in such a case is the remedy if the subsequent irregularity be not for the benefit of the plaintiff, or be of a * nature which in other respects renders it matter of course that the form of action.

This action also in general lies though there was no wrongful intent (*g*¹) in committing the tort; (*i*) as if a sheriff, or a messenger on behalf of assignees of a bankrupt, by mistake take the goods of the wrong person. (*k*) If a sheriff illegally take the goods of B. under execution against the goods of A., it seems that even the sheriff's vendee is liable; but it seems the latter is not liable if the process was only irregular, and the real defendant's goods were taken; (*l*) but if a second trespasser take goods out of the custody of the first trespasser, the owner may support trespass against such second taker, his act not being excusable. (*m*) This action may be supported against a bailee who has only a bare authority, as if a servant take goods of his master out of his shop, and convert them; (*n*) so it is sustainable by an outgoing tenant against the incoming tenant, for taking manure, though the latter had a right to it on paying for it. (*o*) But in general trespass is not sustainable against a bailee who has the possession coupled with an interest, unless he destroy the chattel; (*p*) nor against a joint tenant or tenant in common for merely taking away and holding exclusively the property from his cotenant, (*q*) because each has an interest in the whole, and a right to dispose thereof; (*r*) but if the thing be *destroyed*, trespass lies, (*s*) and an action may be supported for injuring the thing. (*t*) A bailee of a chattel for a certain time, could

(*g*) See *Messing v. Kemble*, 2 Campb. 116; *Winterbourne v. Morgan*, 11 East, 395.

(*g*¹) [*Higginson v. York*, 5 Mass. 341; *Luttrell v. Hazen*, 3 Sneed, 20; *Winter v. Peterson*, 4 Zab. 524; *Clark v. Boardman*, 42 Vt. 667. But there must be some blame, or want of care and prudence to make a man answerable in trespass. *Vincent v. Stinehour*, 7 Vt. 62; *Welch v. Durand*, 36 Conn. 182. An accident, to excuse a trespass, must be unintentional, unavoidable, and without the least fault on the part of the trespasser. *Jennings v. Fundeburg*, 4 McCord, 161. Where a person became possessed of the wagon of another, and changed part of its appendages, and the owner then repossessed himself of it, without knowledge of the changes, it was held that trespass would not lie for the substituted articles. *Parker v. Walrod*, 13 Wend. 296; *S. C.* 16 Wend. 514.]

(*i*) *Ante*, 145; *Baseley v. Clarkson*, 3 Lev. 37; *Covell v. Laming*, 1 Campb. 497; *Colwill v. Reeves*, 2 Campb. 576.

(*k*) *Ante*, 145; *Colwill v. Reeves*, 2 Campb. 576; *Bro. Abr. Propertie*, 23. It would seem that no action would lie if an injury

arose from a mere accident, and unavoidable, without any default or carelessness on the part of the defendant. See *ante*, 146.

(*l*) See *ante*, 90; *Farrant v. —*, 3 Sta. R. 130; *Farrant v. Thompson*, 2 D. & R. 130.

(*m*) *Wilbraham v. Snow*, Sid. 433.

(*n*) *Glosse & Hayman's case*, 1 Le. 87; *Gumbleton v. Grafton*, Cro. Eliz. 78; 5 Co. 13 b.

(*o*) *Beaty v. Gibbons*, 16 East, 116.

(*p*) *Ante*, 190.

(*q*) *Holliday v. Cammell*, 1 T. R. 658; *Saund.* 47 g; *ante*, 89.

(*r*) *Graves v. Sawcer*, 1 Lev. 29; *Martyn v. Knowllys*, 8 T. R. 145; *Co. Litt.* 200 d. *Doe d. Fisher v. Prosser*, Cowp. 217; *Heslop v. Hubbard*, 4 East, 121.

(*s*) *Co. Litt.* 200 a; *ante*, 89.

(*t*) *Martyn v. Knowllys*, 8 T. R. 145; *Waterman v. Soper*, 1 Lord Raym. 73; [*Chesley v. Thompson*, 3 N. H. 9; *Giddens v. Earl*, 12 Wend. 98; *St. John v. Standring*, 2 John. 468. In *Whitney v. Ladd*, 10 Vt. 165, it was held, that if one of two joint owners of personal property forcibly take from the officer, who has taken it on legal process against the other joint owner, the officer may maintain trespass therefor.]

led with an interest, may support this action against the bailor for taking it away before the time; (*u*) and it lies, though after the illegal taking the goods be restored. (*x*) When the taking is unlawful, either the general owner or the bailee, if answerable over, may support trespass, but a recovery by one is a bar to an action by the other. (*y*) Trespass will not lie for a refusal to deliver when the first taking was lawful; trover or detinue being in such case the only remedies. (*z*)

So trespass lies for any immediate injury to personal property occasioned by actual or implied force, though the wrong-doer might not *take away or dispose of the chattel; (*z*¹) as for shooting or beating a dog or other live animal, or for hunting or chasing sheep, &c.; (*a*) or for mixing water with wine; (*b*) or unintentionally running down a ship or a carriage. (*c*) But it is said, though without reason, that for a mere *battery* of a horse, not accompanied with special damage, no action can be supported. (*d*)

It is said, that if a bailee of a beast, &c. *kill* it, trespass cannot be supported, but only case. (*e*) But this position appears to be erroneous; for although the act may not render the party a trespasser *ab initio*, yet he may be considered as a trespasser for the wrongful act itself. (*f*) So case, (*g*) or assumpsit, for a breach of the implied contract, may be supported; (*h*) and it seems clear that if a person be bailee, though coupled with a beneficial interest, as of sheep to feed

(*u*) Heydon & Smith's case, Godb. 173; F. N. B. 86, note (*a*).

(*x*) *Ante*, 180; Bro. Abr. Trespass, pl. 221; 2 Rol. Abr. 569, pl. 3, 6.

(*y*) 2 Saund. 47 *e*; Bro. Abr. Trespass, 67; 2 Rol. Abr. 569 P.

(*z*) Put v. Rawsterne, Sir T. Raym. 472; Lechmere v. Toplady, 2 Vent. 170; 2 Saund. 47 *o*, *p*.

(*z*¹) [Proof of any unlawful exercise of authority over goods will support trespass, although without force, as an attachment, although there was no removal of the property. Gibbs v. Chase, 10 Mass. 125; Robinson v. Mansfield, 13 Pick. 139; Miller v. Baker, 1 Met. 27; Marble v. Keyes, 9 Gray, 219; Wintringham v. Lafoy, 7 Cowen, 735; Phillips v. Hall, 8 Wend. 610; Connah v. Hale, 23 Wend. 462; Bowen v. Sanborn, 1 Allen, 389, 391; Woodbury v. Long, 8 Pick. 543; Blanchard v. Coolidge, 22 Pick. 151; Mead v. Smith, 16 Conn. 346; Hardy v. Clendenning, 25 Ark. 436; Appleton C. J. in Parker v. Hall, 55 Maine, 364. But a mere attachment of personal property, though valid, by an officer who does not take possession of it, or exercise dominion or control over it, or otherwise interfere with and disturb the possession of the owner, will not support trespass. Fernald v. Chase, 37 Maine, 289; Boynton v. Willard, 10 Pick. 166; Rand v. Sargent, 23 Maine, 326;

Bailey v. Adams, 14 Wend. 201; Polley v. Lenox Iron Works, 15 Gray, 513.]

(*a*) Marlow v. Weekes, Barnes, 452; Dand v. Sexton, 3 T. R. 37; Edwards v. Engleton, Hob. 283; 3 Bl. Com. 153.

(*b*) F. N. B. 88.

(*c*) Covell v. Laming, 1 Campb. 497; Lotan v. Cross, 2 Campb. 465; Leame v. Bray, 3 East, 593; but see Rogers v. Imbleton, 2 New Rep. 117.

(*d*) Slater v. Swan, 2 Stra. 872; *quere*, Marlow v. Weeks, Barnes, 452. [Trespass will not lie against one who turns into the highway a horse which he finds wrongfully in his field, although the horse stray away. Cory v. Little, 6 N. H. 213; Humphrey v. Douglass, 10 Vt. 71; S. C. 11 Vt. 22; Knour v. Wagoner, 16 Ind. 414. But trespass will lie against one who chases the plaintiff's horse with dogs, and causes him to run upon a stake so that he dies. James v. Caldwell, 7 Yerger, 38. See Amick v. O'Hara, 6 Blackf. 258.]

(*e*) Bac. Abr. Trespass, G. 1; Moore, 248.

(*f*) Co. Litt. 57 *a*; Countess of Salop v. Crompton, Cro. Eliz. 777, 784; 5 Co. 13 *b*; Bro. Trespass, pl. 295; Glosse & Hayman's case, 1 Leon. 87; 11 Co. 82 *a*.

(*g*) Co. Litt. 57 *a*; note (*4*).

(*h*) Countess of Salop v. Crompton, Cro. Eliz. 777, 784.

his land, or of oxen to plough it, (*i*) and he kill or destroy them, trespass lies, because his interest therein is thereby determined; the same as when a tenant at will cuts down trees. (*k*) So one joint tenant or tenant in common may support trespass against his cotenant, whether the chattel is *destroyed*. (*l*) But for a mere misuser by one tenant in common, case is the remedy; (*m*) and if goods bailed be not destroyed, trespass does not, it seems, lie against a bailee, coupled with an interest, for merely abusing the chattel, (*n*) provided an interest and right of possession still continue in the bailee, and a general owner has no immediate right of possession at the time the injury was committed; nor can trespass be supported even against a stranger, unless there be an immediate right of possession. (*o*) Trespass will not lie for a loss or injury occasioned by a bailee's negligence; because the loss does not lie for any nonfeasance. (*p*)

In some instances trespass may also be supported for any wrong act or injury committed to personal property whilst in the lawfully adverse possession of the wrong-doer; as where he has been guilty of an abuse which renders him a trespasser *ab initio*. (*q*) This rule prevails in general whenever the person who first acted with propriety under an authority or license given by law afterwards abuses it. * which case the *taking*, as well as the real tortious act, may be stated to be illegal, as in the *Six Carpenters' case*. (*r*) So trespass lies for cutting nets, lawfully taken damage feasant; (*s*) or for working horses, &c. distrained. (*t*) But in the case of a distress for rent, we have seen that in general a party cannot become a trespasser *ab initio* by an irregularity, when the caption was lawful. (*u*)

Trespass is also the proper remedy to recover damages for an illegal entry upon, or an immediate injury to, *real property* 3dly. To real property. *corporeal, in the possession of the plaintiff*. (*x*) This remedy in its application to injuries to *real property*, may be considered with reference, 1st, to the *nature* of the property affected; 2dly, to the plaintiff's *right* thereto; and 3dly, to the nature of the *injury* and by whom committed.

(*i*) Co. Litt. 57, 58; Countess of Salop v. Crompton, Cro. Eliz. 784.

(*k*) Gordon v. Harper, 7 T. R. 11; Co. Litt. 57 a; Countess of Salop v. Crompton, Cro. Eliz. 784; 5 Co. 13 b; 11 Co. 82 a; Dyer, 121 b, pl. 17.

(*l*) 2 Saund. 47. See, further, *ante*, 89. What is a destruction for this purpose. *Ib.* (*m*) Martyn v. Knowllys, 8 T. R. 146; 2 Saund. 47 h.

(*n*) 2 Saund. 47 g.
(*o*) Gordon v. Harper, 7 T. R. 9; Ward v. Macauley, 4 T. R. 489.

(*p*) 5 Co. 13 b, 14 a; *ante*, 141.
(*q*) Bac. Abr. Trespass, B. where the doctrine of a party becoming a trespasser *ab*

initio is observed upon, 2 Roll. Abr. 200. See *post*, 200, 201.

(*r*) 8 Co. 146 b; [*post*, 200, 201; Kent v. Willey, 11 Gray, 368; Russell v. Hanscom, 15 Gray, 166.]

(*s*) Reynell v. Champernoon, Cro. Car. 228.

(*t*) Bagshawe v. Goward, Cro. Jac. 1. Oxley v. Watts, 1 T. R. 12; Dye v. Leatherdale, 3 Wils. 20.

(*u*) *Ante*, 155.

(*x*) Haward v. Bankes, 2 Burr. 111. Harker v. Birkbeck, 3 Burr. 1556; The King v. Watson, 5 East, 485; Doe dem. Foley v. Wilson, 11 East, 56; Bac. Abr. Trespass, 3. As to immediate and consequential injuries, see *ante*, 141.

1st. With respect to the *nature of the real property affected*, it must in general be something tangible and fixed, as a house, a room, out-house, or other buildings or land. Trespass may be supported for an injury to land, though not fenced from the property of others; and by the owner of the soil, &c. though it be an highway (*x*¹) or a public bridge; the term *close* being technical, and signifying the *interest* in the soil, and not merely a close or inclosure in the common acceptation of that term. (*y*) It lies, however temporary the plaintiff's interest, and though it be merely in the profits of the soil, as *vestura terre*, or *herbagii pasturae*, (*z*) *prima tonsura*, (*a*) or chase, free warren, &c. (*b*) if it be in exclusion of others. (*c*) So where a person contracted with the owner of a close for the purchase merely of a growing crop of grass there, it was decided that the purchaser had such an exclusive possession of the close, though for a limited purpose, that he might maintain trespass *quare clausum fregit* against any person entering the close and taking the grass, even with the assent of the owner; (*d*) so it lies for a trespass on a portion of a common field after an allotment, authorizing the feeding the same only for a certain time. (*e*) So a person having an exclusive right to dig turves or coals, &c. may support trespass *quare clausum fregit* against another for digging and taking away turves, &c. therein, though *others had common of pasture over the land. (*f*) And if J. S. agree with the owner of the soil to plough and sow it, and to give him (the owner) half the profits, J. S. may support trespass *quare clausum fregit* against a stranger for treading down the corn. (*g*) But unless the plaintiff have an exclusive interest, case is the only remedy, as if he had only a profit *à prendre*, as a right of common of pasture or common of piscary; (*h*) and because

1st. The nature of the real property affected.

(*x*¹) [Cortelyou v. Van Brunt, 2 John. 257; 3 Kent, 432, 433; Codman v. Evans, 5 Allen, 308; Perley v. Chandler, 6 Mass. 454; Robbins v. Borman, 1 Pick. 122; Adams v. Emerson, 6 Pick. 57; Mayhew v. Norton, 17 Pick. 357; Phillips v. Bowers, 7 Gray, 21; St. Mary, Newington, v. Jacobs, L. R. 7 Q. B. 47, 54; Gidney v. Earl, 12 Wend. 98. But where the *locus in quo* is a highway, the plaintiff must prove more than a mere entry; he must show either that the act was unlawful, or, if lawful, that it was done in an improper manner. Munson v. Mallory, 36 Conn. 165.]

(*y*) Doctor and Student, 30; Stammers v. Dixon, 7 East, 207; Lade v. Shepherd, 2 Str. 1004; Harrison v. Parker, 6 East, 154; Chester v. Alker, 1 Burr. 133; [Van Rensselaer v. Van Rensselaer, 9 John. 377.]

(*z*) Co. Litt. 4 b; The King v. Watson, 5 East, 480; Crosby v. Wadsworth, 6 East, 606, 609; Dyer, 285, l. 40; Bro. Trespass, pl. 279; Welden v. Bridgewater, Moore, 302; 2 Rol. Abr. 552, pl. 8; Dawtrie v. Dee, Palm. 47; 5 T. R. 335.

(*a*) Stammers v. Dixon, 7 East, 200; [Stewart v. Doughty 9 John. 108.]

(*b*) Smith v. Kemp, 2 Salk. 637.

(*c*) *Ib.*; Blackett v. Lowes, 2 M. & Sel. 499.

(*d*) Crosby v. Wadsworth, 6 East, 602; [Austin v. Sawyer, 9 Cowen, 39. The grantee of trees may maintain this action against the owner of the soil for cutting them down. Clap v. Draper, 4 Mass. 266; Howard v. Lincoln, 13 Maine, 122.]

(*e*) Welden v. Bridgewater, Cro. Eliz. 421; Burt v. Moore, 5 T. R. 335.

(*f*) Wilson v. Mackreth, 3 Burr. 1825; Harker v. Birkbeck, 3 Burr. 1560, 1561, 1562; Crosby v. Wadsworth, 6 East, 606.

(*g*) Bul. N. P. 85; Wilson v. Mackreth, 3 Burr. 1827; Co. Litt. 4 b; but see Hare v. Coley, Cro. Eliz. 143, and 3 Leon. 213. [Or they may maintain a joint action. Foote v. Colvin, 3 John. 246.]

(*h*) Welden v. Bridgewater, Cro. Eliz. 421; Wilson v. Mackreth, 3 Burr. 1827; Smith v. Kemp, Salk. 637; Bro. Trespass, pl. 174; 2 Rol. Abr. 552, note pl. 8. As to standing

the plaintiff hath not in law the exclusive possession of a pew, trespass cannot be supported even against a stranger for entering it ; (i) but it seems that for breaking a pew, the owner may maintain trespass ; and the person may support trespass against a person preaching in a church without his leave. (l) It may also be brought by a person who erected a *tombstone*, against a person who wrongfully removed and defaces it. (m) But the rule is, that case is the remedy for disturbing a party in the enjoyment of a mere *easement*. (n)

This action also lies for an injury to plaintiff's land covered with water ; (n¹) but if the interest be merely in the water, case is the only remedy. (o) When the trespass is in the plaintiff's river, pond, or lake, it is to be described as an entry on the plaintiff's close or land covered with water ; (p) or it may be charged that the defendant broke and entered a pool ; (q) or that the defendant broke and entered the several fishery of the plaintiff, &c. and fished therein for fish ; but it is disputed whether it lies for fishing in a free fishery. (r)

2dly. With respect to the plaintiff's right or interest in the property affected, we have given it a partial consideration in the preceding pages. (s) The *gist* of this action is the injury to the plaintiff's *possession* ; (s¹) and the general rule is, that unless at the time the injury was committed the plaintiff was in actual possession, trespass cannot be supported ; (t) and though the title may come

place, see *Rex v. Mellor*, 2 East, 190 ; *Stocks v. Booth*, 1 T. R. 430.

(i) *Stocks v. Booth*, 1 T. R. 430 ; *ante*, 160 ; *Mainwaring v. Giles*, 5 B. & Ald. 361 ; *Bryan v. Whistler*, 8 B. & C. 294.

(k) *Ante*, 160 ; *Spooner v. Brewster*, 3 Bing. 137, 138.

(l) *Anonymous*, 12 Mod. 420 ; *Turton v. Reynolds*, 12 Mod. 433.

(m) *Spooner v. Brewster*, 3 Bing. 136.

(n) *Ante*, 160.

(n¹) [*See Smith v. Ingraham*, 7 Ired. 175 ; *M'Kenzie v. Hulet*, 2 Taylor, 181.]

(o) *Challenor v. Thomas*, Yelv. 143. It lies at the suit of the lord of the manor, for trespasses to the sea-shore. *Blundell v. Catterall*, 5 B. & Ald. 268.

(p) *Co. Litt.* 4 b ; *Challenor v. Thomas*, Yelv. 143.

(q) *Challenor v. Thomas*, Yelv. 143 ; *Co. Litt.* 5 b.

(r) *Smith v. Kemp*, 2 Salk. 637 ; *Co. Litt.* 4 b, 122 a ; 2 Bl. Com. 40 ; *Richardson v. Mayor of Oxford*, 2 H. Bl. 182 ; *Child v. Greenhill*, Cro. Car. 554. See *Chitty's Game Laws*, 2d ed. 283, 299. It lies for dredging for oyster spat in a common navigable river, contrary to the 13 Rich. 2, stat. 1, c. 19 ; *The Mayor of Maldon v. Woolvet*, 4 P. & D. 26.

(s) *Ante*, 147 ; and see in general, Com. Dig. Trespass, B. ; Vin. Abr. Entry, G. 4, Trespass, T.

(s¹) [*Barnstable v. Thacher*, 3 Met. 242, 423 ; *Rucker v. M'Neely*, 4 Blackf. 179 ; *Rasor*

v. Qualis, 4 Blackf. 286. Where, in a case for breaking and entering the plaintiff's dwelling-house, it was alleged, by way of aggravation, that the defendant took and carried away the plaintiff's goods therefrom, it is held that the action was not supported on proof merely of a trespass in taking and carrying away the goods. *Eames v. Pritchard*, 8 Cush. 337 ; *Knapp v. Slocomb*, 9 Gray, 75 ; *Gilbert v. Thompson*, 9 Conn. 347 ; *Merriam v. Willis*, 10 Allen, 118 ; *Butt v. McLaughlin*, 6 Allen, 201. But see *Sampson v. Henry*, 13 Pick. 36 ; *Smith v. Smith*, 50 N. H. 212 ; *Loeb v. Mathias*, 10 Ind. 306. And it is otherwise in New York under the present practice. *Colton v. Johnson*, 7 Rob. (N. Y.) 164.]

(t) *The King v. Watson*, 5 East, 485, 486 ; *Sparhawk v. Bagg*, 16 Gray, 583 ; *Strickland v. Tompkins*, 9 John. 61 ; *Wickham v. Freeman*, 12 John. 183 ; *Van Brunt v. Schenck*, 11 John. 485 ; *Yates v. Joyce*, 10 John. 140 ; *Holmes v. Seeley*, 19 W. 507 ; *Schenck v. Mundorf*, 2 P. A. Br. 107 ; *Addleman v. Way*, 4 Yeates, 100 ; *Mather v. Trinity Church*, 3 Serg. & R. 100 ; *Allen v. Thayer*, 17 Mass. 299 ; *Bardwell v. Perkins*, 13 Maine, 87 ; *Moore v. Moore*, 13 Maine, 350 ; *Ripley v. Yale*, 16 Vt. 119 ; *Cong. Society v. Baker*, 15 Vt. 119 ; *Doyle v. Eagle*, 7 Gill & J. 321 ; *Oatman v. Fox*, 43 Vt. 462 ; *Kidder v. Kennedy*, 43 Vt. 479. See, however, *Bulkley v. Dolbear*, 6 Conn. 232 ; *Campbell v. Proctor*, 6 Gr.

question, yet it is not essential to the action that it should. (u) Therefore, a landlord *cannot, during a subsisting lease or demise, support trespass for an injury to the land, but the action of trespass must be in the name of the tenant. (u¹) But a feoffment with livery of seisin made on land determines the tenancy at will, though the tenant be not present nor assenting to the feoffment, and the *feoffee* may maintain *trespass* against the tenant at will who afterwards enters on his possession. (x) The landlord can only proceed in the above instances *in case* as a reversioner; and even to support that remedy the injury must be of such a nature as to affect and prejudice his reversionary interest. (y) But if trees or other property excepted in the lease be felled, or trees not excepted be felled, and afterwards carried away, the landlord may support trespass. (z) The mere occupation by a game-keeper or other servant of a lodge or other premises, as a hired servant, and without paying rent, is to be considered as the possession of the employer, and the latter may declare as on his own possession. (a) The payment of rent by the plaintiff, his exercise of the privilege of shooting, and the taking of the grass without interruption by a third person, by the plaintiff's license, were held to be a

12; *McGrady v. Miller*, 14 Vt. 128. A mortgagee may maintain trespass before condition broken or entry. *Woodruff v. Halsey*, 8 Pick. 333. As to the right of the mortgagor to maintain trespass against the mortgagee and others, see *Howe v. Lewis*, 14 Pick. 329; *Mayo v. Fletcher*, 14 Pick. 525; *Flagg v. Flagg*, 11 Pick. 575; *Fernald v. Linscott*, 6 Greenl. 234.]

(u) *Lambert v. Stroother*, Willes, 221; *Graham v. Peat*, 1 East, 244; *Chesley v. Barnes*, 10 East, 74; [Wilde J. in *Barnstable v. Thacher*, 3 Met. 242. And, therefore, a judgment in this action is not conclusive as to the title to the close, nor as to the right of possession thereof at a time subsequent to the alleged trespass. *Morse v. Marshall*, 97 Mass. 519; *Johnson v. Morse*, 11 Allen, 540; *Thayer v. Carew*, 13 Allen, 82; *Stevens v. Taft*, 8 Gray, 420.]

(u¹) [*Campbell v. Arnold*, 1 John. 511; *Tobey v. Webster*, 3 John. 468; *Wheeler v. Train*, 3 Pick. 255; *Holmes v. Seeley*, 19 Wend. 507; *Bousin v. Benton*, 6 Missou. 592. But trespass will lie by the owner of real estate against a person committing waste by permission of a tenant at will; *Daniels v. Pond*, 21 Pick. 367; but not for a mere disturbance of the possession. *French v. Fuller*, 23 Pick. 104. Trespass will not lie for the reversioner against a person committing waste under authority of the tenant in dower. *Shattuck v. Gragg*, 23 Pick. 88; *Livingston v. Mott*, 2 Wend. 605.]

(x) *Ball v. Callimore*, 1 Gale, 96.

(y) *Ante*, 71, 72; [*Randall v. Cleaveland*, 7 Conn. 328; *Lienow v. Ritchie*, 8 Pick. 235; *Hall v. Snowhill*, 14 N. J. (Law) 8. It has been held in Maine that trespass *quare clau-*

sum may be maintained by the owner of land for an injury to the freehold, though it be in the occupation of a tenant at will; and so can the tenant maintain such an action even against the owner of the freehold for an invasion of his rightful possession. *Kimball v. Souther*, 62 Maine, 309; *Bartlett v. Perkins*, 13 Maine, 87; *Davis v. Nash*, 32 Maine, 411; *Brock v. Berry*, 31 Maine, 293. So in Massachusetts. *Starr v. Jackson*, 11 Mass. 519; *Hingham v. Sprague*, 15 Pick. 102. See *Cushing v. Kenfield*, 5 Allen, 307; *Lienow v. Ritchie*, 8 Pick. 235. In New York case only will lie where the land is in possession of a tenant at will. *Campbell v. Arnold*, 1 John. 511; *Tobey v. Webster*, 3 John. 468; *Austin v. Sawyer*, 9 Cowen, 39; *Stuyvesant v. Tompkins*, 9 John. 61. See, also, *Herr v. Slough*, 2 Browne, 111; *Addleman v. Way*, 4 Yeates, 218; *Shenk v. Mundorf*, 2 Browne, 109; *Cooke v. Thornton*, 6 Rand. 8; *Truss v. Old*, 6 Rand. 556.]

(z) *Ib.* [See *Bulkley v. Dolbeare*, 7 Conn. 235; *Williams v. Lewis*, 3 Day, 498; *Gambling v. Prince*, 2 Nott & McC. 138. So, if land be granted to A. with a reservation of all mill seats, and the grantor permit B. to enter and erect a mill, the entry of B. and the erection of a mill sever the freehold, and render the mill a distinct close, and B. may maintain trespass against A. for pulling down the mill. *Van Rensselaer v. Van Rensselaer*, 9 John. 377; *Jackson v. Buel*, 9 John. 299; *Jordan v. Staples*, 57 Maine, 352. See, however, *Torrance v. Erwin*, 2 Yeates, 200, cited 5 Binney, 290.]

(a) *Bertie v. Beaumont*, 16 East, 33, 36; *Curtis's case*, Lit. Rep. 139; [*Davis v. Clancy*, 3 McCord, 422.]

sufficient possession to enable him to maintain trespass for breaking and entering wood land belonging to the crown. (b) But where plaintiff who had built a chapel conveyed it to the defendant by deed, the validity of which was questionable, and the defendant took possession, and gave the key to a gardener, who with his permission lent it to the plaintiff to preach in the chapel, and thereupon the plaintiff locked up the chapel and refused to return the key, it was held he had not sufficient possession to maintain trespass. (c)

Actual and exclusive possession, without a legal title, is sufficient against a wrong-doer, or a person who cannot make out a title *pro facie* entitling him to the possession; (d) or show any right or authority from the real owner. (e) Therefore, a person in possession under an illegal lease from a clergyman; (f) or under a *mere license* void demise from the crown; (g) or even it should seem an intrusion upon crown land, but not treated as such; (h) may maintain trespass action. A tenant for years; (i) a lessee at will; (k) and a tenant at sufferance; (l) may support this action against a stranger; or even against his landlord, (l) unless a right of entry be expressly or impliedly reserved to the latter. (m) And the contractors for making a navigable canal * having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close across a stream though for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong-doer. (n)

(b) Harper v. Charlesworth, 4 B. & C. 574.

(c) Revett v. Brown, 5 Bing. 7.

(d) Graham v. Peat, 1 East, 244; Chambers v. Donaldson, 11 East, 65, 67; Catteris v. Cowper, 4 Taunt. 547; and see Hall v. Davis, 2 C. & P. 33; per Best C. J. Revett v. Brown, 5 Bing. 9; [Bowley v. Walker, 8 Allen, 21; Barnstable v. Thacher, 3 Met. 242; Burling v. Read, 11 Ad. & El. N. R. 904; Ashley v. Landers, 9 Allen, 250; Van Rensselaer v. Van Rensselaer, 9 John. 381; Hall v. Chaffee, 13 Vt. 150; Ralph v. Bayley, 11 Vt. 521; Moore v. Moore, 21 Maine, 350; Myrick v. Bishop, 1 Hawks, 485; Richardson v. Merrill, 7 Misou. 333; Webb v. Sturtevant, 1 Scam. 181; Sawyer v. Newland, 9 Vt. 383. Where possession has been mixed and the plaintiff shows no title, he cannot object to the title of the defendant. Brown v. Pinkham, 18 Pick. 172; Barnstable v. Thacher, 3 Met. 239.]

(e) Chambers v. Donaldson, 11 East, 65.

(f) Graham v. Peat, 1 East, 244.

(g) Harper v. Charlesworth, 4 B. & C. 574.

(h) See *Ib.* per the judges.

(i) 2 Rol. Abr. 551; Geary v. Bearcroft, Sid. 347; [Stultz v. Dickey, 5 Binn. 285; Van Doren v. Everitt, 2 South. 460; Dorsey v. Eagle, 7 Gill & J. 321.]

(k) *Ib.*; [Stewart v. Doughty, 9 John. 108.]

(l) *Ib.*; 13 Co. 69; Graham v. Peat, 1

East, 245, note (a); Com. Dig. Trespass 1; 1 Saund. 322, note (5).

(l) [Bryant v. Sparrow, 62 Maine, Dickinson v. Goodspeed, 8 Cush. 119. It has been held that a tenant at sufferance may not maintain trespass against his landlord. Wilde v. Cantillon, 1 John. Cas. 123; E. v. Wood, 4 John. 150. But see Faulkner v. Anderson, Gilmer, 221. Where a tenant's will of a house remains in possession after his term has been duly determined by notice or otherwise, he cannot maintain an action of trespass *quare clausum* against the landlord for entering the house with force and arms, and taking away the windows and iron doors. Meader v. Stone, 7 Met. 147; [Ford v. Richardson, 6 Allen, 76; Curtis v. Lowell, 19 Pick. 25; Curtis v. Galvin, Allen, 215.]

(m) Anonymous, 11 Mod. 209; Com. Biens, H.; 11 Co. 48. A lessor having fully entered at the expiration of the term may sue in trespass persons claiming under the late tenant, as well as the late tenant himself; but where a tenant remains in possession after the expiration of his term, the landlord is not justified in expelling him by force in order to regain possession. Harland Moorhouse, 6 Bing. N. C. 52; 8 Scott, S. C.; Newton v. Harland, 1 M. & Gr. 64; Scott N. R. 491.

(n) Dyson v. Collick, 5 B. & Ald. 600.

there must be actual possession, and a mere right to enter is not sufficient; and it has been held that the commissioners of sewers could not maintain an action against commissioners of a harbor, for breaking down a dam erected by the former, as such commissioners, across a navigable river; as the authority to be exercised by them on behalf of the public does not vest in them such a property or possessory interest as would enable them to maintain such action. (o) And the proprietors of a navigation, having by statute a mere easement or right to use the land for the purposes of the navigation, do not necessarily acquire such interest in the soil of a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as will enable them to maintain trespass. (p)

There is a material distinction between personal and real property as to the right of the owner; in the first case, we have seen that the general property draws to it the possession, sufficient to enable the owner to support trespass, though he has never been in possession; (q) but in the case of land and other real property, there is no such *constructive* possession, (q¹) and unless the plaintiff had the *actual possession* by himself or his servant, (r) at the time when the injury was committed, he cannot support this action. (s) Thus, before entry and actual possession, a person cannot maintain trespass, though he hath the freehold in law; as a parson *before* induction, (t) or a conusee of a fine, (u) or a purchaser by lease or release, though the statute

(o) *Duke of Newcastle v. Clarke*, 2 Moore, 666; *Hollis v. Goldfinch*, 1 B. & C. 221.

(p) *Hollis v. Goldfinch*, 1 B. & C. 205; 2 D. & R. 316, S. C.

(q) *Ante*, 70; 2 Saund. 47 a; Bul. N. P. 33; [*Mather v. Trinity Church*, 3 Serg. & R. 512; *North v. Turner*, 9 Serg. & R. 244; *Woodruff v. Halsey*, 8 Pick. 333.]

(q¹) [*Campbell v. Arnold*, 1 John. 612; *Stultz v. Dickey*, 5 Binney, 290; *Webb v. Starrevant*, 1 Scam. 181; *Dobbs v. Gallidge*, 4 Dev. & B. 68; *Leadbetter v. Fitzgerald*, 1 Pike, 448; *Emerson v. Thompson*, 2 Pick. 488. An unrecorded deed of wild land is not, of itself, sufficient evidence of possession by the grantee, to entitle him to maintain trespass against a third person. *Estes v. Cook*, 22 Pick. 295. But see *M'Gran v. Bookman*, 3 Hill (S. Car.), 265. In *Cahoon v. Simmons*, 7 Ired. 189, it was held that constructive possession is sufficient to entitle one to maintain trespass *quare clausum*. See *Van Brunt v. Schenck*, 11 John. 385, where *Spencer J.* says: "We have carried the principle, as to real property, further than has been done in England, and we allow the owner to maintain trespass without actual entry, on the principle that possession follows the ownership, unless there be an adverse possession." See also *Wickham v. Freeman*, 12 John. 184; *Bush v. Bradley*, 3

Day, 306; *Graham v. Houston*, 4 Dev. 232; *Robinson v. Douglass*, 2 Aiken, 364; *Duncan J. in Mather v. Trinity Church*, 3 Serg. & R. 513, 514; *Wilcox v. Kinzie*, 3 Scam. 224; *Sawyer v. Newland*, 9 Vt. 383; *Davis v. Clancy*, 3 McCord, 422; *Bulkley v. Dolbeare*, 7 Conn. 233; *Austin v. Sawyer*, 9 Cowen, 39; *Wheeler v. Hotchkiss*, 10 Conn. 225; *Skinner v. M'Dowell*, 2 Nott & McC. 68; *Truss v. Old*, 6 Rand. 556; *Bigelow v. Lehr*, 4 Watts, 377; *Kempton v. Cook*, 4 Pick. 305; *Shepard v. Pratt*, 15 Pick. 32; *Walter v. Clarke*, 4 Bibb, 218; *Pearson v. Dansby*, 2 Hill (S. Car.), 466.]

(r) *Beatie v. Beaumont*, 16 East, 33; *ante*, 71.

(s) *The King v. Watson*, 5 East, 485, 487; *Bac. Abr. Trespass*, C. 3; [*Fish v. Branamon*, 2 B. Mon. 379; *Davis v. Wood*, 7 Missou. 162; *Gleason v. Edmonds*, 2 Scam. 448; *Tappan v. Burnham*, 8 Allen, 65. The possession of a part of a tract of land, by the owner of the whole, is the possession of the whole. *Kincaid v. Logue*, 7 Missou. 167; *Stone v. Moore*, 7 Missou. 170.]

(t) *Vin. Abr. Entry*, G. 4, and *Trespass*, S.; *Bac. Abr. Leases*, M.; *Hare v. Bickley*, *Plowd.* 528.

(u) *Berry & Goodman's case*, 2 Leon. 147.

executes the use, (*x*) or an heir, (*y*) or a devisee against an abator or a lessee for years before entry. (*a*) And it seems to be *doubtful whether the assignees of a bankrupt can sue for a trespass before bankruptcy; at all events it has been decided that the bankrupt cannot maintain such action. (*b*) But if the party having the legal title to the land enter thereon (as by going on the land, and beginning to plough, &c.), with intent to take possession, although he does not declare that such is his intention, he may maintain trespass against a person wrongfully in possession at the time of the entry, and without quitting possession, desires the owner to go away, and he continues his wrongful possession afterwards. (*c*) A party wrongfully holding possession of land cannot treat the rightful owner who enters on the land as a trespasser. (*d*) A person *after* induction cannot maintain this action for glebe land, though he make no actual entry for the induction puts him in possession of part for the whole; (*e*) but a disseisee may have it against a disseisor for the disseisin because he was then in possession; (*e*¹) but not for an injury after the disseisin, (*f*) until he hath gained possession by reëntry, and then he may support this action for the intermediate damage, (*f*¹) for the entry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him. (*g*) After recovery in ejectment

(*x*) Geary v. Bearcroft, Carter, 66; Vin. Abr. Trespass, S. pl. 13, 14; Greene v. Wallwin, Noy, 73; Com. Dig. Trespass, B. 3.

(*y*) Browning v. Beston, Plowd. 142; Anonymous, 2 Mod. 7.

(*z*) Anonymous, 2 Mod. 7.

(*a*) Bac. Abr. Lenses, M.; Browning v. Beston, Plowd. 142. A tenant for years of a house, demised it by indenture of mortgage dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to the proviso therein after mentioned, and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the proviso thereafter contained. The deed contained a proviso for reconveyance on payment of the mortgage money on the 24th of June then next, and also a proviso that on non-payment on that day it should be lawful for the mortgagee to enter upon and receive and take the rents and profits of the said leasehold and other premises, and, if he should think proper, of his sole authority to sell or underlet the premises, and to sell the fixtures and chattels. Held, that the mortgagee's right to take possession did not attach until the 24th of June, and that he could not maintain trespass for an entry, or for an asportavit of the fixtures and chattels before that day by a stranger. Wheeler v. Montefiore, 1 G. & D. 493.

(*b*) Clark v. Calvert, 8 Taunt. 742; 3 Moore, 96, S. C. See Nias v. Adamson, 3 B. & Ald. 225; Drayton v. Dale, 2 B. & C. 293.

(*c*) Butcher v. Butcher, 7 B. & C. 313.

(*d*) Taunton v. Costar, 7 T. R. 431; Mer v. Meymott, 7 Moore, 574; 1 Bin. S. C. See, also, Browne v. Dawson, D. 355. But see *ante*, 196, note (*m*). [An occupant of land cannot maintain an action against the true owner for a trespass committed by a third person. Merriam v. Willis, 10 Allen, 118, 119. A person having a legal right of entry on land, and entering by force, is not liable to an action of trespass. Hyatt v. Wood, 4 John. 156. If a person having a legal right to enter the house of another for one purpose, and then enter for another purpose, he becomes a trespasser thereby. Abbott v. Wood, 13 M. & W. 115.]

(*e*) Bulwer v. Bulwer, 2 B. & Ald. 414.

(*e*¹) [Rowland v. Rowland, 8 Ham. 100.]

(*f*) 2 Rol. Abr. 553; Dyer, 983; Com. 210.

(*f*¹) Tobey v. Webster, 3 John. 400; Holmes v. Seeley, 19 Wend. 507; P. & D. Dresser, 2 Met. 583; Dorrell v. Johnson, 10 Pick. 263; Bigelow v. Jones, 10 Pick. 263; Allen v. Thayer, 17 Mass. 296; B. & W. Wood, 1 Met. 528; Tyler v. Smith, 599; Byrum v. Carter, 4 Ired. 310; G. v. Houston, 4 Dev. 232; Culling v. C. Vt. 517; Chadbourne v. Straw, 22 Vt. 450. After entry on a tenant by sufficient distress, the owner may sustain trespass against the tenant. Dorrell v. Johnson, 10 Pick. 263.]

(*g*) Vin. Abr. Trespass, T.; 11 Co. 3 Bl. Com. 210; 2 Rol. Abr. 554; Trespass, pl. 35; Holcombe v. Rawlin, Eliz. 540; Com. Dig. Trespass, B. 3.

this action may be supported for mesne profits, though anterior to the time of the demise in the declaration in ejectment; (*h*) unless where a fine has been levied, in which case trespass cannot be supported for an injury committed anterior to the entry to avoid the fine. (*i*) So a copyholder may maintain an action of trespass for mesne profits from the time of surrender, after admittance and subsequent recovery in ejectment. (*k*)

A person having a mere incorporeal right, (*k*¹) as a common of pasture, turbary, &c. cannot support trespass *quare clausum fregit* for treading down the grass growing upon the land upon which he has such right of common, &c.; for although a commoner has a right to take such grass by the mouths of his commonable cattle, he is not to be considered as in possession of the land. (*l*) But whenever there is an *exclusive right of possession in corporeal property, trespass may be supported, though the party has not the absolute right to the soil, or the whole property therein; (*m*) as if a person have an exclusive right to cut turf and peat, or cut thorns, he may support trespass *quare clausum fregit*, and for cutting the turf; (*n*) and it may be supported for a trespass in a portion of a common field after the allotment to the plaintiff. (*o*) So the owner of the soil may support trespass, although the public or private individuals have a right of way, (*p*) or the privilege of holding a market (*q*) thereon, if there be committed on the close any act not protected by the subordinate rights or easements alluded to. (*q*¹) If the plaintiff were in possession of the lands, &c. at the time when the injury was committed, the circumstance of his having quitted possession before the commencement of the action constitutes no objection. (*r*)

With respect to the *nature of the injury to real property*, we have seen that trespass can only be supported when the injury was committed with force actual or implied, and immediate. (*s*)

3dly. The nature of the injury

(*k*) Run. Eject. 442; *Aslin v. Parkin*, 2 Burr. 666, 667; *Peake's Ev.* 326; *Adams's Eject.* 2d ed. 333, 334; *post*.

(*i*) 7 T. R. 732, 733; 3 Bl. Com. 210, 221.

(*k*) *Doe dem. Burnington v. Hall*, 16 East, 210; *Jeffereys v. Hicks*, 2 Wils. 15.

(*k*¹) [If the property injured is tangible, though the right to use it is incorporeal, the person entitled to the use must bring trespass if the injury be direct. But generally, where incorporeal rights are injured, the remedy is by an action on the case. *Seneca Road Co. v. Auburn &c. R. R. Co.* 5 Hill, 170; *Wilson v. Smith*, 10 Wend. 324.]

(*l*) Bro. Trespass, pl. 174; 2 Roll. Abr. 522, note, pl. 8; *Bac. Abr. Trespass*, C. 3; *Wilson v. Mackreth*, 3 Burr. 1825; *Welden v. Bridgewater*, Cro. Eliz. 421.

(*m*) *Ante*, 194, 195; *Harker v. Birkbeck*, 3 Burr. 1563; *Wilson v. Mackreth*, 3 Burr. 1824; *The King v. Watson*, 5 East, 485-

487; *Welden v. Bridgewater*, Cro. Eliz. 421; [*Myers v. White*, 1 Rawle, 353; *Van Rensselaer v. Radcliff*, 10 Wend. 639.]

(*n*) *Harker v. Birkbeck*, 3 Burr. 1560; *Wilson v. Mackreth*, 3 Burr. 1824; *Ashmead v. Ranger*, 2 Salk. 638; *Blackett v. Lowes*, 2 M. & Sel. 499.

(*o*) *Welden v. Bridgewater*, Cro. Eliz. 421; *The King v. Watson*, 5 East, 480, 485-487.

(*p*) *The Mayor &c. of Northampton v. Ward*, 1 Wils. 110.

(*q*) *Ib. Ibid.* 107.

(*q*¹) [*Ante*, 194, and cases in note (*x*¹); *Davenport v. Lamson*, 21 Pick. 72.]

(*r*) *Bac. Abr. Trespass*, C. 3; [*Stultz v. Dickey*, 5 Binney, 285.]

(*s*) *Ante*, 140, 141. [To entitle a party to damage for an unauthorized entry upon his real estate, it cannot be doubted that there should be an allegation in the writ that the defendant broke and entered the same. This

to real property; and of the person committing it.

It lies, however unintentional the trespass; (*t*) and the *locus in quo* were uninclosed, (*u*) or the door or house were open, if the entry were not for a justifiable purpose; (*x*) and even shooting a tame and killing game on another's land, though without an actual entry, is in law an entry; (*y*) though general when the injury was committed off the plaintiff's land, causing something to be suspended over it, but not touching it, a remedy must be case. (*z*) Where a master ordered a servant to throw down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care, and some of the rubbish naturally, and as was to be expected, rolled against the wall, it was held that the master was liable in trespass. (*a*) A mere nonfeasance, as leaving a title on land, we member, is not sufficient to support trespass; (*b*) and it was formerly supposed that for the mere continuance of an injury, for the removal of which the plaintiff had already recovered damages, a case of trespass was the proper remedy; (*c*) but it is now established that trespass is the proper form of action. (*d*)

As to the *person by* and *against* whom this action may be supported, it should be remembered that actual possession is necessary to sue in trespass, and that if the right of possession be in reversion, the action clearly cannot be sustained. Trespass lies against a mere tenant for years, will for pulling down a house, or cutting trees during the tenant's life, or will, (*d*¹) the interest being thereby determined; (*e*) but against a lessee for years, trespass for cutting down trees does not lie, and in the nature of waste is the only remedy for the cutting, (*e*¹) unless the trees were excepted in the lease. (*f*) But if he afterwards cuts the trees away, trespass or trover lies; (*g*) and if the trees be excepted in the lease, and he cut them down, trespass *quare clausum*

is more than mere form. *Sawyer v. Goodwin*, 34 Maine, 420, 421. Trespass for breaking and entering the plaintiff's close cannot be maintained where the evidence shows that the defendant entered by permission of the plaintiff. *Dingley v. Buffum*, 57 Maine, 379; *Wheeler v. Meshingromesia*, 30 Ind. 402.] As to these injuries in general, see *Com. Dig. Trespass*, A. 2; *Bac. Abr. Trespass*, F.

(*t*) *Baseley v. Clarkson*, 3 Lev. 37; *Covell v. Laming*, 1 Campb. 497; *Colvill v. Reeves*, 2 Campb. 576.

(*u*) *Ante*, 194, 195; *Doct. and Stud.* 30; *Stammers v. Dixon*, 7 East, 207; [*Dougherty v. Stepp*, 1 Dev. & B. 371.]

(*x*) *Ante*, 140; *Bac. Abr. Trespass*, F.; 2 *Roll. Abr.* 555, 1, 15.

(*y*) *Keble v. Hickringill*, 11 Mod. 74, 130; *Pickering v. Rudd*, 1 Stark. 58. *Quare*, if shooting over another's land is a trespass. *Pickering v. Rudd*, 1 Stark. 58.

(*z*) *Haward v. Banks*, 2 Burr. 1114;

Keble v. Hickringill, 11 Mod. 74, 130; *Pickering v. Rudd*, 1 Stark. 59; *ante*, 141.

(*a*) *Gregory v. Piper*, 9 B. & C. 591.

(*b*) *Ante*, 141.

(*c*) *Lawrence v. Obee*, 1 Stark. 22.

(*d*) *Holmes v. Wilson*, 10 Ad. & El.

(*d*¹) [*Phillips v. Covert*, 7 John. 1; *Turner v. Townsend*, 9 John. 35; *Turner v. Webster*, 3 John. 470.]

(*e*) *Countess of Salop v. Crompton*, 10 Eliz. 784; 5 Co. 13 b; 11 Co. 81 b; 11 Co. Litt. 57 a; *Saville*, 84.

(*e*¹) [But not for cutting and carrying away the trunks of trees blown down in tempest; trover it seems is the proper remedy for such a case. *Shult v. Barker*, 1 Serg. & R. 272.]

(*f*) *Udal v. Udall*, 11 Mod. 83; 1 S. 332, note (5); *Wyndham v. Way*, 4 S. 316; *ante*, 157, 158.

(*g*) *Ib.*; *Gordon v. Harper*, 7 T. 4 Co. 62; *Vin. Abr. Trespass*, S. pl. 1.

fregit lies for such cutting. (h) And a tenant for years cannot support trespass against a stranger merely for carrying away trees cut down during his term. (i)

The proper remedy by one joint tenant or tenant in common of realty, against the other who commits a partial injury to the land or other property, as by waste, &c. is an action on the case as for misfeasance; (j) but if one tenant in common totally destroy the subject-matter of the tenancy in common, his companion shall have trespass. (k) If one of two tenants in common of an old wall pull it down in order to rebuild it, and does rebuild it, this is not a destruction for which trespass lies. (l) If two be tenants in common of a folding, and one of them by force prevent the other from erecting hurdles, trespass lies. (m) This action does not lie against a tenant in common for taking the whole profits, yet if he drive out of the land any of the cattle of the other tenant in common, or hinder him from entering or occupying the land, an action of ejectment may be supported; (n) but not, it seems, an action of trespass. (o)

Though the entry were lawful, yet by a *subsequent abuse* of an authority in law to enter, as to distrain, &c. (except for rent or poor's rates, (p) or under the turnpike act), (q) the party may become a trespasser *ab initio*. (r) As if an officer under an execution continue * in possession longer than the law allows,

Trespasses
ab initio by
subsequent
abuse.

(h) Bro. Trespass, pl. 55; 1 Saund. 322, note (5); Bac. Abr. Trespass, C. 3.

(i) Evans v. Evans, 2 Campb. 491; Blackett v. Lowes, 2 M. & Sel. 499. See, further, as to trees, *ante*, 167.

(j) Martyn v. Knowllys, 8 T. R. 145; Com. Dig. Estate, K. 8; Cubitt v. Porter, 8 B. & C. 268. [The general doctrine is that one tenant in common cannot maintain trespass against his cotenant for an entry upon and enjoyment of the common property. Hastings v. Hastings, 110 Mass. 280, 285; 4 Kent, 370.]

(k) Cubitt v. Porter, 8 B. & C. 268; Co. Litt. 200; *ante*, 89.

(l) Cubitt v. Porter, 8 B. & C. 268; *ante*, 89. As to the right of the owner of one half of a party-wall to maintain trespass for its destruction, see Murley v. M'Dermott, 3 N. & P. 358.

(m) Co. Litt. 200 b.

(n) Co. Litt. 199 b; Goodlittle v. Tombs, 2 Wils. 119.

(o) Cubitt v. Porter, 8 B. & C. 269; [but see Wilkins v. Burton, 5 Vt. 76; Booth v. Adams, 11 Vt. 156; Porter v. Hooper, 13 Maine, 25; Duncan v. Sylvester, 13 Maine, 517; McGill v. Ash, 7 Barr, 397; King v. Phillips, 1 Lansing, 421.]

(p) Wallace v. King, 1 H. Bl. 13.

(q) 3 Geo. 4, c. 126, s. 144.

(r) Bac. Abr. Trespass, B.; Six Carpenters' case, 8 Co. 146; Reed v. Harrison, 2 Bl. Rep. 1218; Com. Dig. Trespass, C. 2;

Taylor v. Cole, 3 T. R. 292; Shorland v. Govett, 5 B. & C. 488; [Sterling v. Warden, 52 N. H. 197; S. C. 51 N. H. 217; Allen v. Crofoot, 5 Wend. 506; Adams v. Rivers, 11 Barb. 390; Van Brunt v. Schenck, 13 John. 414; Adams v. Freeman, 12 John. 408; Sackrider v. M'Donald, 10 John. 253; Hazard v. Israel, 1 Binn. 240; Jarrett v. Gwathmey, 5 Blackf. 238. An officer who enters a house by authority of law, and attaches goods therein, becomes a trespasser *ab initio* by placing there an unfit person as keeper of the goods, against the remonstrance of the owner of the house. Malcolm v. Spoor, 12 Met. 279. Selling an article under process of law before or after the time prescribed by law, will render the officer a trespasser *ab initio*. Pierce v. Benjamin, 14 Pick. *320; Purrington v. Loring, 7 Mass. 388; Smith v. Gates, 21 Pick. 55. A seizure and sale of the whole of a chattel on an execution against a cotenant of it will make the sheriff a trespasser *ab initio* as to the other. Melville v. Brown, 15 Mass. 82; Walker v. Fitts, 24 Pick. 191, 194; Lothrop v. Arnold, 25 Maine, 136. But the abuse of the authority of law, which makes a man a trespasser *ab initio*, is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts lawful which the law does not forbid. The doctrine does not apply to the case of an agent in a factory, who uses improper force in ejecting a dis-

his entry becomes a trespass *ab initio*. (s) And it seems that a magistrate is a trespasser *ab initio*, if he commit a person charged with an offence for reëxamination for an unreasonable time. (t) So in the case of distress *damage feasant*, a subsequent conversion of the goods renders the original seizure illegal. (u) But in these cases the subsequent act must, in order to render the original entry a trespass, be itself forcible, and an act of such a nature that trespass would have existed if no authority or right existed; and therefore a sheriff acting upon a writ *feri facias* is not a trespasser *ab initio*, merely because he extorts more than he was justified in levying. (x) In the case of a distress *rent*, if the party remain in possession an unreasonable time more than five days; (y) or turn the plaintiff's family out of possession; (z) he is liable for those acts only. In the case of an authority from the complainant himself to enter, the abuse of such authority will not in general render the party a trespasser *ab initio*. (a)

In the next preceding pages we have considered when this action may be supported against a party for his own immediate acts, in some cases it may be supported against a person for the acts of another and of cattle, &c. Thus a party may be sued in respect of his *previous* consent or request that a trespass may be committed: as if A. command or request B. to enter or impress C., or to take his goods, or to commit a trespass on his land, and B. do it, this action lies as well against A. as against

Against a party, for trespasses of others, or of his cattle, &c.

orderly person employed there. *Esty v. Wilmot*, 15 Gray, 168. A mere nonfeasance will not render a party a trespasser *ab initio*. *Hale v. Clark*, 19 Wend. 498; *Gardner v. Campbell*, 15 John. 401.] If an execution creditor after an abandonment of the writ, seizes goods under it, he is liable in trespass to the debtor or any purchaser from him. *Per Parke B. Samuel v. Duke*, 3 M. & W. 630. A party making a distress for two causes, as to one of which he is justified and entitled to notice of action, is nevertheless liable in trespass as to the other. *Lamont v. Southall*, 5 M. & W. 416. See, also, *Charlton v. Alway*, 11 Ad. & El. 993; 3 P. & D. 618.

(s) *Reed v. Harrison*, 2 Bl. Rep. 1218; *Aitkenhead v. Blades*, 5 Taunt. 198. * See *Shorland v. Govett*, 5 B. & C. 488; [*Guptill v. Richardson*, 62 Maine, 265, 266; *Kent v. Willey*, 11 Gray, 373; *Russell v. Hanscomb*, 15 Gray, 166.]

(t) *Davis v. Capper*, 10 B. & C. 28; but see *Cave v. Mountain*, 1 M. & Gr. 257.

(u) *Dye v. Leatherdale*, 3 Wils. 20. [Omitting to give an impounded beast reasonable food and water will make the field-driver a trespasser *ab initio*. *Adams v. Adams*, 13 Pick. 384. See *Gibbs v. Chase*, 10 Mass. 125, 129; *Nelson v. Merriam*, 4 Pick. 249; *Sackrider v. McDonald*, 10 John. 253; *Hopkins v. Hopkins*, 10 John. 369; *Pratt v. Petrie*, 2 John. 191; *ante*, 155. So a failure of

a person, who takes up cattle doing damage on his land and delivers them to the pound-keeper, to leave with the pound-keeper, a memorandum required by law, renders the person liable to the owner of the cattle as a trespasser *ab initio*. *Sherman v. Brame*, Met. 407. See *Kent v. Willey*, 11 Gray, 368; *Kerr v. Sharp*, 11 Serg. & R. 399.

(x) *Shorland v. Govett*, 5 B. & C. 488.

(y) *Wallace v. King*, 1 H. Bl. 13; *Terbourne v. Morgan*, 11 East, 395; *Meade v. Kemble*, 2 Campb. 115; per Lord Mansfield, *Man C. J. Ladd v. Thomas*, 12 Ad. & El. 117; *ante*, 155. What is a reasonable time, see *Pitt v. Shew*, 4 B. & Ald. 208, quoting the decision in *Wallace v. King*, 1 H. Bl. 15.

(z) *Etherton v. Popplewell*, 1 East, 1.

(a) *Re Gibson, Lane*, 30; *Bac. Abr.* 100, pass. B.; *Bennett v. Alcott*, 2 T. R. 100; [*Allen v. Crofoot*, 5 Wend. 506; *Edel v. Yeakel*, 27 Penn. 26; *Dumont v. Smith*, 4 Denio, 319; *Wendell v. Johnson*, 8 N. H. 220; *Ballard v. Noaks*, 2 Pike, 45; *Cusack v. Adams*, 18 Pick. 110, 114. As to the distinction between the abuse of an authority in law and an authority in fact or license, see, further, *Van Brunt v. Schenck*, 13 J. 416; *Barnes v. Barnes*, 6 Vt. 388; *Esty v. Wilmot*, 15 Gray, 168, 169, 170; *Stamford v. Moore*, 12 N. H. 42; *Jarrett v. Gwathmey*, 5 Blackf. 238; *Narehood v. Wilhelm*, Penn. St. 64.]

B.; (b) and trespass lies against a master where, while the servant drives his master, the horse of the latter runs away and does damage. (c) So if A. direct the sheriff to levy particular goods, not the property of the defendant in the action, A. may be sued in trespass. (d) It may also be supported against a person, not being an infant or *feme covert*, who *afterwards assents* to a trespass committed for his benefit, (e) though not so as to render him liable for a forcible entry; (f) so for taking goods, even to subject *the party to liability for the abuse of an authority in law, as a trespasser *ab initio*. (g) But without such consent, trespass does not in general lie; as if A. command his servant to do a lawful act, as to distrain the goods of B. and he wrongfully take the goods of C., A. is not liable, (h) the liability of the sheriff being an exception. (i) And the mere acceptance of goods illegally taken by another does not always furnish evidence of an assent; (k) as if a pound-keeper receive goods illegally distrained. (l) But in these cases, if the party after demand withhold the goods, trover may be supported against him. And, as we have already seen, unless there be an actual consent to the trespass, either before or after it was committed; or unless the act was the probable result of the orders given, and the servant used due care; even a master is not liable in an action of trespass for the act of his servant; though case may be supported against him in some instances, for injuries in respect of which the servant is liable in trespass. (m) We have before seen how far agents or partners, &c. are liable. (n)

Liability for
trespasser of
others, or of
cattle

We have already partially considered the liability of a person for the acts of his cattle. (o) In those cases in which the defendant is

(b) *Ante*, 90; *Flewster v. Royle*, 1 Campb. 187; *Rafael v. Verelst*, 2 Bl. Rep. 1055; *Britton v. Cole*, Salk. 409; 4 Inst. 317; *Bac. Abr. Trespass*, G.; *Com. Dig. Trespass*, C. 1.

(c) *Chandler v. Broughton*, 3 Tyr. 220; 1 Cr. & M. 29. S. C.

(d) 2 Roll. 553, 1, 5, 10.

(e) *Ante*, 90; *Badkin v. Powell*, Cowp. 478; *Barker v. Braham*, 3 Wils. 377; [*Adams v. Freeman*, 9 John. 117; *Smith v. Shaw*, 12 John. 257; *Guille v. Swan*, 19 John. 382; *Wall v. Osborne*, 12 Wend. 39; *Morgan v. Varick*, 8 Wend. 594.]

(f) 4 Inst. 317; *Co. Litt.* 180 b, note (4).

(g) *Re Gibson*, Lane, 90; *ante*, 90; [*Van Brunt v. Schenck*, 13 John. 414.]

(h) *Sanderson v. Baker*, 3 Wils. 312, 317; *M'Manus v. Crickett*, 1 East, 108; *ante*, 90.

(i) *Ante*, 90; [*Hazard v. Israel*, 1 Binney, 240. "If a stranger comes in aid of an officer in executing legal process, and the officer afterwards omits to return the writ, or by any other subsequent abuse of his authority, becomes a stranger *ab initio*, this shall not prejudice the stranger, nor make him a trespasser. The same principle ap-

plies to bailiffs who serve a writ by virtue of a precept from the sheriff. If such writ be not duly returned by the sheriff he is a trespasser, but the bailiff is not punishable. But where the original act of the officer is unlawful in itself, any stranger who aids him in it, will be liable to the party injured, although he act by the officer's command." *Jackson J. in Oystead v. Shed*, 13 Mass. 506, 511; *Elder v. Morrison*, 10 Wend. 128; *Hooker v. Smith*, 19 Vt. 151.]

(k) 2 Roll. 555, 1, 50.

(l) *Badkin v. Powell*, Cowp. 476; [*Folger v. Hinckley*, 5 Cush. 264.]

(m) *Ante*, 90, 146; *M'Manus v. Crickett*, 1 East, 106; 2 Roll. 553, 1, 25; *Boucher v. Noidstrom*, 1 Taunt. 568; *Croft v. Alison*, 4 B. & Ald. 590; [*The Philadelphia &c. R. R. Co. v. Wilt*, 4 Whart. 143.]

(n) *Ante*, 94, 96.

(o) *Ante*, 93, 188. [By the common law, a party, into whose land agisted cattle escape and there do damage, may maintain trespass against the general owner of the cattle, or against the agister, at his election. *Sheridan v. Bean*, 8 Met. 284; *Barnum v. Vandusen*, 16 Conn. 300.]

not liable, unless he had notice of the propensity of his cattle, as in the instance of a dog biting mankind, sheep, &c. (*o*¹) or an unruly bull doing some injury; the remedy is in general by action on the case; (*p*) and that is the proper form of action for the consequence of bringing an unruly horse, &c. into an improper place. (*q*) But if the animal were naturally of the propensity to do the mischief complained of, as horses and cattle to trespass on land, though the owner had no notice in fact of their propensity, the remedy is trespass.

Trespass may also be supported for an injury committed by an animal notoriously ferocious and let loose by the owner. (*s*)

SECONDLY, UNDER COLOR OF LEGAL PROCEEDINGS.

The application of the action of trespass to injuries committed under color of a legal proceeding, may be considered under the following heads:

First, In general no action whatever can be supported for any trespass, however *erroneous*, if expressly sanctioned by the judgment or direction * of one of the superior courts at Westminster, or even by an inferior magistrate, acting within the scope of his jurisdiction. (*t*) If the court or inferior judge has jurisdiction over the subject-matter, (*t*¹) he is not liable as a trespasser, however erroneous the conclusion at which he arrives may be. (*u*) And we have before seen that commissioners of bankrupt are not liable in trespass for committing a person who does not answer to their satisfaction, when examined before them touching the bankrupt's estate.

(*o*¹) [Paff v. Slack, 7 Barr, 254; Decker v. Gammon, 44 Maine, 322.]

(*p*) Ib. Ibid.; Bayntine v. Sharp, Lutw. fo. 90; Mason v. Keeling, 1 Ld. Raym. 608; Rex v. Huggins, 2 Ld. Raym. 1583; Mason v. Keeling, 12 Mod. 333; Dyer, 25, pl. 162.

(*q*) Anonymous, Ventris, 295.

(*r*) Ante, 93; 2 Rol. Abr. 568, N. 1, 15; 3 Bl. Com. 211; Mason v. Keeling, 1 Lord Raym. 608; Rex v. Huggins, 2 Lord Raym. 1583; Bac. Abr. Trespass, G. 2.

(*s*) Ante, 93; Rex v. Huggins, 2 Lord Raym. 1583; Leame v. Bray, 3 East, 595, 596. [The owner of a cow which is accustomed to hook, the vicious propensity being known to the owner, is liable for damage done by her although it be done in the highway against the land of her owner, and while going to her usual watering place. Cogswell v. Baldwin, 15 Vt. 404. So the owner of a bull is liable to this action, if the bull break from his inclosure and gore a horse of another so that he die, and the measure of damages is the value of the horse. Dolph v. Ferris, 7 Watts & S. 367. See the distinction taken between the case of an animal *rightfully* and an animal *wrongfully* in the place where the mischief is done, as regards notice to the owner of the vicious propensity, in Decker v. Gammon, 44 Maine, 322.]

(*t*) 10 Co. 76 a; Perkin v. Proctor, 2 W. 384; Ackerley v. Parkinson, 3 M. & W. 411, 425, 427, 428; Doawell v. Impey, 1 M. & W. 169; ante, 87; Cave v. Mountain, 1 M. & Gr. 257.

(*t*¹) [Shoemaker v. Nesbit, 2 Rawle, 244; Cooper v. Adams, 2 Blackf. 294.]

(*u*) Mills v. Collett, 6 Bing. 85. Where justices have jurisdiction, and the conviction is still subsisting, and is not void, *ex facie*, neither the justices nor the officer who executes the warrant of commitment can be sued as trespassers. Baylis v. Strickland, 1 M. & Gr. 591. But if the conviction be bad on the face of it, as for including more than one distinct offence, or omitting an important substantial covenant, trespass may be supported for levying a penalty by distress. Newman v. Bendyshe, 10 Ad. & El. 11; Newman v. The Earl of Hardwick, 10 Ad. & El. 124. See, also, Ashby v. Harris, 1 M. & W. 673. As to the liability of a convicting magistrate in trespass, where the conviction is quashed on appeal, see Jones v. Gurdon, 2 G. & D. 133; and as to his liability in trespass if he commits a party to disobedience to an order which turns out to be invalid, see Wilkins v. Hemsworth, 3 & P. 55.

rupt's estate. (x) It seems that no action will lie against a judge for what he does *judicially*, though it were done maliciously; (y) at least he would not be liable in trespass in such case. And where the lord chancellor sitting in bankruptcy committed the solicitor to the commission for not obeying an order, it was held that he had jurisdiction to do so, and that no action was sustainable against him for so doing. (z) But when an inferior court is guilty of an *excess* of jurisdiction, *trespass* may be supported for anything done under such proceeding. (a) And in the case of an error by a *ministerial* officer this action may be supported, if the injury complained of was committed with force and immediate. (b) We have already considered how far a judicial officer or other public agent will be liable on the ground of having exceeded his jurisdiction or authority, or acted with negligence in the exercise of his duty. (c)

Secondly, When the court has *no jurisdiction* over the subject-matter, trespass is the proper form of action against all the parties for any act, which, independently of the process, would be remediable by this action, or by trover, if goods have been taken. (d) *Trespass lies *if commissioners of excise ad-*

<sup>2dly. Where
no jurisdiction.</sup>

(x) *Doswell v. Impey*, 1 B. & C. 163; ante, 88.

(y) *Case of Barnardiston & Soame*, 7 St. Trials, 442; 6 Howell, 1094; *Ackerley v. Parkinson*, 3 M. & Sel. 425; 2 Hawk. c. 13, a. 20. See cases cited in *Dicas v. Lord Brougham*, 1 Mood. & Rob. 309; 6 Car. & P. 249, S. C. In such cases the magistrate might be punished by criminal information or indictment. See *Ib.* and *Burn's J.* 26th ed. tit. Justices.

(z) *Dicas v. Lord Brougham*, 1 Mood. & Rob. 309; 6 Car. & P. 249, S. C.

(a) See ante, 88; *Doswell v. Impey*, 1 B. & C. 169. Note the distinction between error in the process or other proceedings where there is jurisdiction over the subject-matter, and an irregular proceeding where there is a total want of jurisdiction. *Ackerley v. Parkinson*, 3 M. & Sel. 425, 427, 428. Trespass is the proper remedy against a mayor of a corporation for issuing a warrant of distress for a borough rate, where he has no jurisdiction. *Fernley v. Worthington*, 1 M. & Gr. 491; 1 Scott N. R. 432, S. C.

(b) *Groenvelt v. Burwell*, 1 Lord Raym. 471; *Briton v. Cole*, 1 Salk. 395; *Morgan v. Hughes*, 2 T. R. 225. The steward of a court baron is a judicial and not a mere ministerial officer. *Holroyd v. Breare*, 2 B. & Ald. 473.

(c) Ante, 88, 95.

(d) 10 Co. 76 a; *Perkin v. Proctor*, 2 Wils. 385; *Brannwell v. Pennick*, 7 B. & C. 536; *Rembert v. Kelly*, Harper, 65; *Kennedy v. Terrill*, Hardin, 490; *Taylor v. Mofatt*, 2 Blackf. 306; *Flack v. Ankeny*, Breese, 145; *Hull v. Blaisdell*, 1 Scam. 384; *Allen*

v. Gray, 11 Conn. 95; *Grammond v. Raymond*, 1 Conn. 40; *Horton v. Auchmody*, 7 Wend. 200; *Brown v. Crowl*, 5 Wend. 298; *Churchill v. Churchill*, 12 Vt. 661; *Putnam v. Man*, 3 Wend. 202; *Bigelow v. Stearns*, 19 John. 39; *Elliott v. Peirsol*, 1 Peters (U. S.), 328; *Beaty v. Perkins*, 6 Wend. 382; *M'Cool v. M'Cluney*, Harper, 486; *Vail v. Lewis*, 4 John. 450; *Gardner v. Neil*, 1 Car. Law Repos. 492.] The case of *Carratt v. Morley*, 1 Q. B. Rep. 18; 1 G. & D. 275, is a very important one to show the liability of parties acting under proceedings void on account of want of jurisdiction, as well as on account of defect in the form of the proceedings. In that case *Morley* had sued *Carratt* as a resident within the jurisdiction of the court of requests for the sokes of *Bolingbroke*, &c. and obtained judgment by default against him, and he was taken in execution by an officer under a warrant of the court, his residence being in the wapentake of *Wraggoc*, which was expressly exempted from the jurisdiction of the court. *Carratt* brought an action of trespass against *Morley*, against six of the commissioners who signed the warrant, and against *Horn*, the officer who arrested him and obtained the money from him under the warrant. It was held, on the authority of *Cohen v. Morgan*, 6 D. & R. 8, and other cases (see *West v. Smallwood*, 6 Dowl. P. C. 580; *Parmiter v. The Liverpool Gas Company*, 3 Ad. & El. 433), and upon principle, that the party who merely originated his suit by stating his case to a court of justice was not guilty of trespass, though the proceedings were erroneous and without jurisdiction; but as the warrant was made without legal authority, the

judge low wines to be strong waters, &c.; (e) or leather searchers properly seize leather. (f) It has been considered, that when proceedings in an inferior court, having no jurisdiction over the defendant, are adopted by a party with an express malicious intent, though there be a demand recoverable elsewhere, an action on the case may be supported. (g) So where the party maliciously and unduly issues a second *fiery facias*, case may perhaps be brought; (h) and if a party maliciously procure a magistrate to grant an illegal warrant, it seems he is liable in case for the malice. (i) Trespass is also the proper remedy, where an inferior court has jurisdiction over the subject-matter, but is bound to adopt certain forms in its proceedings, from which it deviates, and whereby the proceedings are rendered *coram non iudice*. (k) But it does not lie for arresting a person privileged either *personally or locally*, but case is the only remedy. (l)

Justices of the peace are liable in *trespass* in either of the following cases: *First*, If, on their convicting or making an order on a party upon a statute, the conviction or order on the face of it does not shew

commissioners were held liable for the imprisonment which ensued from it. The warrant itself was objected to as not truly describing the court of requests, nor following the style and form prescribed by the act of parliament. This it was contended ought to be considered as the act of the clerk to the commissioners, and not the act of the commissioners themselves, but it was held, as the commissioners would have been liable for the excess of jurisdiction, however perfect the form of the warrant might have been, that this was no protection to them. It was also held, that the defect in the warrant deprived the officer of a protection which he would have possessed if it had been correct, or even substantially good (see *Andrews v. Marris*, 1 Q. B. Rep. 3; 1 G. & D. 268); and he was therefore held liable with the rest. [See *Sheppard v. Furniss*, 19 Ala. 760; *Cooper v. Halbert*, 2 McMullan, 419; *Lovier v. Gilpin*, 6 Dana, 321; *Riley v. Johnston*, 13 Geo. 260; *Dixon v. Watkins*, 9 Ark. 139; *Kennedy v. Terrill*, Hardin, 490.]

(c) *Terry v. Huntington*, Hardr. 483; *Perkin v. Proctor*, 2 Wils. 384.

(f) *Warne v. Varley*, 6 T. R. 443. Where no fraud is attempted in concealing articles from the officers of the customs unless a previous demand is made by them, they are liable in an action of trespass to the person for taking goods by force, but an action of trespass *de bonis asportatis* cannot be supported. *De Gondouin v. Lewis*, 2 P. & D. 283.

(g) *Goslin v. Wilcock*, 2 Wils. 302; *Elsee v. Smith*, 2 Chit. R. 304. *Sed vide Morgan v. Hughes*, 2 T. R. 225. It would seem trespass is at least the safer remedy in such case.

(h) *Waterer v. Freeman*, Hob. 205, 206. See *Branscomb v. Bridges*, 1 B. & C. 145.

(i) *Elsee v. Smith*, 2 Chit. R. 304; *Vivison v. Smallwood*, 3 M. & W. 418. But it is necessary that the constable charged with execution of the warrant, and points out the person to be arrested, he is so far a party to the arrest, and liable in trespass. See *West v. Smallwood*, *supra*.

(k) *Cole's case*, Sir W. Jones, 171; *Vivison v. Gill*, 1 East, 64; *Smith v. Bouch*, 1 Rep. temp. Hardw. 71; *Martin v. Mars*, 1 Hob. 63; *Weaver v. Clifford*, 2 Bulst. 1. Commissioners of sewers are liable in trespass for issuing distress warrants for a rate, which was void on account of irregularity in the making of it. *Wingate v. Waite*, 6 M. & W. 739.

(l) 10 Co. 76 b; 6 Co. 52 a; *Cameroon v. Lightfoot*, 2 Bl. R. 1190; *Tarleton v. Fisher*, Dougl. 671; *Barker v. Braham*, 3 Wils. 3; *Whalley v. Pepper*, 7 C. & P. 506; [See *Swinnerton v. Chamberlain*, 3 Conn. 537; *Smith v. Sherrin*, 12 John. 257; *Chase v. Fish*, 16 Maine, 1; *Carle v. Delesdernier*, 13 Maine, 363.] In an action of trespass has been held to lie against a justice of the peace who voluntarily and without request or authority of the plaintiff, issued an execution against the body of a person whom he knew to be privileged from imprisonment. *Percival v. Jones*, 2 John. Cas. 1. *Farmers' Bank v. McKinney*, 7 Watts, 2; but see *Hess v. Morgan*, 3 John. Cas. 1. So trespass lies against a party at whose instance a void warrant is issued out of a justice's court against a person privileged from arrest. *Curry v. Pringle*, 11 John. 44. *Quære*, whether trespass cannot be supported, if any action at all will lie, when the arrest seems doubtful except there be malice. *Stokes v. White*, 1 Cr., M. & R. 223; *Newman v. Constable*, 1 G. & D. 408; *Lloyd v. Jones*, 5 Ad. & El. 228.

* that any offence has been committed, and in fact discloses that they acted without jurisdiction. (m) *Secondly*, If the conviction or order show an excess of jurisdiction by them. (n) And in these cases trespass lies against the magistrate for any distress or imprisonment upon the conviction or order, although the conviction or order has not been quashed, and there is no imputation of malice. *Thirdly*, A justice of the peace is a trespasser, if the warrant of *commitment* do not show *an offence* over which he has jurisdiction, although there may have been a previous regular conviction which is still in force. (o) *Fourthly*, He is liable if the warrant of *commitment* substantially vary from the conviction, so that the offence stated in the former, and that described in the latter, are in law wholly different in their nature, for in such case the commitment has no conviction to support it. (p) And *Fifthly*, Trespass, and not case, is the proper remedy against a justice of the peace who maliciously grants a warrant against another, and causes him to be arrested thereunder, *without any information*, upon a supposed charge of felony; (q) or who, *Sixthly*, commits a party charged with felony for re-examination for an *unreasonable time*, but without any improper motive; and it seems that a warrant of commitment for an unreasonable time is wholly void. (r)

Magistrates are *not* liable, *First*, If, having jurisdiction over the subject-matter, they produce a conviction drawn up in due form and remaining in force. In such case the conviction is a protection in any action against them for the act so done, and the facts therein stated cannot be controverted in such action (there being a regular commitment or warrant). (s) *Secondly*, They are not liable in trespass upon such a *conviction* being *quashed*; the statute (t) expressly providing in such case (u) that the plaintiff shall not recover more than 2*d*. (without costs of suit) besides the sum levied, if any, unless it be alleged in the declaration, "and which shall be in case only," that the justice acted maliciously and without reasonable and probable cause. In such an action upon the case it is not sufficient for the plaintiff to prove his innocence, and to call on the magistrate to show probable cause for the conviction; but the plaintiff must give such evidence of what passed on the hearing, by calling the witnesses for the prosecution, or otherwise, that it may appear there was no probable cause for the conviction. (x) *Thirdly*, Justices are not liable for a mere error

(m) *Crepps v. Durden*, Cowp. 640; *Branwell v. Penneck*, 7 B. & C. 536; *Else v. Smith*, 2 Chit. Rep. 304; *Gimbert v. Coynsey*, 1 M. & Y. 469.

(n) *Groome v. Forrester*, 5 M. & Sel. 314.

(o) *Wickes v. Clutterbuck*, 2 Bing. 483, altered in 7 & 8 Geo. 4, c. 29, 30, and 9 Geo. 4, c. 31.

(p) *Rogers v. Jones*, 3 B. & C. 409. A slight discrepancy is not material. *Massey v. Johnson*, 12 East, 67.

(q) *Morgan v. Hughes*, 2 T. R. 225.

(r) *Davis v. Capper*, 10 B. & C. 28. See *Cave v. Mountain*, 1 M. & Gr. 257.

(s) *Gray v. Cookson*, 16 East, 13; *Basten v. Carew*, 3 B. & C. 649; *Fawcett v. Fowles*, 7 B. & C. 394. See *Massey v. Johnson*, 12 East, 67; [*Miller v. Grice*, 1 Rich. 147.]

(t) 43 Geo. 3, c. 141, s. 1.

(u) See *Massey v. Johnson*, 12 East, 67; *Gray v. Cookson*, 16 East, 13.

(x) *Burley v. Bethune*, 5 Taunt. 580

in judgment or a mistake in the particular case, where *they have jurisdiction over the subject-matter. The defendant, as a magistrate committed to prison, as a felon, the plaintiff, against whom a charge had been made of maliciously cutting down a tree on premises in his occupation, the property of A. B. ; and it was held that the defendant was not liable to an action. (y) *Fourthly*, We have before us, (z) that magistrates are not liable as trespassers for what they do upon a charge or complaint in a matter over which they may have jurisdiction, unless all the facts are shown to have been proved before them, and it appears that full opportunity was afforded them for forming a correct judgment, &c.

The acts of a justice who has not duly qualified are not absolutely void ; and therefore persons seizing goods under a warrant of distress signed by a justice, who has not taken the oaths at the general sessions, nor delivered in the certificate required, are not trespassers.

Thirdly, When a court *has jurisdiction*, but the proceedings are *irregular*, (a¹) trespass against the attorney and plaintiff in general the proper form of action ; (b) and where a judgment has been set aside for irregularity, (b¹) this is an appropriate remedy for any act done under it. (c) In the case of *Morgan & Hughes*, (d) it was decided, that an action on the case could not be sustained against a magistrate for issuing an irregular and void warrant, though maliciously, and that the action should not lie for trespass ; (e) for in general no action can be supported against a magistrate for anything done by him in that capacity, on the ground of malice ; (f) and if there be an irregularity, that must be treated as such in an action of trespass. (f¹) But with regard to a party issuing or causing to be issued, irregular process, &c. it seems that the per-

(y) *Mills v. Collett*, 6 Bing. 85.

(z) *Ante*, 88.

(a) *The Margate Pier Company v. Hannam*, 3 B. & Ald. 266 ; [*Keyser v. M'Kissan*, 1 Rawle, 139 ; *Cornish v. Young*, 1 Ash. 153.]

(a¹) [*Green v. Morse*, 5 Greenl. 291 ; *Poulk v. Slocum*, 3 Blackf. 421 ; *Barkeloo v. Randall*, 4 Blackf. 479.]

(b) *Parsons v. Lloyd*, 3 Wils. 341 ; *Barker v. Braham*, 3 Wils. 368, 376 ; 2 Bl. Rep. 843. [A justice of the peace who issues an execution containing a command to arrest the judgment debtor, and an attorney who procures such execution to be issued, and causes the debtor to be arrested thereon, in a case in which both know that the law prohibits such arrest or the issuing of such an execution, are jointly liable to the debtor in trespass. *Sullivan v. Jones*, 2 Gray, 570.] Attorney and client liable for act of agents ; *ante*, 91. Where the process is *irregular* merely, and not void, and has not been set aside, trespass will not lie. *Riddell v. Pakeman*, 2 Cr., M. & R. 30 ; 3 Dowl. 714, S. C. As to the liability of the attorney, see *Codrington v. Lloyd*,

8 Ad. & El. 449 ; *Sowell v. Champion*, 8 Ad. & El. 407.

(b¹) [*Milliken v. Brown*, 10 Serg. & R. 427 ; *Reynolds v. Orvis*, 7 Cowen, 266. But if the process be erroneous or void only, trespass will not lie. *Reynolds v. Orvis*, 7 Cowen, 266. But see *Chapman v. Dyett*, 11 Wend. 31.]

(c) *Philips v. Biron*, 1 Stra. 509 ; [*M'Cluney v. M'Cluney*, Harper (S. Car.), 486. See *levying an execution after the return* *Vail v. Lewis*, 4 John. 450 ; *Milliken v. Brown*, 10 Serg. & R. 188. So, for setting out an execution and procuring an arrest under it, upon a judgment which the party knew had been satisfied. *Bradley v. Carlton*, 1 Law Rep. (N. Car.) 369.]

(d) 2 T. R. 225.

(e) See, also, *Hill v. Bateman*, 1 B. & Ald. 710 ; *Ackerly v. Parkinson*, 3 M. & Sel. 427 ; *Barnardiston & Soames' case*, 7 S. & Tr. 442 ; 6 Howell, 1094.

(f) *Johnstone v. Sutton*, in error, 1 T. R. 545 ; *Reynolds v. Kennedy*, 1 Wils. 232.

(f¹) [*Reynolds v. Orvis*, 7 Cowen, 266.]

prejudiced is at liberty to support an action on the case against him where there was no cause of action and the proceeding was malicious as well as irregular. (g) The liability of a magistrate, if a conviction be void, or be quashed, has been already observed upon. (h)

Fourthly, When the process has been *misapplied*, as when A. or his property has been taken upon process against B., trespass * is in general the only remedy. (i) And trespass is the proper form of action, if there be a misnomer in the process which has not been waived, though it be executed on the person, (i¹) or goods of the party against whom it was in fact intended to be issued; (k) and in these cases the sheriff and his officers are liable, as well as the parties who expressly directed the process to be thus irregularly executed. (l)

Fifthly, When the process of a superior or inferior court has been *abused*, (m) trespass against the sheriff and his officer, or other ministerial officer, (n) committing the abuse, is the proper action; if the conduct of the officer was in the first instance illegal, and an immediate injury to the body, or to personal or real property; as if the officer arrest out of the sheriff's bailiwick, (o) or after the return day of the writ; (p) or if he break open an outer door, &c.; (q) or seize under a *fiery facias* fixtures of the defendant, who was a freeholder. (r) And although the conduct of the officer were in the first instance lawful, yet, if he abuse his authority and commit some act of trespass not warranted by the process; as if he

4thly. Where process misapplied.

5thly. When process is abused.

(g) *Ante*, 204. Where a party being in the custody of the marshal of the king's bench prison, was brought up to the court upon an order of the court, and charged with an attachment for contempt, on which attachment he was afterwards detained in custody, it was holden that trespass was maintainable against the party who caused the order to be served on the marshal. *Dissentiente*, Lord Abinger C. B. *Bryant v. Clutton*, 1 M. & W. 408. Where the party originating the proceedings takes part in the arrest, of course he is liable in trespass. See *West v. Smallwood*, 3 M. & W. 418.

(h) *Ante*, 204, 205.

(i) *Sanderson v. Baker*, 2 Bl. Rep. 833; *Wale v. Hill*, 1 Bulst. 149; *Coots v. Lighthworth*, Moore, 457. See *Reeves v. Slater*, 7 B. & C. 486; [*Foss v. Stewart*, 14 Maine, 312; *Baldwin v. Whittier*, 16 Maine, 33; *Sibley v. Brown*, 15 Maine, 185; *Lothrop v. Arnold*, 25 Maine, 136.]

(i¹) [*Griswold v. Sedgwick*, 6 Cowen, 456; *Mead v. Haws*, 7 Cowen, 332.]

(k) *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clifton*, 8 East, 328; [*Melvin v. Fisher*, 8 N. H. 406.] When the party arresting is liable, see *Rex v. Sheriff of Middlesex*, 2 Chit. Rep. 257; *Morgans v. Bridges*, 1 B. & Ald. 647. See *Tidd*, 9th ed. 447; *Reeves v. Slater*, 7 B. & C. 486.

(l) *Ante*, 90, 91, 92; [*Collins v. Waggoner*, Breese, 143.]

(m) *Woodgate v. Knatchbull*, 2 T. R. 148.

(n) *Holroyd v. Breare*, 2 B. & Ald. 473.

(o) *Olliet v. Bessey*, Sir T. Jones, 214; *Sanderson v. Baker*, 2 Bl. Rep. 834.

(p) *Perrot v. Mumford*, 2 Esp. Rep. 585; [*Stoyel v. Lawrence*, 3 Day, 1; *Vail v. Lewis*, 4 John. 450; *Adams v. Freeman*, 9 John. 117; *Barkeloo v. Randall*, 4 Blackf. 476; but neither the plaintiff nor his attorney will be liable unless the arrest were made by their direction, and an action on the case will not lie against them for not countermanding the execution after return day. *Vail v. Lewis*, 4 John. 450; *Adams v. Freeman*, 9 John. 117; *Hollister v. Johnson*, 4 Wend. 639.]

(q) *Lee v. Gansell*, Cowp. 1; *Ratcliffe v. Burton*, 3 B. & P. 223; [*Ilseley v. Nichols*, 12 Pick. 270; *Oystead v. Shed*, 13 Mass. 520; *Douglass v. The State*, 6 Yerger, 525; *Steadman v. Crane*, 11 Met. 295. Those who aid the sheriff in making an arrest, by breaking an outer door of the defendant's dwelling-house, are trespassers, though they act by command of the sheriff. *Hooker v. Smith*, 19 Vt. 151.] As to when party justified in breaking open doors, &c. see *Lloyd v. Sandilands*, 2 Moore, 207; 8 Taunt. 250, S. C.; *Lannock v. Brown*, 2 B. & Ald. 592. (r) *Winne v. Ingilby*, 5 B. & Ald. 625.

detain a party on a *capias ad satisfaciendum*, after he tenders debt and costs; (s) he becomes a trespasser *ab initio*. (t) If the act be merely a nonfeasance, or any act not in itself a forcible trespass, case for such abuse or wrongful act, and not trespass, is in general the proper remedy. (u) And in general, when the act complained of consists of a mere nonfeasance; as if the sheriff, or a magistrate, improperly refuse bail, or to act, when they should do so; an action upon the case, and not an action of trespass, is the form to be adopted. (x)

Sixthly, When a ministerial officer proceeds *without warrant*, on information of another, trespass, and not case, is the proper form of action against the informer, if it turn out that the offence for which an arrest without warrant is justifiable has been committed by any person; (y) and trespass is the proper remedy against the informer if there were no warrant, although it may appear that some person had committed the offence, and it be one in which an arrest might legally be made without a warrant, provided there was not reasonable or probable cause for charging the plaintiff with having committed the offence. When an officer proceeds without warrant, and without foundation, upon his own apprehension, trespass is the proper form of action against him. (z)

Seventhly, But no person who acts upon a regular writ or warrant can be liable to this action; (z¹) however malicious his

(s) Per *Dennison J. Smith v. Sibson*, 1 Wils. 154.

(t) *Bac. Abr. Trespass, B.*; *Reed v. Harrison*, 2 Bl. Rep. 1218; *ante*, 200, 201; [*Melville v. Brown*, 15 Mass. 82; *ante*, 200, note (r) and cases; *Guptill v. Richardson*, 62 Maine, 257.] Detaining a prisoner after notice of his acquittal; *Webb v. Allen*, 1 Anstr. 261. As to when trespass or case is proper in such cases, see *Price v. Peek*, 1 Bing. N. C. 380; *Blessley v. Slowman*, 3 M. & W. 40; *Smith v. Eggington*, 7 Ad. & El. 167; 2 N. & P. 143.

(u) *Shorland v. Govett*, 5 B. & C. 485; *ante*, 199; [*Humphrey v. Case*, 8 Conn. 102.]

(x) *Ante*, 149, 199; *Osborn v. Gough*, 3 B. & P. 551; *Green and the Hundred of Buclechurch's case*, 1 Leon. 323; *Parsons v. Lloyd*, 3 Wils. 342, 343; *Ackerly v. Parkinson*, 3 M. & Sel. 421; [*Horne v. Constant*, 4 John. 32.]

(y) *Stonehouse v. Elliot*, 6 T. R. 316; *Hedges v. Chapman*, 2 Bing. 523; *Flewster v. Royle*, 1 Campb. 187. The officer is not liable if he act on information of a felony, although no offence had been committed. *Lawrence v. Hedger*, 3 Taunt. 14; *Hedges v. Chapman*, 2 Bing. 526; 1 Chit. Crim. Law, 21, 22. In an action of trespass by A. against B. for false imprisonment, the latter cannot defend himself under a magistrate's warrant against C., although A. the plain-

tiff was the party charged with felony, was the person against whom the warrant was intended to issue. *Hoye v. Bush*, 1 Gr. 775; 2 Scott N. R. 86, S. C.

(z) *Groenvelt v. Burwell*, 1 Salk. 399; *Ld. Raym. 454*, S. C.; *Lawrence v. Hedger*, 3 Taunt. 14; 1 Chit. Crim. Law, 21, 22.

(z¹) [*Saracool v. Boughton*, 5 Wend. Plummer v. Dennett, 6 Greenl. 421, and cases there cited; *Luddington v. Peck*, Conn. 700; *Watson v. Watson*, 9 Conn. Merriam v. Bryant, 14 Conn. 200; *Beaumont v. Perkins*, 6 Wend. 382; *Morris v. Scott*, Wend. 281; *Wilcox v. Smith*, 5 Wend. 231; *Noble v. Holmes*, 5 Hill, 194; *Henderson v. Hendershot*, 1 Hill, 118; *Jermain v. Waggener*, 1 Hill, 279; *Parker v. Watson*, 16 Wend. 514; *Hart v. Dubois*, 20 Wend. 236; *Bell v. Clap*, 10 John. 263; *Hayden v. Shed*, 11 Mass. 500; *Donahoe v. Shepard*, Met. 326; *Wilmarth v. Burt*, 7 Met. Churchill v. Churchill, 12 Vt. 661; *Parsons v. Smith*, 1 Gilman, 411; *Barnes v. Barnard*, 1 Gilman, 401; *Owens v. Starr*, 2 Litt. 257; *Turner v. Walker*, 3 Gill & J. 377; *M'Hugh v. Pundt*, 1 Bailey, 441; *Kennedy v. Fortner*, Hardin, 490; *Fortner v. Flanagan*, 3 Port. 257; *Miller v. Grice*, 1 Rich. 147; *Hastings v. Sumner*, 1 Pick. 459; *Smith v. Bowker*, Mass. 76; *Sanford v. Nichols*, 13 Mass. 1. But it is only a precept which appears upon its face to have been issued by compe-

duct; (*z*²) but case for the malicious motive and want of probable cause for the proceeding, is the only sustainable form of action. (*a*)

7thly. If proceedings regular in form.

The *declaration* in this action contains a concise statement of the injury complained of, whether to the person, or to personal or real property, and should allege that such injury was committed *vi et armis* and *contra pacem*. The pleading rules of Hilary T. 4 W. 4, ordered, that in actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by *name*, or *abuttals*, or *other description*, in failure whereof the defendant may demur specially. The same rules also affect the *pleas* and *other pleadings*. The stat. 3 & 4 W. 4, c. 42, s. 21, enables a defendant, in some cases of trespass for injuries to personal or real property, to pay money into court, after obtaining leave from the court or a judge for the purpose. The general issue is, *not guilty* of the trespasses as alleged by the plaintiff; and under it few matters of defence can be given in evidence, and consequently the pleadings in this action require much attention. No costs whatever are recoverable by the plaintiff where the damages given are under 40s., unless the judge certify that the action was really brought to try a right besides the mere right to recover damages, or that the trespass was wilful and malicious. (*b*) The act, however, does not extend to deprive plaintiffs of costs in actions for trespasses over lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, out-buildings or premises in respect of which any notice not to trespass thereon shall have been previously served upon or left at the abode of the defendant. (*c*)

* V. EJECTMENT. (*d*)

This action lies for the recovery of the possession of real property, in which the lessor of the plaintiff has the *legal interest* and a *possessory right* not barred by the statute of limitations. (*e*)

V. EJECTMENT. In general.

authority that affords a justification to the officer who executes it. *Guptill v. Richardson*, 62 Maine, 257.]

(*z*²) [An officer is protected in executing process regular on its face, though he may know facts which make it void for want of jurisdiction. *People v. Warren*, 5 Hill, 440; *Wilmarth v. Burt*, 7 Met. 257. But if he actually knows that the process he is executing has been superseded he will be liable. *Morrison v. Wright*, 7 Porter, 67. So, where a party wantonly takes out execution upon a satisfied judgment, and sells the property of the defendant. *M'Guinity v. Herrick*, 5 Wend. 240; *Brown v. Feeter*, 7 Wend. 301.]

(*a*) *Ante*, 149; *Belk v. Broadbent*, 3 T. R. 185; *Boot v. Cowper*, 1 T. R. 535, reported also in 3 Esp. Rep. 135; *Ratcliffe v. Burton*, 3 B. & P. 225; *Stonehouse v. Elliott*, 6 T. R. 315; *Hal. P. C.* 151. As to the effect of a defect in the warrant, see *Andrews v. Maris*, 1 Ad. & El. N. S. 3; *Carratt v. Morley*, 1 Ad. & El. N. S. 29; *ante*, 203, note (*d*).

(*b*) 3 & 4 Vict. c 24, s. 2.

(*c*) *Ib.* s. 3. See Appendix. [As to the effect of a judgment in trespass or trover for conversion of the plaintiff's goods, see *Floyd v. Browne*, 1 Rawle, 121; *White v. Philbrick*, 5 Greenl. 147; *ante*, 181, note (*z*¹).]

(*d*) As to the history of this action, see

(*e*) *Goodtitle v. Jones*, 7 T. R. 47; *Aslin v. Parker*, 2 Burr. 668; *Doe v. Wharton*, 8 T. R. 2.

It is not a *real* action, nor a mere *personal* action; but it is is termed a *mixed* action, partly for the recovery of the thing property itself, and partly to recover damages. It is true that in general the damages recovered in an action of ejectment are merely nominal, but in some cases between landlord and tenant such damages are in effect the full amount of the mesne profits up to the time of trial. (*f*) It is now brought in the name of a nominal plaintiff whose supposed right to the possession is founded on a supposed demise made to him by the party or parties really entitled to the possession of the property, or sometimes several demises. This remedy is attended with the peculiar advantage, that by introducing several counts on the demises of different persons, all risk of defeat on account of any doubt in whom the legal right is vested, may in general be avoided. The action cannot be commenced until the plaintiff's *right of entry* has accrued. If that take place in term of declaration, which is the first proceeding in the suit, may be delivered in and intituled of such term; or if the right of entry accrue in another term, the declaration may be delivered any time before the next term being intituled of the preceding term. In either case a notice accompanies the declaration, requiring the party in possession to appear at the term subsequent to that of which the declaration is intituled. But in ejectment by a landlord against his tenant, or other person claiming under such tenant, the practice has been altered with respect to the issuable terms; in order to give landlords, whose right of entry accrues in or shortly after either of those terms, an opportunity of bringing actions of ejectment and having them tried at the next assizes. The statute (*h*) provides, that where in such actions the tenancy expires or right of entry accrues in or after Hilary or Trinity Term, the lessor of the plaintiff may, at any time within ten days after such tenancy shall expire or right of entry accrue, serve a declaration in ejectment, intituled of the day next after the day of the demise in such declaration, whether the same shall be in term or out of term, with a notice to appear and plead within ten days; and proceedings may be had, * and rules to plead given, in the same manner as if the declaration had been served before the preceding term; but no judgment can be signed against the casual ejector until default in appearance and plea within such ten days; and it is requisite to give six clear days' notice of trial before the commission day of the assizes.

3 Bl. Com. 199. The nature of it; Goodtitle v. Tombs, 3 Wils. 120; Alin v. Parkin, 2 Burr. 667, 668; Selw. N. P. Ejectment; Run. Ejectment; Tidd, c. 45, 1189, 9th ed.; Chitty's Arch. Pr. 7th ed. and the excellent work of Mr. Serjeant Adams, 2d ed. See the act of 1 Geo. 4, c. 87, for facilitating proceeding, &c. by landlord against tenant holding over, and 11 Geo. 4 and 1 W.

4, c. 70. [The action of ejectment in use in the practice of Massachusetts Stearns Real Actions, 352, note.]

(*f*) Under stat. 1 Geo. 4, c. 87; Chit. Prac. 227.

(*g*) And in certain cases between landlord and tenant to put in bail if ordered by &c. 1 Geo. 4, c. 87, s. 1.

(*h*) 1 W. 4, c. 70, s. 36.

at which the action is to be tried. That statute also provides that a judge of either of the courts at Westminster may, upon summons, give time to plead, or stay or set aside the proceedings, or postpone the trial until the next assizes, &c.

Mere nominal damages and costs are recoverable in this action; and in order to complete the remedy for damages, when the possession has been long detained, an action of trespass for the *mesne profits* must in general be brought after the recovery in ejectment. (i) This action of *ejectment* may be considered with reference, *first*, to the nature of the *property*, or thing to be recovered; *secondly*, the *right* to such property; and, *thirdly*, to the nature of the *ouster* or *injury*.

This action is in general only sustainable for the recovery of the possession of the real property, (k) as for land or buildings annexed to the land, upon which an *entry* might in point of *fact* be made, and of which the sheriff could deliver actual possession. (l) Therefore, it is not in general sustainable for the recovery of property which in legal consideration is *not tangible*; (l') as for an advowson, rent, common in gross, or other incorporeal hereditament; (l'') or a water-course, where the land over which the water runs is not the property of the claimant, &c. (m) Nor is it sustainable for a *movable* chattel, such as a stall. (n)

1st. For what property it lies.

But ejectment lies for common appendant or appurtenant, if demanded as such, with the land in respect of which it is claimed, for the sheriff, by giving possession of the land, gives possession of the common. (o) *Quare impedit* is the proper remedy for the recovery of a church or rectory where the church is full; but ejectment lies for a church or rectory when demanded as such, if the lessor has been presented, instituted, and inducted; and for this purpose the church is void if the adversary was simoniacally presented. (p) Ejectment also lies for *tithes*, by the statute of 32 Hen. 8, c. 7, s. 7. (q) This action

(i) [Cummins v. Noyes, 10 Mass. 535; Osbourn v. Osbourn, 11 Serg. & R. 55.] As to the action for mesne profits, see *post*, 215.

(k) For what an ejectment lies, and the description, see Run. Eject. 121-136; Selwyn's N. P. Eject.; Adams on Eject. 18, &c.; and Tidd, 9th ed. 1190.

(l) Per Tindal C. J. Doe v. Musgrave, 1 M. & Gr. 639; [Black v. Hepburn, 2 Yeates, 331; Jackson v. Buel, 9 John. 298; Nichols v. Lewis, 15 Conn. 137; White v. White, 16 N. J. (Law) 202. This action may be maintained by the owner of the soil against a private person who appropriates to his own use a part of the public highway. Wright v. Carter, 3 Dutcher, 77; Brown v. Galley, Hill & Den. 806.]

(l') [Judd v. Leonard, 1 D. Chip. 204; Black v. Hepburn, 2 Yeates, 331; Den v. Craig, 3 Green, 191.]

(l'') [Wood v. Truckee Turnpike Co. 24 Cal. 474; Black v. Hepburn, 2 Yeates, 331; Judd v. Leonard, 1 D. Chip. 204.]

(m) 3 Bl. Com. 206; Challenor v. Thomas, Yelv. 143; Run. Eject. 131-136; Adams, 18, 20.

(n) Doe v. Cowley, 1 Car. & P. 123.

(o) Newman v. Holdmyfast, 1 Stra. 54; Baker v. Roe, Rep. temp. Hardw. 127; Bul. N. P. 99.

(p) Doe dem. Watson v. Fletcher, 8 B. & C. 25. It will not lie for a canonry; Doe v. Musgrave, 1 M. & Gr. 625; 1 Scott N. R. 468, S. C.; nor for a tin bound, but it will for a mine under the bound. Doe v. Alderson, 1 M. & W. 210.

(q) 3 Bl. Com. 206; Bul. N. P. 99; 2 Saund. 304, note (12).

* is also maintainable for a coal mine; (r) for a fishery; (s) for *prima tonsura* of land; (t) for hay, grass, and after-math; (u) and the pasture of sheep. (x) It is necessary to describe with some degree of certainty the nature of the property in the pleadings, and the word "tenement," except by way of reference to an antecedent specification of particular descriptions, is too general; (y) and if a writ of course, where the ground also belongs to the plaintiff, is sought to be recovered, it must be described as so many acres of land *covered* with water. (z)

With respect to the *title*, a party having a right of entry, whether his title be in fee-simple, fee-tail, in copyhold, or for life, or years, (z¹) may support an action of ejectment; but the right of possession must be of some duration, and exclusive; therefore an ejectment cannot be supported for a standing place where a party has merely a license to use land, &c. (a)

The general rule governing this action is, that the lessor of the plaintiff must recover upon the *strength of his own title*, and of course cannot in general found his claim upon the insufficiency of the defendant's (b) for possession gives the defendant a right against ev

(r) *Commyn v. Kincto*, Cro. Jac. 150.

(s) *The King v. Old Alresford*, 1 T. R. 361.

(t) *Goodtitle dem. Chester v. Alker*, 1 Burr. 133, 145.

(u) *Wheeler v. Toulson*, Hardw. 330.

(x) 2 Dal. 95.

(y) *Doe dem. Bradshaw v. Plowman*, 1 East, 441; *Goodtitle v. Walton*, 2 Stra. 834. Where, however, ejectment was brought for twenty messuages, twenty *tenements*, &c. the court of common pleas, after verdict and writ of error, allowed the record to be amended by striking out twenty *tenements*; *Doe dem. Laurie v. Dyball*, 1 Moore & P. 330; and in 8 B. & C. 70, it was held that the declaration being for a messuage and *tenement*, was no ground of error. See, in general, *Adams*, 2d ed. 26.

(z) *Challenor v. Thomas*, Yelv. 143; Co. Litt. 4 b.

(z¹) [Under a count claiming a fee-simple, the plaintiff cannot recover for a life estate; *Forsyth v. Rowell*, 59 Maine, 131. See *Winstanley v. Meacham*, 58 Ill. 97. But he may recover such portion of the premises as he makes title to, though it be less than that demanded. *Magruder v. Peter*, 4 Gill & J. 323; *Carroll v. Norwood*, 5 Harr. & J. 155; *Berry v. Willett*, 2 Harr. & M. 376; *Hughes v. Holliday*, 3 Iowa, 30; *Van Alstyne v. Spraker*, 13 Wend. 578; *Underwood v. Jackson*, 1 Wend. 95; *Harrison v. Stevens*, 12 Wend. 170; *Holmes v. Seely*, 17 Wend. 75; *Thomas v. Orrell*, 5 Ired. (Law) 569; *Moore v. Abernathy*, 7 Blackf. 442; *Halsey v. Martin*, 22 Cal. 645; *Gray v. Givens*, 26 Missou. 291; *Fenwick v. Gill*, 34

Missou. 194; *Johnson v. Norton*, 3 B. 429; *Dickerson v. Talbot*, 14 B. Mon. Kelly v. Hare, 1 Humph. 163.]

(z²) [*Olendorf v. Cook*, 1 Lansing, 31; (a) *The King v. The Inhabitants of Lor.*, 2 East, 190; *Goodtitle dem. Mill Wilson*, 11 East, 345. [A reservation, deed, of a right for the grantor to erect or occupy a mill-dam, is such a tenement may be recovered in ejectment. *Jackson Buel*, 9 John. 298; *ante*, 196, note (z).]

(b) *Martin dem. Tregonwell v. Strac* in note (b) to *Roe dem. Crow v. 1* were, 5 T. R. 107; *Goodtitle dem. ker v. Baldwin*, 11 East, 488; *Adams*, [Sullivan v. Dimmitt, 34 Texas, 114; *man v. Crull*, 26 Ind. 436; *Bruce v. Mite* 39 Maine, 390; *Webster v. Hill*, 38 Ma 78; *Douglass v. Libbey*, 59 Maine, Chaplin v. Barker, 53 Maine, 275; *Patte* v. Litton, 23 La. Ann. 274; *Tracy v. 1* wick & C. R. Co. 39 Conn. 382; *Fost* Evans, 51 Missou. 39; *Richardson v. Pu* 63 Barb. 67; *Hill v. Draper*, 10 Barb. Johnston v. Jackson, 70 Penn. St. Campbell v. Fletcher, 37 Md. 430; *Clar* Diggs, 6 Ired. (Law) 159; *Union B* v. Maynard, 51 Missou. 548; *Eldon v. 1* 6 Blackf. 341; *Huddleston v. Garret* Humph. 629; *Winn v. Cole*, Walker, 1 Moore v. Tice, 22 Cal. 513; *Sanford v. M* gin, 30 Geo. 355; *Joy v. Berdell*, 25 Ill. Stuart v. Dutton, 39 Ill. 91; *Boylan v. M* ker, 28 N. J. (Law) 274; *Creight v. Sha* 9 Watts & S. 82; *Hall v. Gettings*, 2 B John. 112. The defendant may defeat a recovery, by showing a paramount outstand

person who cannot show a sufficient and better title, and the party who would change the possession must therefore first establish a legal title. (c) But it seems that *prior possession*, even for a short period, is a sufficient *prima facie* title against a mere wrong-doer or intruder. (d) And therefore if a stranger who has no color of title should evict a person who has been in quiet possession even short of *twenty* years, without a strict legal title, the person evicted may maintain judgment against the intruder. (e) A lessee whose tenancy is *determined will not in general be permitted to insist that his lessor had no title to demise and recover; (f) nor will a third

title to the premises in a third person. *Roe v. Baxter*, 33 Geo. 81; *Roe v. Sullivan*, 33 Geo. 486; *Salter v. Williams*, 10 Geo. 186; *Sutton v. M'Leod*, 29 Geo. 589; *Jones v. Scoggins*, 11 Geo. 119; *Masseingill v. Boyles*, 11 Humph. 112; *Atkins v. Lewis*, 14 Grattan, 30; *King v. Stevens*, 18 Ala. 475; *Masterson v. Cheek*, 23 Ill. 72; *Holbrook v. Brenner*, 31 Ill. 501; *Rupert v. Mark*, 15 Ill. 540; *Connelly v. Doe*, 8 Blackf. 320; *Peck v. Carmichael*, 9 Yerg. 325; *Jackson v. Given*, 8 John. 137. But the execution defendant cannot defeat the recovery of possession by the purchaser at the execution sale, by setting up a title in some third person. *Hayes v. Bernard*, 38 Ill. 297; *Den v. Winans*, 14 N. J. (Law) 1; *Laughlin v. Stone*, 5 Missou. 53; *Page v. Hill*, 11 Missou. 149; *Hobson v. Doe*, 4 Blackf. 487; *Sherry v. Denn*, 8 Blackf. 542; *Lyerly v. Wheeler*, 11 Ired. Law, 288; *Avent v. Read*, 2 Porter, 480. Where the plaintiff shows a title in another, with which he fails to connect himself, it is fatal to his recovery. *Balance v. Flood*, 52 Ill. 49; *Hunter v. Cochran*, 3 Barr, 105; 2 Greenl. Ev. § 331. See *Jackson Real Actions*, 5, 6.]

(c) *Roe dem. Haldane v. Harvey*, 4 Burr. 2487; *Graham v. Peat*, 1 East, 246; *Run. Eject.* 15; *Doe v. Staple*, 2 T. R. 684; *Goodtitle v. Jones*, 7 T. R. 47. [But he is not bound to show an earlier and better possession. *Sweeny v. Reilly*, 42 Cal. 402.]

(d) *Doe dem. Harding v. Cooke*, 7 Bing. 346; *Doe v. Dyball*, M. & M. 346. See, fully, 1 Chitt. Gen. Prac. 241, 273; [Bates v. Campbell, 25 Wisc. 613.]

(e) *Id. Ibid.*; *Doe v. Dyball*, M. & M. 346; [Smith v. Lorillard, 10 John. 338; *Jackson v. Hazen*, 2 John. 22; *Jackson v. Harder*, 4 John. 202; *Buckner v. Chambliss*, 30 Geo. 652; *Shumway v. Phillips*, 21 Penn. St. 151; *Reed v. Shepley*, 6 Vt. 602; *Newman v. Cincinnati*, 18 Ohio, 323; *Russell v. Erwin*, 38 Ala. 44; *M'Call v. Pryor*, 17 Ala. 533; *Ayres v. Bursley*, 32 Cal. 620; *Kean v. Cannovan*, 24 Cal. 291; *Nagle v. Macy*, 9 Cal. 426; *Hutchinson v. Perley*, 4 Cal. 33; *Schultz v. Arnot*, 33 Missou. 172; *Dale v. Fawrie*, 43 Missou. 556; *Jones v. Nunn*, 12 Geo. 469; *Day v. Alverson*, 9 Wend. 223; *Leport v. Todd*, 32 N. J. (Law) 124; *Jackson v. Walker*, 7 Cowen, 367;] but *Doe*

dem. Crisp v. Barker, 2 T. R. 749, seems *contra*. See *Graham v. Peat*, 1 East, 246; *Throgmorton v. Scott*, 2 East, 469; *Hiern v. Mill*, 13 Ves. jun. 119; *Adams on Eject.* 32. It is clear that *trespass* would lie in such case against a stranger; *Graham v. Peat*, 1 East, 244; *Catteris v. Cowper*, 4 Taunt. 548; and according to *Allen v. Rivington*, 2 Saund. 111, 4 Taunt. 548, note (a), priority of possession alone gives a good title to the lessor of the plaintiff against the defendant and all the world, except the person who has a better title; and this rule applies for the defendant. *Doe v. Reade*, 8 East, 356. In the case of personal property, it is clear that a person having possession, though without any title, may support trespass, detinue, or trover, against a stranger who takes away the property; see 2 Saund. 47 c; and it seems better policy to protect the quiet possession of land against any person but the real owner, than to encourage a struggle for the possession by a party having no color of title. A lessee for years of a corporation may maintain ejectment though there be no custom in the manor to lease, and no license has been obtained from the lord, such lease being good between the parties to it, and void only as against the lord. *Doe dem. Tressider v. Tressider*, 1 G. & D. 70. So an heir, on whom a contingent remainder in a copyhold has devolved, may maintain an ejectment before admittance. *Doe v. Rolfe*, 3 N. & P. 648. But an assignment of copyhold premises by a common law conveyance without surrender is not sufficient to support an ejectment. *Doe v. Webber*, 3 Bing. N. C. 922.

(f) *Driver dem. Oxenden v. Lawrence*, 2 Bl. Rep. 1259; *Barwick v. Thompson*, 7 T. R. 488; *sed vide* *England v. Slade*, 4 T. R. 683; *Peake's Law of Evid.* 318; notes to *Balls v. Westwood*, 2 Campb. 11; *Doe v. Ramsbottom*, 3 M. & Sel. 516; and a mere licensee is in this respect on the same footing as a tenant. *Doe v. Baytup*, 3 Ad. & El. 188; 4 N. & M. 837, S. C. Nor can the assignee of a lessee dispute the lessor's title. *Doe v. Skirrow*, 7 Ad. & El. 157; 2 N. & P. 123, S. C. Payment of rent is not always conclusive against the tenant. *Doe v. Brown*, 7 Ad. & El. 447; *Gregory v. Doidge*, 3 Bing. 474.

person in such case be allowed to defend as landlord; (*g*) if he have entered into the consent rule, the court will discharge the same with costs; (*h*) but after the expiration of a notice to quit, given to him by his landlord, the tenant may show that the landlord's title is at an end. (*i*) The lessor of the plaintiff may also have a strict legal right; (*k*) a mere equitable and beneficial interest, (*k*¹) without the legal title, will not suffice, and the doctrine that the legal estate cannot be set up at law by a trustee against the *cestui que trust*, no longer prevails. (*l*) But where trustees ought to convey to the beneficial owner, it will, after a lapse of many years, and under certain circumstances, be left to the jury to presume that they have conveyed accordingly; so where the beneficial occupier of an estate by the possessor under an equitable title (*m*) induces a fair presumption that there has been a conveyance of the legal estate to such possessor. (*n*) But when the facts of the case preclude such presumption, the party having only the equitable interest cannot prevail in a court of law. (*o*) Where a lessor and his lessee joined in

(*g*) *Doe dem. Knight v. Lady Smythe*, 4 M. & Sel. 347, 348; *Doe v. Mills*, 1 Moody & Rob. 385; 2 Ad. & El. 17.

(*h*) *Doe v. Rhys*, 2 Younge & Jervis, 88.

(*i*) *Doe v. Ramsbottom*, 3 M. & Sel. 516. See *Doe v. Whitroe*, 1 D. & Ry. N. P. C. 1; but see *Doe dem. Knight v. Lady Smythe*, 4 M. & Sel. 347. See note (*f*), *supra*.

(*k*) *Doe v. Wharton*, 8 T. R. 2; *Adams*, 33; [*Groves v. Marks*, 32 Ind. 319; *Mulford v. Tunia*, 35 N. J. (Law) 256; *Chiles v. Davis*, 58 Ill. 411; *Kennedy v. Johnson*, 69 N. Car. 249; *Buell v. Irwin*, 24 Mich. 145; *Leonard v. Diamond*, 31 Md. 536; *Roundtree v. Little*, 54 Ill. 323; *Walker v. Kynett*, 32 Iowa, 524; *Hopkins v. Ward*, 6 Munf. 38; *Wright v. Douglass*, 3 Barb. 554; *Williams v. Hartshorn*, 30 Ala. 211; *Cunningham v. Dean*, 33 Miss. 46; *Hammond v. Inloes*, 4 Md. 138; *Cheney v. Cheney*, 26 Vt. 506; *Thompson v. Adams*, 55 Penn. St. 479; *Gillett v. Treganza*, 13 Wisc. 472; *Eggleston v. Bradford*, 10 Ohio, 312.]

(*k*¹) [*Jackson v. Pierce*, 2 John. 221; *Jackson v. Deyo*, 3 John. 417; *Jackson v. Sisson*, 2 John. Cas. 321. An equitable title is no defence in ejectment. *Lindley v. Oates*, 1 Ohio, 243; *Spencer v. Marckel*, 2 Ohio, 263; *Holt v. Hemphill*, 3 Ohio, 232; *Stark v. Smith*, 5 Ohio, 455; *Stuart v. Parish*, 6 Ohio, 476; *Moore v. Burnet*, 11 Ohio, 334; *Jackson v. Pierce*, 2 John. 221; *Sinclair v. Jackson*, 8 Cowen, 543; *Thompson v. Wheatley*, 5 Sm. & M. 499; *Winn v. Cole*, *Walker*, 119. But in some cases the defendant has been allowed to defend upon facts amounting only to an equitable right or defence. *Newsome v. Williams*, 27 Ark. 632; *Pope v. Cole*, 64 Barb. 406; *Smith v. Tome*, 68 Penn. St. 158; *Love v. Watkins*, 40 Cal. 547; *Elder v. Allison*, 45 Geo. 13; *Allison v. Elder*, 45 Geo. 17; *Cramer v. Benton*, 4 Lansing, 291; *S. C.* 60 Barb. 216.]

(*l*) *Doe dem. Shewin v. Wroot*, 5 M. & Sel. 138; *Goodtitle dem. Miller v. Wilson*, 2 East, 334. [See *Jackson v. Sisson*, 2 John. Cas. 321; *Jackson v. Chase*, 2 John. Cas. 321; *Jackson v. Pierce*, 2 John. 226; *Brook v. M'Clain*, 61 Penn. St. 146. A tenant may recover in ejectment against his landlord *cestui que trust*. *Beach v. Beach*, 14 Vt. 28.]

(*m*) But no presumption that an outgoing term has been satisfied will be made in favor of a party having no merits, and having the equitable title, &c. *Doe v. Hammond*, 6 Bing. 174. As the term has been assigned to attend to the inheritance, it will not be presumed to have been surrendered unless there has been enjoyment inconsistent with the existence of the term, or some act done in order to avoid the tenure under the tremor and totum as a continuing interest. 3 Sugd. Vend. & Pur. 10th ed. 28.

(*n*) *England v. Slade*, 4 T. R. 683; *Doyle v. Sybourn*, 7 T. R. 3; *Doe v. Jones*, 8 T. R. 47; *Doe v. Hilder*, 2 B. & Ald. 782; *Doyle v. Reade*, 8 T. R. 122; *Keene v. Deard*, 2 East, 248, 263.

(*o*) *Ib. Ibid.*; *Doe v. Williams*, 2 M. & Sel. 749; [*Cawsey v. Driver*, 13 Ala. 838; *V. Bogue*, 31 Ill. 464; *Abbott v. Chase*, 2 Iowa, 453; *Page v. Cole*, 6 Iowa, 453; *Stinebaugh v. Wisdom*, 13 B. Mon. 34; *Sinclair v. Jackson*, 8 Cowen, 543; *Jackson v. Van Slyck*, 8 John. 487; *Spencer v. Marckel*, 2 Ohio, 263; *Nichols v. Haskin*, 3 Ala. 619; *Collins v. Robinson*, 33 Ala. 100. In some of the states an equitable defence may be set up to an action of ejectment. *W. v. Wozencraft*, 22 Cal. 607; *Meador v. Sons*, 19 Cal. 294; *Prentiss v. Brewer*, 19 Wisc. 635; *Hayden v. Stewart*, 27 Miss. 286; *Safford v. Hynds*, 39 Barb. 625; *Phagen v. Traphagen*, 40 Barb. 537; *C. v. La Fontain*, 51 Barb. 186; *Thurman v.*

under-lease to a third person, in which it was provided that if the under-lessee should be guilty of a breach of covenant, then the first lessor *and* his lessee might enter; it was held that on breach of the covenant in the lease to the under-lessee, ejectment might be maintained by the first lessee alone. (*p*)

The lessor of the plaintiff must also in this action have the *right of possession* at the time of the demise laid in the declaration and at the commencement of the action. (*q*) Therefore, the doctrine which formerly prevailed, that a mortgagee might maintain an ejectment to get into the receipt of the rents and profits, without giving a notice to quit, though a tenant under a demise anterior to the mortgage be in possession, is now exploded; (*r*) and a remainder-man, or reversioner, cannot support this action whilst the right of possession is in another. (*r*¹) Nor can ejectment be sustained unless it be brought within twenty years next after the right of entry of the lessor of the plaintiff, or the person through whom he claims, accrued. (*s*) But the circumstance of the title of lessor of the plaintiff having expired, (*t*) or of his being tenant for life and having died (*u*) since the day of the demise laid in the declaration, affords no ground of objection on the trial, and proceedings may be continued in the name of the nominal plaintiff for the recovery of mesne profits and costs.

This action is only sustainable for what in fact, or in point of law,

derson, 30 Barb. 621; *M'Clane v. White*, 5 Minn. 178; *Rosiers v. Van Dam*, 16 Iowa, 175.]

(*p*) *Doe d. Bedford v. White*, 4 Bing. 276; 13 Moore, 528, S. C.

(*q*) *Doe dem. Whatley v. Telling*, 2 East, 277; *Right v. Beard*, 13 East, 210; *Blackbourn v. Laseels*, Cro. Eliz. 800; *Doe v. Mitchell*, 2 M. & Sel. 446; [*Eggleston v. Bradford*, 10 Ohio, 312; *Wilson v. Inloes*, 11 Gill & J. 351; *Whitley v. Bramble*, 9 B. Mon. 143; *Smith v. McCann*, 24 How. (U. S.) 398; *Scisson v. McLaws*, 12 Geo. 166; *Pitkin v. Yaw*, 13 Ill. 251; *Kile v. Tubbs*, 32 Cal. 332; *Laurissini v. Doe*, 25 Miss. 177; *Buxton v. Carter*, 11 Missou. 481; *Layman v. Whitney*, 20 Barb. 559.] But a copyholder may lay the day of demise between the surrender and his admittance. *Doe dem. Bennington v. Hall*, 16 East, 208.

(*r*) *Run. Eject.* 109; *Thunder v. Belcher*, 3 East, 449. As to a tenant's power to set up the title of a prior mortgagee against a subsequent mortgagee, see *Doe v. Barton*, 3 P. & D. 194. As to the relation between a mortgagee and a tenant let into possession by the mortgagor after the mortgage, see *Evans v. Elliott*, 1 P. & D. 256; *Rogers v. Humphreys*, 4 Ad. & El. 299; 5

N. & M. 511, S. C.; *Brown v. Storey*, 1 M. & Gr. 117; 1 Scott N. R. 9, S. C.

(*r*¹) [*Jackson v. Schoonmaker*, 4 John. 390.]

(*s*) 3 & 4 W. 4, c. 27, s. 2. Sect. 3 defines the time when the right of entry shall be considered as having first accrued. Since this statute the doctrine of *adverse possession* is altogether done away with. *Doe dem. Knight v. Nepean*, 2 M. & W. 894. The conveyance of a crown manor by the commissioners of woods and forests does not pass inclosures from the waste made without leave of the crown more than twenty years before the conveyance. *Doe dem. Watt v. Morris*, 2 Bing. N. C. 189; 2 Scott, 277, S. C. [This action is barred by an adverse possession of twenty years under claim of title in the defendant. *Hallett v. Forrest*, 8 Ala. 264; *Hammond v. Ridgely*, 5 Harr. & J. 151; *Wilkes v. Elliot*, 5 Cranch C. C. 611; *Vaughan v. Green*, 1 Leigh, 287; *Jackson v. Brink*, 5 Cowen, 480; *Briggs v. Prosser*, 14 Wend. 227; *Jackson v. Harder*, 4 John. 202; *Den v. Lane*, 1 Penning. 417.]

(*t*) *Doe dem. Morgan v. Bluck*, 3 Campb. 447.

(*u*) *Thrustout dem. Turner v. Gray*, 2 Stra. 1056; *Doe dem. Morgan v. Bluck*, 3 Campb. 450.

amounted to an *ouster* or dispossession of the lessor of the plaintiff. But such *ouster* may, and usually is, by merely *holding over* and an immediate tenant may be sued for the holding over by his under-tenant, though against his will. (y) It is necessary that the possession should be adverse or illegal at the time the supposed demise laid in the declaration in ejectment (z), for if there be no ouster, or the defendant be not in possession at the time of the bringing of the action, it will fail; (a) and in such case the plaintiff should proceed by action of trespass. An action of ejectment is sustainable against a person who occupied a house and with the possession, though he did so merely as the servant for another. An actual ouster may be by driving cattle out of the land, or by suffering the party to occupy it; and in such case even one tenant in common may support an ejectment against his cotenant; (c) but in general the mere receipt * of all the profits by the latter will amount to an ouster. (d) If a tenant underlet, and at the end of the term his sub-tenant refuse to quit, the original lessor may support an ejectment against both, and both are liable to pay mesne profits. (e)

The requisites and forms of the *declaration* in this action are pointed out in the second volume. The count or counts should be on the demise of the person entitled to the land, and to the *right of possession* at the time of the supposed

(x) 3 Bl. Com. 199; [Deuchatell v. Robinson, 24 La. Ann. 176.]

(y) Post, 214. [Ejectment lies in Rhode Island wherever a person has wrongfully entered, or, having rightfully entered, wrongfully detains any tenement or estate. McCann v. Rathbone, 8 R. I. 297.]

(z) Right v. Beard, 13 East, 210, 212; Doe dem. Whatley v. Telling, 2 East, 257.

(a) Goodright v. Rich, 7 T. R. 327; Fenn dem. Blanchard v. Wood, 1 B. & P. 573; [Jackson v. Hakes, 2 Caines, 335; Cooley v. Penfield, 1 Vt. 244; M'Daniels v. Reed, 17 Vt. 674; Dutton v. Warschaner, 21 Cal. 609; Klink v. Cohen, 13 Cal. 623; Dimick v. Deringer, 32 Cal. 488; Hyde v. Folger, 4 McLean, 255; Lockwood v. Drake, 1 Mich. 14; Lucas v. Johnson, 8 Barb. 244; Van Buren v. Cockburn, 14 Barb. 118; People v. New York, 28 Barb. 240; Wallis v. Doe, 2 Sm. & M. 220; Newman v. Foster, 3 How. (Miss.) 383; Pickett v. Doe, 5 Sm. & M. 470; Smith v. Walker, 10 Sm. & M. 584.]

(b) Doe dem. Cuff v. Stradling, Sittings at Westminster after Trin. Term, 1817; coram Mr. Justice Bayley, 1 Chit. Rep. 119; [Shaver v. M'Graw, 12 Wend. 558.]

(c) Run. Eject. 194; Co. Litt. 199 b; Doe dem. Fishar v. Prosser, Cowper, 217; Adams, 52; [Logan v. Goodall, 42 Geo. 95; Lawrence v. Ballou, 37 Cal. 518; Buchanan v. King, 22 Grattan, 414; Barnitz v. Casey,

7 Cranch, 456; Shaver v. M'Graw, 12 Wend. 562; Valentine v. Northrup, 12 Wend. 562. And so, for his share of the premises, against a third party. Robinson v. Roberts, Conn. 145; Tarver v. Smith, 38 Ala. 145; Bryan v. Averett, 21 Geo. 401; Carswell v. Smart, 12 Ired. (Law) 369; Dawd v. Christ, 1 Jones (Law), 353; Cruger v. Claughry, 51 Barb. 642; Hardy v. Johnson, 1 Wallace, 371; Chambers v. Handley, J. Marsh. 98. So tenants in common may join in ejectment. Touchard v. Keyes, Cal. 202; Hicks v. Rogers, 4 Cranch, 100; Magee v. Doe, 9 Florida, 382; Innis v. Crawford, 4 Bibb, 241; Harrison v. Bibb, 4 Bibb, 420; but see *contra*, in Mississippi, Wathen v. Inglis, 1 Missou. 746; Duval v. Smith, 1 Missou. 313.]

(d) See p. 213, note (c). But see 3 W. 4, c. 27, s. 12.

(e) Roe v. Wiggs, 2 New Rep. 330; see Bourne v. Richards, 4 Taunt. 720. Under the Oregon code regulating actions for the recovery of real property, several persons claiming to own land in undivided shares may be joined as defendants in one action by a party claiming a paramount title, notwithstanding one only is in possession of the whole tract. The plaintiff is not required to bring separate actions against each cotenant. McCoun v. Hannah, 3 Ore. 302.]

demise; (*f*) and although the form is free from difficulty, yet great care must be observed in applying the same; thus, if one or more tenants in common were stated in one count to have *jointly* demised to the nominal plaintiff, instead of inserting *separate* demises, the action would fail. (*g*) On the other hand unnecessary counts should not be inserted, because if the plaintiff should not establish all on the trial, he would have to pay costs. (*h*)

The premises must be described with certainty; (*i*) and the omission of the description where the premises are situate is *error*, though the county and vill in which the *demise* was made have been stated in the declaration and the venue in the margin. (*k*)

If the defendant appear, he must, by the terms of the consent rule, *plead* only the general issue, (*k*¹) though he may, by leave of the court, plead to the jurisdiction. (*l*) The *damages*, we have seen, are merely nominal, and it is usual to remit them, in order to recover a real compensation in an action of trespass for the meane profits, (*l*¹) which may be brought in the name of the nominal plaintiff or of the lessor. (*m*) But by 1 Geo. 4, c. 87, s. 2, at the trial of an action of ejectment by a landlord against his tenant, the judge may permit the plaintiff, after proof of his right to recover the whole or any part (*m*¹) of the premises, to go into evidence of the mesne profits from the expiration of the tenancy down to the time of the verdict, or to some day specially named therein; and the jury may include damages for such mesne profits in their verdict. (*m*²) Full *costs* are recoverable;

(*f*) *Goodtitle v. Jones*, 7 T. R. 47; *Doe v. Mitchell*, 2 M. & Sel. 447; *Doe dem. Benington v. Hall*, 16 East, 208; [*Barclay v. Yeomans*, 27 Wisc. 682.] A party's name should not be inserted as a lessor merely to exclude his evidence for the defendant; *Fenn v. Grainger*, 3 Campb. 178; and if a lessor's name be inserted without his consent, the court on motion will order it to be struck out of the declaration.

(*g*) *Doe v. Errington*, 3 Nev. & Man. 46. [The action for the recovery of possession of real property now stands upon precisely the same footing in New York with all other actions, in respect to parties and union of causes of action in a single complaint. *Hubbell v. Lerch*, 62 Barb. 295.]

(*h*) *Doe v. Webber*, 1 Harr. & Wol. 10.
(*i*) [Seeley v. Howard, 23 Mich. 11; *Stewart v. Camden & C. R. R. Co.* 33 N. J. (Law) 115; *Rayburn v. Elrod*, 43 Ala. 700; *Olen-dorf v. Cook*, 1 Lansing, 37; *Inge v. Garret*, 38 Ind. 96; *Leary v. Langsdale*, 35 Ind. 74; *Barclay v. Howell*, 6 Peters, 498; *Fen-wick v. Floyd*, 1 H. & Gill, 172; *Doll v. Fel-ler*, 19 Cal. 300; *Munson v. Munson*, 30 Conn. 425; *McManus v. Stevens*, 10 La. Ann. 177; *Newman v. Lawless*, 6 Missou. 263; *Russell v. Fee*, 1 Browne, 194; *Hawn v. Norris*, 4 Binn. 77; *Den v. Woodson*, 1 Hayw. 24; *Mitchell v. Gover*, 1 Harr. & J.

207; *Hitchcox v. Rawson*, 14 Grattan, 526; *Orton v. Noonan*, 18 Wisc. 447.] As to the description of the parish, see *Doe v. Carter*, 1 Y. & J. 492.

(*k*) *Doe d. Rogers v. Bath*, 2 Nev. & Man. 410; [*Clark v. Clark*, 7 Vt. 190; *Wooster v. Butler*, 13 Conn. 309; *Newman v. Law-less*, 6 Missou. 283.] If the premises are merely described as "situate in the county of S." without any other local description, it will be sufficient after verdict. *Doe v. Gunning*, 7 Ad. & El. 243; 2 N. & P. 260, S. C.

(*k*¹) [*Hutto v. Thornton*, 44 Miss. 166.]

(*l*) *Adams on Eject.* 241.

(*l*¹) [But the entry of the *remittitur dam-num* is mere form, and the want of it does not prejudice the action for mesne profits. *Van Alen v. Rogers*, 1 John. Cas. 281. In Massachusetts, the plaintiff recovering judgment in a writ of entry, is by statute entitled in the same action to recover damages for the intermediate rents and profits of the estate, from the time when his title accrued, under certain prescribed rules. *Genl. Stat. c. 134, § 13 et seq.*]

(*m*) The lessor of the plaintiff cannot release the action of ejectment. *Doe v. Brewer*, 4 M. & Sel. 300.

(*m*¹) [See ante, 211 note (*z*¹).]

(*m*²) [*Dawson v. M'Gill*, 4 Whart. 230;

but when the judgment is against the casual ejector by the default of the party in possession, the only mode of recovering the costs is by an action of trespass, for the mesne profits, (*m*³) which much resembles the common * action of trespass, and the particular properties of which will form the next subject for our consideration. The *judgment* is that the plaintiff do recover his term (or terms, according to the number of demises in the declaration) of and in the tenements, (unless the damages be remitted, as is most usual) the damages to be assessed by a jury, with the costs of increase. The writ of possession, which has hitherto followed the judgment, may now be issued immediately after the trial at nisi prius, in cases where the verdict is given for the plaintiff, or he is nonsuited for want of the defendant's appearance to confess lease, entry, and ouster, upon the judgment certificate to that effect, under the 11 Geo. 4 and 1 W. 4, c. 7, s. 88.

If upon notice to quit, given to a tenant, he give notice to his under-tenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his under-tenants refuse to quit, an ejectment, and also an action of trespass for the mesne profits, may still be maintained against him for so much as the under-tenants have not given up. (*n*)

A termor who lets to an under-tenant cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuse to acknowledge him as landlord, or pay him rent, under threat of distress, although the under-tenant still retains possession.

VI. ON THE ACTION FOR MESNE PROFITS.

The action of ejectment, as at present conducted, though nominally a *mixed* action, being altogether a mere fiction, it is never brought by a *nominal* plaintiff against a *nominal* defendant for a *supposed* ouster, merely *nominal* damages to be given; and satisfaction for the injury the real plaintiff has sustained by being kept out of the mesne profits, &c. is not, in general, included in the verdict in the ejectment. The law has therefore provided a remedy for this injury, namely, by an action, which is *in form* an action of trespass *vi et armis*, but *in effect* to recover

Boyd v. Cowen, 4 Dall. 138; Beard v. Federy, 3 Wallace, 478; Van Name v. Van Name, 23 How. Pr. 247; Livingston v. Tanner, 12 Barb. 481; Sullivan v. Davis, 4 Cal. 291; Patterson v. Ely, 19 Cal. 28; Walker v. Mitchell, 18 B. Mon. 541; Armstrong v. Hinds, 8 Minn. 254; Garner v. Jones, 34 Miss. 505; Bayard v. Inglis, 5 Watts & S. 465; Cook v. Nicholas, 2 Watts & S. 27; Battin v. Bigelow, Peters C. C.

452. This mode of obtaining the mesne profits is provided by statute in Massachusetts, and is exclusive. Genl. Sts. c. §§ 13 et seq.; Raymond v. Andrews, 6 C.

(*m*³) [Baron v. Abeel, 3 John. 483. Tate v. Doe, 24 Miss. 465.]

(*n*) Roe v. Wiggs, 2 Bos. & Pul. Rep. 330; but see Bourne v. Richardson, Taunt. 720.

the rents and profits of the estate. (*n*¹) It is *in form* an action of trespass, because it is consequent upon, and, as it were, supplemental to, the action of ejectment, and therefore must necessarily be of the same species with it. In this action the plaintiff complains of his ejection, of the perception of the mesne profits by the defendant, and of the waste or dilapidations, if any, committed or suffered by him, and prays judgment for the damages thereby sustained. It has been said that a lessor in ejectment may, if he please, waive the trespass, and recover the mesne profits in an action for use and occupation; (*o*) *but this election must be limited to the profits accruing antecedently to the day of the demise in the declaration in ejectment; for the action for use and occupation is founded on a *contract*; the action of ejectment upon a *wrong*; and when applied to the same period of time, are wholly inconsistent with each other; since in the former the plaintiff treats the defendant as his tenant, and in the latter as a trespasser. (*p*) When, however, a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt upon the 4 Geo. 2, c. 28, against the tenant, for double the yearly value of the premises during the time he so holds over; for the double value is given by way of penalty, and not as rent; (*q*) but it is not yet settled whether, when the ejectment is founded upon a notice to quit given by the *tenant*, the landlord is entitled to maintain debt upon the 11 Geo. 2, c. 19, for double rent: the better opinion seems to be that he is not. (*r*) This action, however, is not in all cases necessary; for by the statute, (*s*) in action of ejectment between landlord and tenant, the landlord may, upon such proof of his right to recover possession of the whole or any part of the premises mentioned in the declaration, give evidence of and recover in such

(*n*¹) [Holmes v. Davis, 19 N. Y. 488, Wilde J. in Emerson v. Thompson, 2 Pick. 484; Cox v. Callender, 9 Mass. 533, 535; Cutts v. Spring, 15 Mass. 135, 137. The right to mesne profits is a necessary consequence of a recovery in ejectment. Benson v. Matzdorf, 2 John. 369; Murphy v. Guion, 2 Hayw. 145; Poindexter v. Cherry, 4 Yerger, 305. See Winkley v. Hill, 6 N. H. 391. But they can be recovered only since the time of the demise laid in the declaration; Denn v. Chubb, Cox, 466; and previously to the commencement of the action of ejectment in Connecticut. Starr v. Pease, 8 Conn. 541. In this action, the record of the recovery in ejectment is conclusive of the title of the lessor of the plaintiff at the date of the demise, but not of the time when the possession commenced. Poston v. Jones, 2 Dev. & B. 294; Chirac v. Reinicker, 11 Wheat. 280; Whittington v. Christian, 2 Rand. 363; Buntin v. Duchane, 1 Blackf. 56; Lloyd v. Nourse, 2 Rawle, 49. No defence can be set up in bar of the action for mesne

profits, which would have been a bar to the ejectment. Baron v. Abeel, 3 John. 481. The provision made by statute in Massachusetts for the recovery of the *mesne* profits in the same action in which the premises are demanded (Genl. Sta. c. 134, §§ 13 *et seq.*), excludes an independent action of trespass for *mesne* profits against the tenant after a recovery on the writ to obtain possession. Raymond v. Andrews, 6 Cush. 265.]

(*o*) Goodtitle v. North, Doug. 584; Doe dem. Cheny v. Batten, Cowp. 243.

(*p*) Birch v. Wright, 1 T. R. 378, 387; [Poindexter v. Cherry, 4 Yerger, 305; Leland v. Touzey, 6 Hill, 328; Morgan v. Varick, 8 Wend. 587; Baron v. Abeel, 3 John. 481.]

(*q*) Soulsby v. Neving, 9 East, 310.

(*r*) Cheny v. Batten, Cowp. 245; Timmins v. Rowllison, 3 Burr. 1603; Soulsby v. Neving, 9 East, 314; Adams on Eject. 188 and 328, 2d ed.

(*s*) 1 Geo. 4, c. 87, s. 2. [See *ante*, 214, note (*l*¹).]

action the mesne profits of the premises from the expiration of the tenant's interest down to the time of the verdict, or some other day, to be specially mentioned therein; (*s*¹) but trespass must be resorted to for the profits accruing subsequently.

The action for mesne profits may be brought pending a writ of error in ejectment, and the plaintiff may proceed to ascertain damages, and to sign his judgment, (*s*²) but the court will stay execution until the writ of error is determined. (*t*) The action is in its nature, and must be brought in the county where the land is situate.

The action for mesne profits may be brought *by* the lessor or plaintiff in ejectment either in his own name, or in the name of the nominal lessee (John Doe); but in either shape the plaintiff must support his action; for it is not in any manner affected by the fiction which prevails in the ejectment. It is however, sometimes more advantageous to bring the action in the name of the lessor than in the name of the plaintiff, who is the party really concerned; as he may then recover damages for the rents and profits received by the defendant from the time of the demise laid in the declaration in ejectment, which cannot be done * at the suit of the nominal plaintiff. (*x*) In such cases the courts will stay the proceedings until security be given for costs, when the action for mesne profits is brought in the name of the nominal lessee. (*y*) The action may be brought in the name of the nominal lessee, as well where the judgment in ejectment is by default as where it is upon a verdict; for there is no distinction between judgment by default and upon verdict in this respect: in the one the right of the plaintiff is tried and determined against the defendant, and in the other it is confessed. (*z*) A tenant in common, who has recovered in ejectment, may maintain an action for mesne profits against his companion. (*a*) A joint action for mesne profits may be supported by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained a separate demise by each. (*b*) In the case of *Keech dem. Warburton v. Hall*, (*c*) where it was held that a mortgagee might recover in ejectment, without a previous notice to quit, against a tenant claiming

(*s*¹) [*Ante*, 214, and cases in note (*m*¹).]

(*s*²) [*Jackson v. Delaney*, 5 Cowen, 33; *Lion v. Burtis*, 5 Cowen, 408; *White v. Guirons*, Minor, 331.]

(*t*) *Cas. Prac. C. P.* 46; *Donford v. Ellys*, 12 Mod. 138.

(*u*) As to ejectment by churchwardens and overseers in that character, see *Doe d. Higgs v. Cockell*, 6 C. & P. 525.

(*x*) *Bul. N. P.* 87; *Chatfield v. Parker*, 8 B. & C. 551, note. See an additional reason there given.

(*y*) *Say. Costs*, 126.

(*z*) *Aslin v. Parkin*, 2 Burr. 665. [The

plaintiff in ejectment should take actual possession of the premises, after recovery of the writ, before commencing his action for the mesne profits, although the defendant may have left them. *Carson v. Smith Jones* (N. Car.), Law, 106; *Nelson v. Yerber*, 360; *Caldwell v. Walters*, Penn. St. 378.]

(*a*) *Goodtitle v. Tombs*, 3 Wils. 118; *ting v. Derby*, 2 Bl. Rep. 1077.

(*b*) *Chamier v. Willett*, 5 M. & Sel. Chit. Rep. 410.

(*c*) *Dougl.* 21. See *ante*, 213.

under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee, it was asked by the counsel for the defendant, if such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the tenant, as he would then pay the rent twice. Lord Mansfield C. J. gave no opinion on that point; but said there might be a distinction, for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee, until he determined his will. (d)

The person *against whom* the judgment in ejectment has been given, ought, in general, to be made the defendant in this action; and a recovery in ejectment against the wife cannot be admitted as evidence in an action against the husband and wife for mesne profits. (e) It seems to have been doubted whether a tenant, whose under-tenant holds over after the expiration of his term, is liable for *mesne profits*; (f) but in practice the former is often joined in the action with his under-tenant; and he is liable, at all events, if he has expressly recognized the acts of his under-tenant, and has received rent from him for the period possession was improperly detained. (g) And in general any person found in possession, after a recovery in ejectment, is liable to the action, (g¹) and it is no defence that he was on the premises merely as an agent, and under the license of the defendant in ejectment, for no man can license another to do an illegal act. (g²) *The defendant, however, in such case, will only be liable for the mesne profits for the time during which he actually retained possession. (h) This action being in trespass could not be maintained by or against personal representatives for the profits accruing during the lifetime of the testator or intestate, and received by him. (i) But we have seen that the 3 & 4 W. 4, c. 42, s. 2, altered the law in this respect. (k)

The *declaration* should state the time when the defendant ejected the plaintiff, and the length of time he was kept out of possession; and a declaration which does not contain these averments is bad on special demurrer; but the defect is aided after judgment by the statute 4 Ann. c. 16. (l) The land or other

The declaration, please, &c.

(d) And see 4 Ann. c. 16, s. 10. [A mortgagee cannot sustain an action for the mesne profits before actual entry, although the condition has been broken, and he has commenced an action to foreclose. *Wilder v. Haughton*, 1 Pick. 89; *Gibson v. Farley*, 16 Mass. 280, 286; *Mayo v. Fletcher*, 14 Pick. 525, 531; *Boston Bank v. Reed*, 8 Pick. 459; but see *Lyman v. Mower*, 6 Vt. 345; *Warner v. Pate*, 5 Vt. 166.]

(e) *Dean v. White*, 7 T. R. 112.

(f) Per Mansfield C. J. *Burne v. Richardson*, 4 Taunt. 720.

(g) *Doe v. Harlow*, 12 Ad. & El. 40. And

see *Roe v. Wiggs*, 2 New Rep. 330; and *Burne v. Richardson*, 4 Taunt. 720.

(g¹) [See *Jackson v. Stone*, 13 John 447.]

(g²) [Trespass for mesne profits does not lie against the lessee of a disseisor. *Fletcher v. M'Farlane*, 12 Mass. 43; *Emerson v. Thompson*, 2 Pick. 473, 485, 486.]

(h) *Girdlestone v. Porter*, K. B. 39 Geo. 3; *Woodf. Landl. & Ten.* 7th ed. 419; *Adams*, 331.

(i) *Ante*, 79-102.

(k) *Ib.* *Ibid.*

(l) *Higgins v. Highfield*, 13 East, 407.

these cases that such costs have not been taxed. (r) And the plaintiff may also recover as *damages* the *costs* incurred by him in a court of error, in reversing the judgment in ejectment erroneously obtained by the defendant, although *directly* such costs may not be recoverable. (s) If the plaintiff recover less than 40s. and the judge do not certify that the action was really brought to try a right, besides the mere right to recover damages, or that the trespass was wilful and malicious, he will be entitled to no costs. (t)

CONSEQUENCES OF A MISTAKE IN THE FORM OF ACTION.

We have seen that the courts consider it of great importance that the boundaries between the different actions should be preserved; (u) and the consequences of a mistake in the application of the remedy are very material. (u¹)

CONSEQUENCES OF
MISTAKE IN
THE FORM
OF ACTION.

When the objection to the *form* of the action is substantial, and appears *upon the face of the declaration*, without regard to *extrinsic facts*, it may be taken advantage of by demurrer, or by motion in arrest of judgment, or by writ or error. (x) But if the objection is not now *apparent* on the face of the declaration, but may only be established by the proof of *extrinsic facts*, then the only mode of objection may be on the trial as a *variance* and failure in proving an injury as described in the declaration, and consequently ground of nonsuit. Thus where the plaintiff in an action in other respects on the case stated that the defendant *wilfully* drove his coach and horses *against* the plaintiff's carriage, the court arrested the judgment, on the ground that it necessarily appeared from such allegation that the action should have been *trespass*, and not *case*. (y) When the defendant demurs he is entitled to costs, but not so upon a motion in arrest of judgment, (y¹) because he ought to have objected at an earlier stage and by demurrer; and consequently where delay is not desired by the defendant, it is preferable to demur, in order to obtain costs. * The cases are contradictory upon the question, whether a

(r) *Symonds v. Page*, 1 Cr. & Jerv. R. 29.

(s) *Nowell v. Roake*, 7 B. & C. 404.

(t) See 3 & 4 W. 4, c. 24, s. 2, in Appendix.

(u) *Ante*, 109, note (t). The courts will not decide upon a question in a wrong form of action, even though the parties agree to waive the objection. *Ib.*

(u¹) [See *Butler v. Collins*, 11 Cal. 391. A recovery in tort will not be allowed in an action on contract. *Beard v. Yates*, 5 N. Y. Sup. Court, 76. *Gilbert J.* in this case said: "The case really set forth by the plaintiff in his complaint cannot be changed upon the trial into one of a different nature. Such a principle is obviously necessary to the administration of justice. . . . We think the salutary rule that a plaintiff must recover,

if at all, according to his allegations as well as his proofs, has not been abolished by the Code."]

(x) *Turner v. Hawkins*, 1 B. & P. 476; *Savignac v. Roome*, 6 T. R. 125; *Cameron v. Reynolds*, Cowp. 407; *Knights v. Quarles*, 4 Moore, 532; [*Warren v. Fisher*, 2 N. J. (Law) 240; *Hall v. Phillips*, 2 N. J. (Law) 367; *Case v. Mark*, 2 Ohio, 169; *Vail v. Lewis*, 4 John. 450; *Taylor v. Rainbow*, 2 Hen. & Munf. 423; *Agry v. Young*, 11 Mass. 220; *Wickliffe v. Sanders*, 6 Monroe, 299.] Formerly it was the ground of a plea in abatement. *Post*, tit. Pleas in Abatement.

(y) *Savignac v. Roome*, 6 T. R. 125; *Ogle v. Barnes*, 8 T. R. 188; *M'Manus v. Crichtett*, 1 East, 109.

(y¹) [*Pangburn v. Ramsay*, 11 John. 141.]

substantial objection to the form of action is a ground of nonsuit. In a case where it appeared upon the face of the declaration, that an action should have been brought against the sheriff, and not against the under-sheriff; after verdict, upon a rule to show cause why a nonsuit should not be entered, Lord Mansfield observed, that the court should order a nonsuit to be entered, the plaintiff must pay the defendant his costs, but if the judgment was arrested, the plaintiff must pay his own costs; but that as it appeared upon the face of the declaration in that case, that the defendant might have demurred, and thereby have prevented the costs of the subsequent proceedings, the court would arrest the judgment, and not permit a nonsuit to be entered; (a) but in a more recent case it was held otherwise. (b)

When the objection to the form of action *does not appear on the face of the pleadings*, it can only be taken as a ground of nonsuit, in which case the defendant will be entitled to his costs. (c) Where the action was in assumpsit for money had and received, and it appeared on the trial that the plaintiff should have declared in another form of action, yet as the objection was not apparent on the face of the declaration, and consequently the defendant could not demur, or avail himself of it otherwise than on the trial, it was decided that the plaintiff was properly nonsuited. (d) Where the plaintiff has mistaken the proper form of action, and declared in assumpsit instead of debt, *he may even* in a penal action *have leave to amend*; though, where the defendant had been holden to bail, an amendment was not allowed so as to charge his bail. (e) It seems discretionary in the court to permit an amendment in a penal action. (f)

If by either of these means the plaintiff fail in his action, and judgment be given against him for that reason, and not upon the merits, he is at liberty to commence a fresh action; (f¹) and the defendant cannot plead in bar the proceedings in the first ineffectual suit. Thus, if the plaintiff by mistake bring trespass instead of trover, and judgment be given against him on that account, the defendant cannot plead it in bar to an action of trover brought afterwards against him.

(z) *Cameron v. Reynolds*, Cowp. 407; *Lindon v. Hooper*, Cowp. 414; *Sadler v. Robins*, 1 Campb. 256. [The plaintiff cannot be nonsuited on account of a defect in his declaration. *Van Vechten v. Graves*, 4 John. 403.]

(a) *Cameron v. Reynolds*, Cowp. 407.

(b) *Sadler v. Robins*, 1 Campb. 256.

(c) *Cameron v. Reynolds*, Cowp. 407; *Lindon v. Hooper*, Cowp. 414; [*Shaw v. Reed*, 15 Mass. 430, 441.] *Tobey v. Webster*, 3 John. 468; *Waldron v. Hopper*, 1 N. J. L. 339.]

(d) *Lindon v. Hooper*, Cowp. 414-4.

(e) *Billing v. Flight*, 2 Marsh. 124; *v. Kibblewhite*, 2 Marsh. 185. ✓

(f) *Ex parte Swift*, 3 Dowl. 636. [Martin v. M'Knight, 1 Overton, 330; *ton v. Kirby*, 2 Hayw. 174; *Dulany v. Wood*, 4 Harr. & M. 496; *Low v. Little*, 3 John. 346; *Barber v. M'Henry*, 6 John. 616; *Davis v. Saunders*, 7 Mass. 62.]

(f¹) [*Benton v. Duffy*, Cam. & N. Close v. Stuart, 4 Wend. 95.]

(g) 2 Saund. 47 p; *Kitchin v. Campbell*, Wils. 309.

him; (*h*) and if the plaintiff mistake his cause of action, and the defendant demur, the plaintiff is certainly not precluded from commencing a fresh action, and may reply to a plea in bar of the judgment on demurrer, that the same was not obtained on the merits. (*i*) But if the defendant plead, and the plaintiff take issue, and a verdict *be found for the defendant upon the merits, the plaintiff will be estopped from bringing a fresh action; provided the defendant plead the former verdict specially as an estopped; for if he omit to do so, it is, under the general issue, merely matter of argument and inference in his favor. (*k*) If the plaintiff demur to the plea in bar upon the merits, and such plea be sufficient, in that case also no second action can be commenced; (*l*) but if the plea were not sufficient, and the judgment against the plaintiff was on the defect in his declaration, the former judgment against him will be no bar. (*m*)

OF JOINDER OF ACTIONS. (*n*)

Where the plaintiff has two *causes of action* which may be joined in one action, he ought to bring one action only; and if he commence two actions, he may be compelled to consolidate them, and to pay the costs of the application. (*o*) It is, therefore,

OF JOINDER
OF ACTIONS.

(*h*) *Ib. Ibid.*; [Morton J. in *Wilbur v. Gilmore*, 21 Pick. 253.]

(*i*) *Lampen v. Kedgewin*, 1 Mod. 207; *Vin. Abr. Judgment*, Q. 4; *Kitchin v. Campbell*, 2 Bl. Rep. 831; [Morton, J. in *Wilbur v. Gilmore*, 21 Pick. 253; *Story J. in Gilman v. Rives*, 10 Peters, 301, 302. A judgment of nonsuit upon an agreed statement of facts has been holden to be no bar to another action. *Knox v. Waldoborough*, 5 Greenl. 185; *Bridge v. Sumner*, 1 Pick. 371.]

(*k*) *Vooght v. Winch*, 2 B. & Ald. 662; *Hooper v. Hooper, McClel. & Y.* 509; [*Howard v. Mitchell*, 14 Mass. 241; *Wood v. Jackson*, 8 Wend. 9; *Wright v. Butler*, 6 Wend. 238; *Shafer v. Stonebreaker*, 4 Gill & J. 359; *Church v. Leavenworth*, 4 Day, 274; *Towns v. Nims*, 5 N. H. 259.]

(*l*) *Lampen v. Kedgewin*, 1 Mod. 207; *Vin. Abr. Judgment*, Q. 4.

(*m*) *Ib. Ibid.*

(*n*) The joinder of several persons in a suit has already been considered. As to joinder of actions in general, see 2 Saund. 117 *a*, note; *Tidd*, 9th ed. 10-14; *Com. Dig. Action*, G.; *Bac. Abr. Actions in General*, C.; 2 *Vin. Abr.* 38, *Actions, Joinder*, U. c.; *Gillb. C. P.* 5, &c.

(*o*) *Cecil v. Briggs*, 2 T. R. 639; *Tidd's Prac.* 9th ed. 614; [*Boothe v. Payne*, 1 Dowl. N. S. 348; *Anderson v. Twogood*, 1 Ad. & El. N. S. 245; *Curtis v. Baldwin*, 42 N. H. 400.] *Aliter*, if at the time of bringing the first action the other cause of action had not become perfect and complete, 2 T. R. 639; *Connack v. Gundry*, 1 Chit. Rep. 709 *a*; *Wise v. Frowse*, 9 Price, 393. [Con-

solidation of actions is not a matter of right, but rests in the discretion of the court, to be exercised on motion for the purpose. *Scott v. Brown*, 1 Nott & McC. 417, note; *Worthy v. Chalk*, 10 Rich. (S. Car.) 141; *McRae v. Boast*, 3 Rand. (Va.) 481; *Brown v. Scott*, 1 Dall. 145; *Powell v. Gray*, 1 Ala. 17; *Den v. Kimble*, 10 N. J. (Law) 335; *Jackson v. Stiles*, 5 Cowen, 282; *Dunning v. Bank of Auburn*, 19 Wend. 23; *Wilkinson v. Johnson*, 4 Hill (N. Y.), 46; *Logan v. Mechanics' Bank*, 13 Geo. 201; *Brewster v. Stewart*, 3 Wend. 441; *Blake v. Michigan Southern & Northern Ind. R. R. Co.* 17 How. Pr. 228; *Percy v. Seward*, 6 Abb. Pr. 326; *Dunn v. Mason*, 7 Hill, 154; *Sykes v. Planters' House &c.* 7 Missou. 477; *Lewis v. Daniel*, 45 Geo. 124. Several causes of action, which may be consolidated, ought not to be sued separately, though one or both separately may be within the summary jurisdiction, and both together not so. *Phillips v. Delane*, 2 Brevard, 429. See *Parrot v. Green*, 1 McCord, 531; *Planters' &c. Bank v. Cowing*, 2 Nott & McC. 438. Suits upon notes of different dates, due at different times and payable to the plaintiff in different rights, cannot be consolidated. *Brice v. Kelly*, 7 Jones (Law), 266. So where it does not appear that the defence is the same in each suit *Worley v. Glentworth*, 10 N. J. (Law) 241; *Thompson v. Shepherd*, 9 John. 262; *Dunning v. Bank of Auburn*, 19 Wend. 23; *Logan v. Mechanics' Bank*, 13 Geo. 201; *Clark v. Metropolitan Bank*, 6 Sandf. 665; *Den v. Kimble*, 9 N. J. (Law) 335. Actions on different policies, though on the same risk, will

material to ascertain when several demands may be included in the same action. This may be considered in reference to, *first*, the joint

not be consolidated. *Camman v. New York Ins. Co.* 1 Caines, 114. Where two suits for the same cause of action are founded upon different securities, the plaintiff may prosecute both to judgment, but he can have only one satisfaction. *Stillwell v. Bertrand*, 22 Ark. 379. As to actions for damages in tort to be determined by a jury, see *Sherman v. McNitt*, 4 Cowen, 85; *Mitchell v. Smith*, 4 Md. 403 (under statute); *Cooper v. Weed*, 2 How. Pr. 40. Three suits between the same parties were held to have been properly consolidated, in *Crawford v. French*, 25 Texas, 436. Five suits on bonds were consolidated into three in *Prior v. Kelly*, 4 Yeates, 128. So seven into three, in *Ramsey v. Wynkoop*, 1 Yeates, 5. See *People v. McDonald*, 1 Cowen, 189. It is not the practice in New Hampshire to consolidate actions between the same parties, brought at the same term, but to prevent oppression by limiting costs. *Curtis v. Baldwin*, 42 N. H. 398. So in Massachusetts, *Genl. Sts. c. 156, § 10*; *Stafford v. Gold*, 9 Pick. 533; *Butler v. Shapleigh*, 10 Cush. 303. As to California, see *Wallace v. Eldredge*, 27 Cal. 498. Under the New York practice, where actions sought to be consolidated are to be defended, the party making the motion must show by affidavit that, the questions involved in them are substantially the same in all the actions; that the causes of action are such as may be joined in the same declaration; and either that no defence is intended in either suit, or, that the defences in all will be substantially identical. *Dunn v. Mason*, 7 Hill, 154; *Wilkinson v. Johnson*, 4 Hill, 46; *Dunning v. Bank of Auburn*, 19 Wend. 23; *Curtis v. Baldwin*, 42 N. H. 400, 401; *Clason v. Church, Coleman*, 62. The effect of consolidating is, that when two suits are consolidated, they must be conducted in every respect as one and the same. *Castro v. Whitlock*, 15 Texas, 437. Where the cause of action is single and entire, the plaintiff cannot divide and split it up so as to maintain two suits upon it. If he has chosen to compel payment of a part of an entire demand, this will in general operate as an extinguishment of the whole. 2 Chitty Contr. (11th Am. ed.) 1172, and note (c¹); *Badger v. Titcomb*, 15 Pick. 409, 413; *Marble v. Keyes*, 9 Gray, 221; *Pinney v. Barnes*, 17 Conn. 420; *Avery v. Fitch*, 4 Conn. 362; *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228; *Ingraham v. Hall*, 11 Serg. & R. 78; *Colvin v. Corwin*, 15 Wend. 557; *Farrington v. Payne*, 15 John. 432; *Smith v. Jones*, 15 John. 229; *Willard v. Sperry*, 16 John. 121; *Hopf v. Myers*, 42 Barb. 270; *Miller v. Covert*, 1 Wend. 487; *James v. Lawrence*, 7 Harr. & J. 73; *Crips v. Talvande*, 4 McCord, 20; *Vance v. Lancaster*, 3 Hayw. 130; *Strike's case*, 1 Bland (Md.), 95; *Wagner v. Jacoby*, 26 Miss. 532; *Herriter v. Porter*,

23 Cal. 345; *Brannenburg v. Indianapolis R. R. Co.* 13 Ind. 103; *Camp v. Morgan*, 27 Ill. 255; *Casselberry v. Forquer*, 27 Ill. Phillips v. Berick, 16 John. 136; *Ag Valencia*, 39 Cal. 292; *Thompson v. S*, 51 Ill. 213; *Logan v. Caffrey*, 30 Pen. 196; *Hess v. Heeble*, 6 Serg. & R. 57; *vill v. Garrigues*, 5 Barr, 152; *Miller v. ice*, 6 Hill, 122; *Kempton v. Savings tution*, 53 N. H. 587; *Chicago &c. R. v. Nichols*, 57 Ill. 464. Judgment for tion of one entire demand is a bar to other action for the remainder. *Banc Winspear*, 44 Barb. 209; *Siemon v. S*, 29 N. Y. 598; *S. C. 33 Barb. 9*. This must be limited to cases where the action is single and entire. *Phillips v. ick*, 16 John. 136. And the law extends only to the items not included in the not to the original claim. *Thompson v. ton*, 51 Ill. 213. But a contract to do things at several different times is divisible in its nature, and an action can be sustained upon each liability, as it accrues; although the agreement is entire, the performance several. *Badger v. Titcomb*, 15 Pick. Reformed &c. *Church v. Brown*, 54 191; *Heywood v. Perrin*, 10 Pick. 228; *Greenleaf v. Kellogg*, 2 Mass. 568; *T v. Randall*, 2 Mass. 283; *Hastings v. wal*, 8 Mass. 455. But if the action brought until more than one claim has accrued, all the claims due must be included in one action. *Reformed &c. Church v. Brown*, 54 Barb. 191; *Casselberry v. quer*, 27 Ill. 170; *Reformed &c. v. B*, 54 Barb. 191. If the plaintiff has sued defendant in the county court, or before a magistrate, and, in order to bring the within the jurisdiction of that court or magistrate, has abandoned part of his judgment recovered in that suit will be to any action which he may bring to recover the part so abandoned. *Vines v. Arms*, C. B. 632; *Ex parte Gale*, R. M. C. 214; *Planters' & Merch. Bank v. Ch*, 1 Geo. 50; *Merrick v. Dawson*, 2 (Del.) 50. A running account, for goods sold, &c. at different times, is not an entire demand incapable of being divided for the purpose of bringing several suits, but there be an agreement to that effect. *Badger v. Titcomb*, 15 Pick. 409; *Secor v. St*, 3 Hill, 548. See *Perry v. Harrington*, Met. 368. The contrary, was, however, in *Guernsey v. Carver*, 8 Wend. 492; *dernagle v. Cocks*, 19 Wend. 207; *Stevens v. Lockwood*, 13 Wend. 644; *vin v. Corwin*, 15 Wend. 557; *Lane v. C*, 3 Day, 255; *Avery v. Fitch*, 4 Conn. In *Badger v. Titcomb*, *supra*, it was held that, if the items claimed in the second could have been proved in the former, the presumption would be that they were proved; but this presumption might be rebutted. See *Webster v. Lee*, 5 Mass.

of different *forms* of action; *secondly*, of different *rights* of action; and, *thirdly*, the consequences of misjoinder.

The joinder in action often depends on the *form* (*o*¹) of the action, rather than on the *subject-matter* or *cause* of action: thus in an action against a carrier for the loss of goods, if the plaintiff declare in *assumpsit* he cannot join a count in *trover*, as he may if he declare against him in *case*; for the joinder depends on the *form* of the action. (*p*) If a cause of action, which ought to be laid in *assumpsit*, be improperly laid in *case*, and joined with a count in *trover*, no objection can be taken with effect on the ground of *misjoinder*, but only the particular defective count should be demurred to. (*q*) But if the count objected to be for a nonfeasance and breach of a contract, and is substantially in *assumpsit*, though it omit the words "undertook and faithfully promised," yet it will be considered as framed in *assumpsit*, (*q*¹) and if it be joined * with other counts merely for torts, the misjoinder will invalidate the whole declaration. (*r*) In a declaration on the case, one count stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain swine to be taken care of for reward, and in consideration thereof defendant *agreed* with plaintiff to take care of the swine, and *redeliver* the same on request; the court held, on motion in arrest of judgment, that this was a count in *assumpsit*, and could not be joined with counts in *case*. (*s*) The result of the authorities is stated to be, that "when the *same plea* may be pleaded, and the *same judgment* given on all the counts of the declaration; or whenever the *counts* are of the *same nature*, and the *same judgment* is to be given on them all, though the *pleas* be different, as in the case of debt upon

Golightly v. Jellicoe, 4 T. R. 147, note; *Bouzey v. Wordsworth*, 18 C. B. 325. The rule, that an entire cause of action shall not be made the ground of several distinct suits, applies to torts as well as to contracts. Thus where a tort is committed as to several chattels, by a single indivisible act, the claim for damages cannot be split and a several action brought for each chattel by the same plaintiff; a recovery for one part is a bar to an action for another part. *Farrington v. Payne*, 15 John. 432; *Phillips v. Berick*, 16 John. 136; *Hite v. Long*, 6 Rand. 457; *Marble v. Keyes*, 9 Gray, 221.]

(*o*¹) [*But see Hallock v. Powell*, 2 Caines, 216.]

(*p*) *Per Buller J. Brown v. Dixon*, 1 T. R. 277. And see the judgment of Lord Ellenborough C. J. in *Govett v. Radnidge*, 3 East, 70; and *ante*, 161. [Causes of action founded on tort and on contract cannot be joined in the same declaration. *Church v. Mumford*, 11 John. 480; *Clinton v. Hopkins*, 2 Root, 225; *Ryle v. Howlet*, 3

Bibb, 347; *Stovel v. Westcott*, 2 Day, 418; *Wickliffe v. Sanders*, 6 Monroe, 296; *Wickliffe v. Davis*, 2 J. J. Marsh. 70; *Trandle v. Arnold*, 7 J. J. Marsh. 407; *Carstarphen v. Graves*, 1 A. K. Marsh. 435; *Sayers v. Scudder*, 1 Penn. 53; *Van Pelt v. Van Pelt*, 2 Penn. 619. Neither trespass nor *trover* can be joined with *assumpsit*. *Polhemus v. Annin*, *Coxe*, 176; *Little v. Gibbs*, 1 South. 213; *Howe v. Cook*, 21 Wend. 29.]

(*q*) *Samuel v. Judin*, 6 East, 335, 336; 1 New Rep. 45, S. C.

(*q*¹) [See *Booth v. The Farmers' & Mechanics' National Bank of Rochester*, 1 N. Y. Sup. Ct. Rep. 45.]

(*r*) *Thomas v. Pearce*, 1 Chit. Rep. 619, K. B. Easter Term, 1817; [*Polhemus v. Annin*, *Coxe*, 176; *Little v. Gibbs*, 1 South. 11; *Howe v. Cook*, 21 Wend. 29.] What a misjoinder of case and *assumpsit*. *Orton v. Butler*, 2 Chit. Rep. 343; *ante*, 150, 153.

(*s*) *Corbett v. Packington*, 6 B. & C. 268; *ante*, 153; [*Reardon v. Farrington*, 7 Ark. 364.]

bond and on simple contract, they may be joined." (t) Perhaps the latter, that is, the *nature* of the causes of action, is the best criterion by which to decide as to the joinder of counts. (u) By this rule we may decide in general what forms of action may be joined in the same declaration.

In actions in *form ex contractu*, the plaintiff may join as many different counts as he has causes of action of the same nature in *assumpsit*; so also in covenant, debt, account, annuity, or *scire facias*. So debt on bond, or other specialty, may be joined in the same action with debt on judgment, or on simple contract, (x^1) or for an annuity; and debt and detinue may be joined together, (x^2) though in all these cases the pleas are different, and in detinue the judgment varies from the form of the judgment in debt; (y) which joinder has probably been allowed, because the practice is sanctioned by the authorities in the *Registrum Brevium*. (z) So several counts may be joined in one action on a penal statute for different penalties of a similar nature, as for several acts of bribery. (a)

So, in actions in *forms ex delicto*, several distinct trespasses may be joined in the same declaration in trespass. (b) And several causes of action in *case* may be joined with *trover*; (c) thus, case against a common carrier for losing goods; or a count for immoderately r

(t) 2 Saund. 117 *e, f*; Bac. Abr. Actions in General; Com. Dig. Action, G.; [Whipple v. Fuller, 11 Conn. 582.]

(u) Tidd, 9th ed. 12.

(x) Bac. Ab. Actions in General, C.; Com. Dig. Actions, G.; 2 Vin. Ab. pl. 42, 45, 64; Tidd, 9th ed. 10, 11.

(x^1) [Smith v. First Congregational Meetinghouse in Lowell, 8 Pick. 178; Farnham v. Hay, 3 Blackf. 167; Floyd v. Yandes, 1 Blackf. 102; Union Cotton Manufactory v. Lobdell, 13 John. 462; Gray v. Johnson, 14 N. H. 414; Mardis v. Terrell, Walker, 327; Vandeusen v. Blum, 18 Pick. 229, 231; Eib v. Pindall, 5 Leigh, 109; Patterson v. Chalmers, 7 B. Mon. 595. But these causes of action should not be included in the same count. Tillotson v. Stipp, 1 Blackf. 77. Several notes or bonds may be set out in one petition in debt in Missouri, and each will be considered a separate count. Jones v. Cox, 7 Missou. 173. In Mississippi, counts on a promissory note and a sealed instrument conditioned for the payment of money and the doing of other things, may be joined in the same declaration in an action of assumpsit or debt. Lamkin v. Nye, 43 Miss. 241.]

(x^2) [Rucker v. Hamilton, 3 Dana, 36; Calvert v. Marlow, 18 Ala. 67.]

(y) Bro. Ab. Joinder in Action, 97; Gilb. C. P. 5; 2 Saund. 117 *b*; Duke of Bedford v. Alcock, 1 Wils. 252. In Dalston v. Janison, 5 Mod. 92, it is said by the court that it seems strange that debt and detinue should

be joined, because these actions have different judgments. Mr. Tidd (p. 11, note) observes, that in order to join debt and detinue it seems they must both be founded on contract. *Sed quære*.

(z) Gilb. C. P. 5, 6, 7; Bac. Ab. Actions in General, C.

(a) Holland *qui tam* v. Botham, 4 B. & C. 229; Young v. The King, in error, 3 B. & C. 103; 2 Vin. Ab. 44, pl. 49.

(b) 2 Saund. 117 *b*; 8 Co. 87 *b*; 1 B. & C. 38, &c.; Heath's Max. 7; [Wilkes v. Pond, 34 Conn. 391. Trespass lies for a trespass against a tenant in fee simple, and may be joined with a count for a rescue or pound breach. Baker v. Bolton, 10 John. 240. A count in trespass at common law may be joined with a count on the statute for the same injury, if the statute gives an action of trespass. Prescott v. Tufts, 4 Mass. 146; also if the statute gives double damages. Farwell v. Burt, 11 Pick. 244; Worster v. Bridge, 16 Pick. 541. But see Whipple v. Fuller, 11 Conn. 382. Counts for trespass to land and for taking and carrying away chattels may be joined. Parker v. Parker, 236; Bishop v. Baker, 19 Pick. 541.]

(c) *Ib.* *Ibid.*; Brown v. Dixon, 1 B. & C. 277; Mast v. Goodson, 3 Wils. 348; Parke v. Smith v. Goodwin, 4 B. & C. 420; [Ayer v. Bartlett, 9 Pick. 156; Horsely v. Branch, 1 Humph. 199; Knapp v. Knapp, 28 Mich. 53. A count in trespass cannot be joined with a count in trespass. Crenshaw v. Moore, 10 Geo. 384.]

* a horse ; or for disturbing the plaintiff in his right of common ; or for hindering him from landing goods upon a yard of the defendant, contrary to agreement between them ; (d) or for not returning to the plaintiff a spaniel delivered to the defendant, to be tried and returned in a reasonable time, but keeping and detaining the same from the plaintiff ; may be joined in one action with a count in trover. (e) So a count charging defendant with having preferred a charge of felony against plaintiff before a magistrate, and having under a warrant to search the plaintiff's house for stolen goods, obtained upon such charge, entered the plaintiff's house, may be joined with counts strictly in case. (f) So in *replevin* the plaintiff may in the same declaration count on several takings on different days and at different places in the same county. (g) And the plaintiff may, in a declaration in *trespass*, unite a count for the battery or seduction of his servant, *per quod servitium amisit*, (h) with a count for battery of the plaintiff himself, (i) or *quare clausum fregit*, (k) or trespass and rescue ; (l) and all these counts might be included in one declaration, though the loss of service, and the consequence of the rescue, might be made the subjects of an action on the case. (m) However, if these injuries be joined with a count in *trespass*, then each should be stated to have been committed *vi et armis*.

But in order to prevent the confusion which might ensue, if different forms of actions, requiring different pleas and different judgments, and of a different nature, were allowed to be joined in one action, it is a general rule, that actions in form *ex contractu* cannot be joined with those in form *ex delicto*. (n) Thus assump-

(d) See *ante*, 150, 151.

(e) *Supra*, note (c) ; 2 Saund. 117 b.

(f) *Hensworth v. Fowke*, 1 Nev. & Man. 321. [Slander and malicious prosecution may be joined. *Miles v. Oldfield*, 4 Yeates, 427. Counts for malicious suits, one brought by the defendant in his own name, and one in the name of a third party, may be joined. *Pierce v. Thompson*, 6 Pick. 197.]

(g) *Fitz. N. B.* 68, note (a) ; *Bul. N. P.* 54 ; 2 Vin. Ab. 41.

(h) *Vincent v. Fursy*, *Alleyn*, 9 ; *Bac. Abr. Actions in General*, C. ; *Tullidge v. Wade*, 3 Wils. 18 ; *Heath's Max.* 7 ; *Ditcham v. Bond*, 2 M. & Sel. 436 ; *Woodward v. Walton*, 2 New Rep. 476.

(i) *Ditcham v. Bond*, 2 M. & Sel. 436.

(k) *Woodward v. Walton*, 2 New Rep. 476 ; *Ditcham v. Bond*, 2 M. & Sel. 436.

(l) *Sharpe v. Bechenowe*, 2 Lutw. fo. 1249 ; 1 Lord Raym. 83 ; *Tidd*, 9th ed. 11 ; [*Baker v. Dumbolton*, 10 John. 240 ; *Mockford v. Taylor*, 19 C. B. N. S. 209. Counts in trespass *quare clausum*, and for assault and battery, may be joined. *Arnold v. Maudlin*, 6 Blackf. 187.]

(m) See *ante*, 150-154 ; 2 Saund. 117 c, and notes.

(n) The only exception seems to be debt and detinue. *Ante*, 222. But it is doubtful whether detinue is to be ranked as an action *ex delicto* ; *ante*, 135 ; and whether it can be joined with debt unless the count in detinue be founded on contract ; *ante*, 222, note (y). [Two causes of action, one arising out of injury to property, and the other out of contract, are improperly joined, and the defect may be taken advantage of on demurrer. *Booth v. The Farmers' & Mechanics' National Bank of Rochester*, 1 N. Y. Sup. Ct. Rep. 45 ; *Genl. Sts. Mass.* c. 129, § 2, div. 5, § 12. But in Massachusetts, where it is deemed doubtful to which of the two classes of actions, contract or tort, a particular cause of action belongs, a count in contract may be joined with a count in tort, averring that both are for one and the same cause of action ; *Genl. Sts. Mass.* c. 129, § 2, div. 5 ; *Cunningham v. Hall*, 7 Gray, 559, 562 ; although the action is entitled in the writ an action of contract. *Hulett v. Pixley*, 97 Mass. 29. It is within the discretion of the presiding judge to determine at what stage of the trial the plaintiff must elect on which count he will rely. No exception lies to his decision on this point. *Crafts v. Belden*, 99 Mass. 539 ;

sit cannot be joined with case, (*o*) or trover, (*p*) nor trover with detinue, (*q*) &c.

And, with the above exceptions, counts in one species of action cannot be joined with counts in another. Thus assumpsit, covenant, debt, (*q*²) or account cannot be joined with each other, (*r*) nor trover with case, (*r*¹) for they are actions of distinct natures, and the elements are different, that in trespass being in strictness *quod capere* and that in case *quod sit in misericordia*; (*s*) and neither trespass or case could be joined with replevin or detinue, nor can the two *forms of action be united in a suit. In criminal proceedings joinder of different offences of the same degree in an indictment does not render the proceedings defective; though it is a matter of discretion in the court on motion to quash an indictment so framed.

Where the same form of action may be adopted for several distinct injuries, the plaintiff may in general proceed for all in one action, (*t*¹) though the several rights affected were derived from different titles; but a person cannot in the same action join a demand in *his own right*, and a demand as *representative* of another, or *in autre droit*; nor demands against a person on his *own* liability, and on his liability in his *representative* capacity. (*u*) The points which usually occur in practice may be considered as they arise in actions, 1st, by and against *partners*; 2dly, *husband and wife*; 3dly, *the assignees of a bankrupt*; and, 4thly, *executors, &c.*

Sullivan v. Fitzgerald, 12 Allen, 482; Carlton v. Pierce, 1 Allen, 26, 28; Atwater v. Clancy, 107 Mass. 369.]

(*o*) Corbett v. Packington, 6 B. & C. 268; [Stoyell v. Westcott, 2 Day, 418; Wilson v. Marsh, 1 John. 503; Church v. Mumford, 11 John. 480; Creel v. Brown, 1 Rob. 260; Hitt v. Lippitt, Geo. Decis. 89; Rodley v. Roop, 6 Blackf. 158; Etchison v. Post, 5 Blackf. 140; Tucker v. Gordon, 2 Brevard, 136; Copeland v. Flowers, 21 Ala. 472; but see Hallock v. Powell, 2 Caines, 216. Counts in deceit and contract cannot be joined. Crooker v. Willard, 28 N. H. 134, note, and cases cited; Seligman v. Kalkman, 8 Cal. 207.]

(*p*) 2 Saund. 117 c; Samuel v. Judin, 6 East, 335; Orton v. Butler, 2 Chit. R. 343; [Polhemus v. Annin, Cox, 176; Little v. Gibbs, 1 South. 11; Howe v. Cook, 21 Wend. 29. Assault and slander cannot be joined. Anderson v. Hill, 53 Barb. 238. But under the Code of Virginia, in an action on the case, counts in trespass may be joined with counts in case. Parsons v. Harper, 16 Grattan, 64.]

(*q*) Kettle v. Bromsall, Willes, 118; [Hood v. Hanning, 4 Dana, 21.]

(*q*¹) [Pell v. Lovett, 19 Wend. 546; but see S. C. 22 Wend. 369.]

(*q*²) [Canton &c. Building Association v. Weber, 34 Md. 669.]

(*r*) Bac. Abr. Actions in General. [McGinnity v. Laguerrenne, 10 Ill. 273; Cruikshank v. Brown, 10 Ill. 75; F. Yandes, 1 Blackf. 102; Canton &c. Building Association v. Weber, 34 Md. 669.]

(*r*¹) [Cooper v. Bissell, 16 John. 146; Pard v. Furniss, 19 Ala. 760. These counts may be joined by statute in Virginia. Hagar v. Brainard, 44 Vt. 294.]

(*s*) Courtney v. Collet, 1 Lord Raym. 273; 2 Saund. 117 c, 117 c, note (c). 5 See Weeton v. Woodcock, 5 M. & W. 48.

(*t*) The King v. Kingston, 8 East, 4; Young v. The King, 3 T. R. 103; 1 Crim. Law, 252-255; 7 & 8 Geo. 4, c. 48.

(*t*¹) [Under the Massachusetts practice any number of counts for different causes of action belonging to the same division may be inserted in the same declaration. Genl. Sts. c. 129, § 2, div. 5; but two counts of action, not arising on the same count, shall not be embraced in the same count, except the count on an account annexed. Div. 4.]

(*u*) Bac. Abr. Actions in General, Vin. Abr. 62; Com. Dig. Actions, G.

In actions *by* and *against* several persons, whether *ex contractu* or *ex delicto*, all the causes of action must be stated to be joint. (u¹) Thus a plaintiff cannot, in a declaration against two defendants, state that *one* of them assaulted him, and in another part that the other assaulted him, or took his goods, for the trespasses are of several natures, and against several persons, and they cannot plead to this declaration. (x) Neither can the plaintiff in trover recover against several defendants for several conversions of the same goods; in order to fix all the defendants, he must prove a joint conversion by all, and if the evidence show separate conversions, he must take his verdict against those defendants only who were parties to some one conversion, and all the other defendants must be found not guilty. (y) But in the case of a survivor of several contracting parties, a demand by or against him as survivor may be joined with a demand due to or from the party in his own right; (z) and, subject only to a plea in abatement, counts upon a promise by the defendant, and another since become a bankrupt and certificated, may be joined in separate actions against the solvent partner alone, with counts on promises made by the defendant solely since the other became a bankrupt. (a)

We have already fully considered the various instances in which a husband and wife ought to sue or be sued jointly or separately in an action *ex contractu* or *ex delicto*. (b) It will be sufficient here to *observe, that when the wife is co-plaintiff in an action *ex contractu*, no cause of action can be included, unless it be founded on a contract with a feme before marriage, or she be the meritorious cause of action; and her interest must expressly appear on the face of every count. (c) And in an action in form *ex delicto* for a personal injury, if the wife be joined, the declaration must proceed only for torts to her individually, and not for such wrongs as only affect the husband. (d)

We have also before partially noticed what demands may be joined

(u¹) [Moore v. Platte County, 8 Missou. 467; McKee v. Kent, 24 Miss. 131.]

(x) 2 Saund. 117 a; Cutsworth, Sty. 153, 154; Drummond v. Dorant, 4 T. R. 360.

(y) Nicoll v. Glennie, 1 M. & Sel. 588; [Chamberlain v. Shaw, 18 Pick. 378; Strickland v. Barrett, 20 Pick. 415; Lockwood v. Bull, 1 Cowen, 322.]

(z) Richards v. Heather, 1 B. & Ald. 29; Golding v. Vaughan, 2 Chit. Rep. 436; Hancock v. Haywood, 3 T. R. 433; Slipper v. Scidstone, 5 T. R. 493; 1 Esp. Rep. 47; French v. Andrade, 6 T. R. 582; [Davis v. Church, 1 Watts & S. 240. Counts on demands due the plaintiff as surviving member

of different firms may be joined. Stafford v. Gold, 9 Pick. 533.]

(a) Hawkins v. Ramsbottom, in error, 6 Taunt. 179.

(b) As plaintiffs *ex contractu*, ante, 32; and *ex delicto*, ante, 82. As defendants *ex contractu*, ante, 65; and *ex delicto*, ante, 104.

(c) Ante, 32, 33. [See Staley v. Bahrite, 2 Caines, 221.] The declaration must not contain a count on the promise of the husband and wife after marriage, even to pay her debt contracted *dum sola*. Morris v. Norfolk, 1 Taunt. 212, in error.

(d) Ante, 82, 83. [Slander of a husband and wife cannot be joined in the same action. Ebersoll v. Krug, 3 Binney, 555.]

in an action at the suit of the *assignees of a bankrupt*. (e) And remember, that counts on causes of action accruing to the assignees after the bankruptcy, may be joined with counts on causes of action which accrued to the bankrupt before bankruptcy, whenever the former causes of action arose upon transactions with the assignees in their representative character, and money recovered thereon would be assets in their hands in such capacity. (f) If there have been any promise to the assignees or causes of action since the act of bankruptcy, care must be taken to insert such count in the declaration adapted to such demand; and where two partners became bankrupts at different times, and the defendant between the two acts of bankruptcy illegally received money, and the assignees of the two partners, in their action to recover it, declared only for money had and received to the use of *the two partners*, before they became bankrupts, and in another count for money had and received to the use of the *plaintiffs as assignees*, it was decided that the plaintiffs could not recover, because they should have declared in one count for money had and received to the use of the partner who last became bankrupt, and of the plaintiffs as assignees. (g)

It is now a well settled rule, in actions by a plaintiff who is *4thly. Executors, &c.* *executor or administrator, that where the money, when recovered, would be assets, the executor may declare for it in his representative character*; and that the best line to adopt in determining whether counts may be joined, is to consider whether the sums when recovered, would be assets. (h) It is therefore clear, that an executor or administrator may declare *as such* for goods sold or money paid by him in that character, and may join such count with counts on promises to the testator or intestate. (i) So money had and received by the defendant to the use of the plaintiff as executor, (k) and an account stated with him as executor, for moneys due and owing to the testator, (l) or to the plaintiff as executor, or to the plaintiff and wife as executrix, (m) may be joined with counts (m¹) on promises

(e) *Ante*, 28.

(f) *Ante*, 29.

(g) *Smith v. Goddard*, 3 B. & P. 465.

(h) *Cowell v. Watts*, 6 East, 405; 2 Saund. 117 d, and notes, 5th ed.; *Thompson v. Stint*, 1 Taunt. 332; *Powley v. Newton*, 2 Marsh. 147; 6 Taunt. 453, S. C.; *Cowell v. Watts*, 2 Smith's Rep. 416; per Le Blanc J. *Tidd*, 9th ed. 12, 13; *Dowbiggin v. Harrison*, 9 B. & C. 666.

(i) *Ord v. Fenwick*, in error, 3 East, 104; *Cowell v. Watts*, 6 East, 405; *Edwards v. Grace*, 2 M. & W. 190; *Werner v. Humphreys*, 3 Scott N. R. 226. [See *Hapgood v. Houghton*, 10 Pick. 154; *Stevens v. Gregg*, 10 Serg. & R. 234; *Sebring v. Keith*, 2 Bailey, 192; *Peries v. Aycinena*, 3 Watts &

S. 64; *Lowe v. Bowman*, 5 Blackf. 4; *Boyle v. Townes*, 9 Leigh, 158; *Lea v. M'kins*, 7 Barr, 385.]

(k) *Petrie v. Hannay*, 3 T. R. 659. *Richardson v. Griffin*, 5 M. & Sel. 294; T. 9th ed. 12.

(l) *Henshall v. Roberts*, in error, 5 E. 150; *Cowell v. Watts*, 6 East, 405, 410; *King v. Thorn*, 1 T. R. 487; *Thompson v. Stint*, 1 Taunt. 322; *Powley v. Newton*, Marsh. 147.

(m) *Cowell v. Watts*, 6 East, 405, 410; *Thompson v. Stint*, 1 Taunt. 322; *Powley v. Newton*, 2 Marsh. 147 ac.; *Nicolas v. King*, 1 Lord Rayn. 437; 2 Saund. 117 *semble* cont.

(m¹) [In assumpsit by an administrator

the testator or intestate; and as an executor may, under circumstances, lend money, it should seem the insertion of a count for money lent by him as such would not be a misjoinder. (*n*) And counts on promises made to an intestate may be joined with counts on promissory notes given to the plaintiff as administrator since the death of the intestate. (*o*) And where the plaintiff declared as executor upon a bill of exchange indorsed to him in that character, it was holden sufficient. (*p*) It should, however, be observed, that where the transaction takes place after the death of the testator, the executor has the option of declaring in his private character. (*q*)

But an executor cannot include counts on causes of action accruing to him in his private right and individual character, with counts on causes of action which are laid to have been vested in him in his *representative* capacity, (*r*) and cannot join a count upon a bond given to his testator, and a count upon a bond given to him as executor, in the same action; (*s*) for the executor, by taking the bond, would extinguish the original debt, and it would not, when recovered, be assets. (*t*) Where six years have elapsed since the death of the testator or intestate, or it may on any other account be material for the plaintiff to avail himself of a promise or acknowledgment since the death, counts should be introduced in the declaration on promises to the executor in that character; (*u*) for otherwise such promise or acknowledgment cannot be given in evidence. (*x*) In every count stating a debt or promise to the executor or administrator in that character, the word "*as*" executor, &c. must be inserted. (*y*) It is not enough to say that it accrued to him, "executor, or being executor, * as aforesaid;" but it must be averred that it accrued to him "*as* executor." Great care was formerly requisite not to introduce *unnecessarily*, in a decla-

tionis non, a count alleging a promise to have been made to the first administrator, may be joined with counts alleging a promise to the plaintiff's intestate, and a promise to the plaintiff. *Sullivan v. Holker*, 15 Mass. 374. See *Clark v. Lamb*, 6 Pick. 512; *Fry v. Evans*, 8 Wend. 530.]

(*n*) *Webster v. Spencer*, 3 B. & Ald. 360.

(*o*) *Partridge v. Court*, 5 Price, 412; 7 Price, 591; *Catherwood v. Chaband*, 1 B. & C. 150.

(*p*) *King v. Thorn*, 1 T. R. 487; *Cowell v. Watts*, 6 East, 410-413; 2 Vin. Abr. 48, pl. 9.

(*q*) See *Brassington v. Ault*, 2 Bing. 177; 9 Moore, 340, S. C.

(*r*) 2 Saund. 117 c. [See *French v. Merrill*, 6 N. H. 465; *Bulkeley v. Andrews*, 39 Conn. 523. Counts by or against an executor or administrator cannot be joined with counts by or against him in his own right. *Mason v. Norcross*, Cox, 252; *Epes v. Dudley*, 5 Rand. 437; *Grahame v. Harris*, 5 Gill & J. 489; *Yates v. Kimmel*, 5 Missou. 87; *Jefford v. Ringgold*, 6 Ala. 544; *Brown v.*

Webber, 6 Cush. 560; *Kennedy v. Stallworth*, 18 Ala. 368. As to trustees, see *Smith v. Geortner*, 40 How. Pr. 185.]

(*s*) *Hosier v. Lord Arundel*, 3 B. & P. 7. *Sed vide King v. Thorn*, 1 T. R. 487; *Cowell v. Watts*, 6 East, 405.

(*t*) *Partridge v. Court*, 5 Price, 412; 7 Price, 591; *Powley v. Newton*, 6 Taunt. 456.

(*u*) See the forms, *post*, vol. ii. 119, and the consequences as to costs, *Ashton v. Pointer*, 5 Tyr. 322; and *post*, 227.

(*x*) *Sarell v. Wine*, 3 East, 409; *Hickman v. Walker*, Willes, 29; *Pittam v. Foster*, 2 D. & R. 363; 1 B. & C. 248, S. C.; *Hurst v. Parker*, 1 B. & Ald. 93; *Short v. M'Carthy*, 3 B. & Ald. 626; *Whitehead v. Howard*, 5 Moore, 105; *Ward v. Hunter*, 6 Taunt. 210; [Jones v. Moore, 5 Binney, 573.]

(*y*) *Henshall v. Roberts*, in error, 5 East, 150; *Powley v. Newton*, 2 Marsh. 151; 2 Saund. 117 d, e, note; but see *Curtis v. Davis*, 2 Lev. 110; 2 Vin. Abr. 47, pl. 6, 48, pl. 9; *Brigden v. Parkes*, 2 B. & P. 424.

ration by an executor on a cause of action accruing to the testator counts on causes of action alleged to have accrued after the testator's death; because an executor, *necessarily suing as such*, was exempt from liability to the defendant's costs, if the action failed by reason of the wording of the statute, which gave costs to plaintiffs. (2) Now it is enacted, that, "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which such action is brought or a judge of any of the superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon any cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

So in an action *against* an executor, a count cannot be introduced which would charge him *personally*; for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*. Therefore a count for money lent to, or had and received by, an executor as such, is not sustainable. (c) And a count in *assumpsit* against a husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife as administratrix, for the latter and occupation by them after the death of the testator. (d) But in an action of covenant against an executor on the deed of the testator the plaintiff may join a breach by the testator, and a breach since the testator's decease. (e) So an account stated by the defendant *as* executor of moneys due *from the testator*, may be supported, and may be joined with counts upon promises by the testator; and this is the common mode of declaring against executors and administrators, to save the statute of limitations; (f) and a count upon an account stated by an executor as such, of moneys due and owing from *him* in that character, may be joined with counts on promises by the testator, as

(2) See *Dowbiggin v. Harrison*, 9 B. & C. 668; *Tidd*, 9th ed. 978.

(a) 3 & 4 W. 4, c. 42, s. 31. [See *Muntorf v. Muntorf*, 2 Rawle, 180.]

(b) 2 Saund. 117 *e*; *Hayter v. Moat*, 5 Dowl. 298; 2 M. & W. 56, S. C.; *Corner v. Shew*, 3 M. & W. 350; see *post*, 228, note (h). [See *Bachelor v. Fiske*, 17 Mass. 464; *Kayser v. Disher*, 9 Leigh, 357; *Myer v. Cole*, 12 John. 349; *Demott v. Field*, 7 Cowen, 58. But a count on a promise by an executor or administrator as such, and in which he is not charged as personally liable, may be joined with a count on a promise by the deceased. *Carter v. Phelps*, 8 John. 440; *Malin v. Bull*, 13 Serg. & R. 441; *M'Kinley v. Call*, 1 Monroe, 54; *Howard v. Powers*, 6 Ohio, 93. See *Reynolds v. Reynolds*, 3

Wend. 244; *Bishop v. Harrison*, 2 M. & W. 539.]

(c) 2 Saund. 117 *e*; *Jennings v. New*, 4 T. R. 347; *Rose v. Bowler*, 1 H. 108; *Ashby v. Ashby*, 7 B. & C. 444; & R. 102, S. C.; [*Sibbit v. Lloyd*, 6 M. & W. 63; *Myer v. Cole*, 12 John. 349; *Demott v. Field*, 7 Cowen, 58.]

(d) *Wigley v. Ashton*, 3 B. & Ald. 104; *Wilson v. Wigg*, 10 East, 313.

(f) 2 Saund. 117 *e*; *Lecar v. Atkin*, 1 H. Bl. 102; *Ellis v. Bowen*, Ford. Rep. Exchequer, 98. Where an account has not been stated by the defendant as executor, add counts, as *post*, vol. 123. Counts on promises by the defendant as executor should always be inserted, if he has admitted the debt, or promised pay-

account stated does not make the executor personally liable. (g)

*Perhaps a count for money paid for the defendant as executor may be joined with counts on promises by the testator. (h) Whenever an executor, &c. is sued upon promises by him in that character, the words "*as executor*," &c. must be inserted in each count in stating the promise, and also in stating the debt or cause of action, if it be laid to have accrued after the testator's death. (i)

The *consequences* of a *misjoinder* are more important than the circumstance of a particular count being defective; for in the case of misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on a general demurrer, (i¹) or in arrest of judgment, or upon error; (k) and if on a writ of error one of several counts in a declaration in assumpsit be bad, and the defendant below suffer judgment by default, and the damages be assessed generally on the whole declaration, such judgment must be reversed. (l) A demurrer for misjoinder must be to the whole declaration, and not merely to the defective count or breach. (m) The plaintiff cannot, if the declaration be demurred to, aid the mistake by entering a *nolle prosequi*, so as to prevent the

3dly. Consequences of misjoinder.

(g) *Powell v. Graham*, 7 Taunt. 580; 1 Moore, 305, S. C.; *Ellis v. Bowen*, Forrester's Rep. Exch. 98; *Cowell v. Watts*, 6 East, 405-412; *Wilson v. Wigg*, 10 East, 313; [*Collins v. Weiser*, 12 Serg. & R. 97; *Malin v. Bull*, 12 Serg. & R. 443; *Vaughn v. Gardner*, 7 B. Mon. 326; *Carter v. Phelps*, 8 John. 440; *Whitaker v. Whitaker*, 6 John. 112.] See *vide* *Rose v. Bowler*, 1 H. Bl. 108, 114; 2 Saund. 117 d; *Bridgen v. Parkes*, 2 B. & P. 424.

(h) *Ashby v. Ashby*, 7 B. & C. 444. Counts for goods sold to, and work and labor done for the defendant as executor cannot be joined with a count for money found to be due on an account stated with the defendant as executor. *Corner v. Shew*, 3 M. & W. 350. In this case Lord Abinger C. B. said, "No doubt the count for money paid might have been supported by proof of payment by the plaintiff, after the death of the testator, of money in discharge of some entire joint liability, which the plaintiff and the testator had entered into as sureties;" and it seems to have been admitted that there was no misjoinder on account of the introduction of the count for money paid. In that case, however, it was expressly decided that an executor could make no new contract in his representative character, to charge the estate of the testator, and consequently that for any breach of contract entered into by him as executor, subsequently to the decease of the testator, he could only be made liable in his individual capacity, and that whether such

contract related to the expenses of the funeral of the deceased or otherwise.

(i) *Bridgen v. Parkes*, 2 B. & P. 424; *ante*, 226.

(i¹) [*Peabody v. Wash. Ins. Co.* 20 Barb. 339; *Williams v. Bradbury*, 9 Texas, 487; *Burrows v. Holderman*, 31 Ind. 412.]

(k) *May v. House*, 2 Chit. Rep. 697; *Bridgen v. Parkes*, 2 B. & P. 424; *Jennings v. Newman*, 4 T. R. 347; *Rose v. Bowler*, 1 H. Bl. 108; *Morris v. Norfolk*, in error, 1 Taunt. 212; [*Fernald v. Garvin*, 55 Maine, 414; *Fritz v. Fritz*, 23 Ind. 388; *Whiting v. Cook*, 8 Allen, 63; *Fairfield v. Burt*, 11 Pick. 244; *Cooper v. Bissell*, 16 John. 146; *Pell v. Levett*, 19 Wend. 546; *Rodley v. Roop*, 6 Blackf. 158; *Pharr v. Bachelor*, 3 Ala. 237; *Whitney v. Crim*, 1 Hill, 61; *West v. Stanley*, 1 Hill, 69; *Governor v. Evans*, 1 Pike, 349. Advantage of such defect can be taken under the Massachusetts practice act only by demurrer. *Barlow v. Leavitt*, 12 Cush. 484.] See in general as to the consequences of misjoinder or non-joinder of parties, whether plaintiffs or defendants, *ante*, 14, 51, 52, 75, 97; of husband and wife, *ante*, 37, 67, 85, 105.

(l) *Stone v. Macnair*, 1 Moore, 126; *Corner v. Shew*, 4 M. & W. 163. But where several breaches are assigned, some of which are bad, and the jury give general damages, the court will not arrest the judgment, but will award a *venire de novo*. *Leach v. Thomas*, 5 Dowl. 612.

(m) *Kingdon v. Nottle*, 1 M. & Sel. 355, 366; [*Fernald v. Garvin*, 55 Maine, 414.]

operation of the demurrer for misjoinder; (*n*) though the court will generally give the plaintiff leave to amend by striking out some of the counts on payment of costs. (*o*) In some cases, however, a misjoinder may be aided by intendment after verdict. (*p*) And by taking separate damages, or by entering a *remittitur damna*, the misjoinder may be aided; (*q*) and though it is reported to have been decided that assumpsit and trover be *joined, and there be a verdict for the defendant on the count in trover, that does not cure the declaration, such doctrine is now overruled. (*s*)

OF THE ELECTION OF ACTIONS.

In considering the application of each particular action, we have seen that the party injured frequently has an election of several remedies for the same injury. (*a*) As the due exercise of this election is of great importance, it may be useful concisely to state the principal points which direct the choice of several remedies. And these may be with reference to, 1st, the nature of the plaintiff's right or interest in the matter affected; 2dly, the number of the parties to the action; 3dly, the number of the counts of action, and the joinder thereof in one suit; 4thly, the nature of the defence, and whether it be advisable to compel the defendant to plead specially; 5thly, the venue, or place of trial; 6thly, the burden of the defence to be adduced by the plaintiff or defendant; 7thly, the costs, and, 8thly, the judgment and execution.

Firstly. A strict legal title is essential to the support of some remedies, but in others the plaintiff's bare possession of the property affected is sufficient. Where the title of the plaintiff may be doubtful, it is in general advisable to adopt the latter description of remedy. Thus an action of trespass for real property may be supported against a stranger by any person in the actual possession, though he have no title; but in ejectment

(*n*) *Rose v. Bowler*, 1 H. Bl. 110, 113, 114; *Drummond v. Dorant*, 4 T. R. 360; *Tidd*, 9th ed. 681; 1 Saund. 207 c. [The defendant can avail himself of the misjoinder only by demurring to the whole declaration; he cannot plead to one count and demur to the other. *Smith v. Merwin*, 15 Wend. 184.]

(*o*) *Jennings v. Newman*, 4 T. R. 348; [*Fernald v. Garvin*, 55 Maine, 417; *Noble v. Laley*, 50 Penn. St. 281; *Pennsylvania R. R. v. Zug*, 47 Penn. St. 480.]

(*p*) *Curtis v. Davis*, 2 Lev. 110; Com. Dig. Action, G.; 2 Vin. Abr. 47, pl. 7; *Smith v. Goodwin*, 4 B. & Ad. 413.

(*q*) *Knightly v. Birch*, 2 M. & Sel. 533; *Tate v. Whiting*, 11 Mood. 196; 2 Vin. Abr. 48, pl. 9; *Hancock v. Haywood*, 3 T. R. 433.

(*r*) See 2 Saund. 117 c.

(*s*) *Kightley v. Birch*, 2 M. & Sel. 533. There is no doubt that where some of the counts of a declaration are good, and others defective, and separate damages have been assessed on each count, that the court may only arrest the judgment on the defective counts; *aliter* if the verdict was general. *Hayter v. Moat*, 5 Dowl. 298. [See *Lane v. Hastings*, 19 Wend. 627.]

(*a*) Com. Dig. Actions, M.; *Watson v. Norbury*, Styles, 4; Co. Litt. 145 a; *Rylands v. Thornton*, 2 Bl. Rep. 1112. [In cases of election between action at law and suit in equity, see *Bradford v. Williams*, Md. Ch. 1; *Ex parte Sterns*, 14 Ala. Semmes v. Mott, 27 Geo. 92; *Napier v. Gidieere*, 1 Cheves, 101.]

lessor of the plaintiff must in general recover on the strength of his own legal title; (b) and may be defeated even if an outstanding term in a trustee be shown, unless it can be presumed that such term has been satisfied, &c. Therefore, where the title of the party injured is doubtful, the action of trespass should sometimes be chosen; and as the defendant in replevin for a distress taken damage feasant must in his avowry or cognizance state, and if denied must prove, a title to the *locus in quo*, in fee or tail, in himself, or some person from whom he derives his title, an action of trespass is preferable to a distress, where the title of the occupier of the land may be doubtful. (c) On the other hand, where * the party interested can clearly establish a title in himself or in his trustee, and yet it may be doubtful in which particular person the legal title may be vested, a distress, or an action of ejectment where there has been an ouster, may be advisable, because in replevin brought for the distress there may be several avowries upon different titles, and in ejectment there may be several counts on demises by different parties. In some cases we have seen that where the property of a person has been taken away or withheld from him, he may waive the tort and sue in assumpsit for the value; (d) but as bare possession is sufficient in general to sustain an action of trover or trespass against a wrong-doer, (e) it may often be better to adopt one of those forms of action than to sue in assumpsit for money had and received, as in the latter form of action a stricter right to the goods or the proceeds might be required. (f) So, where an injury is done to a messuage or land, it may often be better to sue in the name of the tenant than in the name of the landlord as reversioner, (g) because in the latter form of action strict proof of the letting and reversionary interest is indispensable. (h)

Secondly. In an action in form *ex contractu*, we have seen that if a person who ought to be made *co-plaintiff* be omitted, it is a ground of nonsuit, &c. (i) except in the case of executors or administrators, (k) whereas in actions in form *ex delicto*, the non-joinder of a party who should have been a *co-plaintiff* can only be pleaded in abatement; (l) and consequently the latter form of action, if it can be adopted, is in many instances preferable, where there is reason to doubt who should be joined as a plaintiff. We have also seen that a joinder of *too many defendants* in an action in form

2dly. The number of the parties.

(b) *Graham v. Peat*, 1 East, 244, 246. See, however, *ante*, 211.

(c) 1 Saund. 346 c, note (2); *Lambert v. Strother*, Willes, 221.

(d) *Ante*, 112.

(e) *Ante*, 71, 170; *quare* as to trover.

(f) *Edmeads v. Newman*, 1 B. & C. 418.

(g) See *ante*, 157.

(h) See *Cotterill v. Hobby*, 4 B. & C. 465.

(i) *Ante*, 14.

(k) *Ante*, 23.

(l) *Ante*, 75.

ex contractu is a ground of nonsuit, (*m*) and that the omission of a person who ought to be made a defendant may be pleaded in abatement; (*n*) but that in actions in form *ex delicto* the omission of a person jointly concerned in committing the injury, cannot in general be pleaded in abatement, and that when the injury may in point of fact have been committed by several, the joinder of too many defendants will be no ground of objection; (*o*) and therefore where it may be doubtful how many persons should be made defendants, it is advisable to declare in case, in preference to an action of assumpsit. So, a distress for a rent-charge is frequently preferable to an action of debt, because in the latter all the persons of the estate charged with the payment must be joined. (*q*)

Thirdly. Where the plaintiff has several demands of a similar nature, recoverable in different forms of action, he frequently declares in case, and then he ought to proceed for the whole in that form of action which will embrace his various claims. (*r*) The plaintiff or party may declare specially against a bailee for neglect either in assumpsit or in case; if he have also a money demand against the bailee due on simple contract, he should declare for both causes of action, assumpsit; but if instead of the money demand, he have a demand in debt, cause of action in trover, the declaration should be in case, with a count in trover, in order to avoid the expense of two actions. (*s*) If there be for a money demand due on a simple contract, the plaintiff in general has an option to declare either in assumpsit or debt; if there be also another demand of an unliquidated nature, founded on a simple contract, it is then proper to declare in assumpsit for both causes of action; but if there be no unliquidated demand, or if part of the demand be due on specialty, debt may be preferable. So in an action against the assignees of a bankrupt for rent, if it be doubtful whether they have accepted the lease, although they have taken possession, it is advisable to declare in debt on the lease, and add a count in case for use and occupation. So debt on a life policy, with a count in assumpsit for money had and received, may be preferable to covenant; because under the common count, the premium may in some cases be claimed. And as debt and detinue may be joined, (*t*) the declaration should be in those forms of action, where the defendant detains the plaintiff's goods, and also owes him a debt.

(*m*) *Ante*, 14.

(*n*) *Ante*, 53.

(*o*) *Ante*, 75; *Bretherton v. Wood*, 6 Moore, 141; 3 B. & B. 54; 9 Price, 408; *Govett v. Radnidge*, 3 East, 62-70.

(*p*) *Ib.* *Id.*; *Govett v. Radnidge*, 3 East, 62-70.

(*q*) Co. Litt. 162 b; 1 Saund. 282 (1), and 284, notes (3) and (4).

(*r*) *Ante*, 221, 223.

(*s*) *Govett v. Radnidge*, 3 East, 70.

(*t*) *Ante*, 222.

Fourthly. By a judicious choice of the remedy, the defendant may be frequently precluded from availing himself of a defence which he might otherwise establish. Thus in assumpsit ^{4thly. The defence.} against a person, who has been a bankrupt, for money had and received by him before his bankruptcy, however tortiously, his certificate would be a sufficient bar, but by declaring in case or trover, where the money was received tortiously, &c. he will be deprived of such defence. (u) And where goods have been sold by a person in contemplation of bankruptcy by way of fraudulent preference to a creditor, the remedy by the assignees should be trover, and not assumpsit as for goods sold and delivered; because, in the latter form of action, the defendant might avail himself of the debt from the bankrupt as a set-off. (x) And in *cases of fraud, the statute of limitations may not begin to run till the fraud is discovered, and therefore it would be sometimes advisable to sue for the fraud, and waive the action of assumpsit. Thus, where the defendant was guilty of a fraud in not taking a sufficient security on his investing plaintiff's money, the plaintiff might waive the fraud, and sue in assumpsit for not procuring sufficient security; but if it be apprehended that the defendant would in such action of assumpsit establish a defence under the statute of limitations, it would be better to declare in case for the fraud, as the statute might then only run from the time the fraud was discovered. (y) The election of the form of action was also frequently material, in order to compel the defendant either to take issue upon some particular allegation in the declaration, instead of putting the plaintiff to prove the whole of his case, or to compel the defendant to state his ground of defence specially. (z) Thus, in covenant for rent, the defendant must plead to some particular allegation, and there is no general issue; but in debt on a lease he might have pleaded *nil debet*, and thereby compelled the plaintiff to prove the whole of his declaration. (a) So trespass was in general preferable to case, because in the latter, under the general issue, the defendant might not only dispute the plaintiff's statement of his cause of action, but also give in evidence most matters of defence, but which he must have pleaded specially in trespass; (b) and detinue was in some cases preferable to trover, in order to compel the defendant to plead his lien specially. (c) But the general pleading rules of Hil. Term, 4 W. 4, requiring a

(u) *Parker v. Norton*, 6 T. R. 695; *Stainforth v. Fellowes*, 1 Marsh. 184; *ante*, 162.

(x) *Smith v. Hodson*, 4 T. R. 211; *Nixon v. Jenkins*, 2 H. Bl. 135; *ante*, 162. When not, see *Hunter v. Prinsep*, 10 East, 378; *Thomason, Hippip, and others v. Frere*, 10 East, 418.

(y) *Brown v. Howard*, 4 Moore, 508; 2 B. & B. 73, S. C. See, also, *Battley v. Faulkner*, 3 B. & Ald. 288; *Short v. M'Carthy*, 3 B. & Ald. 626; *Clarke v. Hougham*, 2 H. &

C. 153; 3 D. & R. 326, S. C.; [2 Chitty Contr. (11th Am. ed.) 1235, and note (b), and numerous cases cited, and the points upon this subject stated.] *Sed vide Howell v. Younge*, 5 B. & C. 259; 8 D. & R. 14, S. C.; *Rhodes v. Smethurst*, 4 M. & W. 50.

(z) *Post*, tit. Pleas.

(a) *Warren v. Consett*, 2 Ld. Raym. 1500.

(b) *Ante*, 162; *post*, tit. Pleas.

(c) *Ante*, 139.

special plea, in most cases have put an end to many of the grounds of preference.

Fifthly. In some cases there may be two or more actions in the same venue. *The* for the same injury, the one *local*, and the other *transitory*. Thus, *debt* for rent by the assignee or devisee of the estate against the lessee is local, and must be laid in the county where the estate lies; (*d*) but in *covenant*, at the suit of the same parties, an express covenant for the payment of rent, &c. the venue is transitory; (*e*) and consequently the latter form of action should be adopted where it may be advisable to try the cause out of the county where the estate is situate.

Sixthly. The evidence must also be attended to in the election of actions. Thus, it is frequently more convenient that the action should be trespass than case, because if it be laid in trespass, no nice points can arise upon the evidence, by which the plaintiff may be defeated upon the form of the action, as there may in many instances if case be brought. (*f*) And here we may again allude to the advantage of using trespass by the tenant, rather than case by the reversioner, in the case of injury to land. (*g*) And very often the form of action, by driving the defendant to plead more specially, may narrow the plaintiff's evidence. (*h*)

Seventhly. In actions in form *ex contractu*, the plaintiff is in general entitled to full costs, though he recover less than 40s. *Costs.* In such cases, it having been decided that the 22 & 23 Car. 2, does not extend to actions of assumpsit, debt, detinue, or covenant, and therefore it is not in general material, so far as respects the choice of which of these forms of action be adopted. But as case and assumpsit are frequently concurrent remedies, it will often be advisable to bring the action in assumpsit instead of case, as since the statute 3 & 4 Geo. c. 24, s. 2, the plaintiff in the latter form of action will be entitled to no costs if the damages recovered be under 40s. unless the judge directs otherwise under that act.

Eighthly. The action of debt is frequently preferable to assumpsit or covenant, because the judgment in debt by *nil dicere* is in general final, and execution may be issued immediately without the expense and delay of a writ of inquiry, which is usually necessary in assumpsit or covenant, in the case of judgment against the defendant.

(*d*) 1 Saund. 238, 241; *Maskelyne v. Higford*, Sir W. Jones, 53.

(*e*) *Ib. Ibid.*

(*f*) *Leame v. Bray*, 3 East, 600.

(*g*) *Ante*, 230.

(*h*) *Ante*, 232.

(*i*) *Tidd*, 9th ed. 963.

default; (*k*) and it is better to proceed in debt on an award than on the arbitration bond, because in case of judgment by default in an action on the latter, a writ of inquiry is necessary, under the 8 & 9 W. 3, c. 11. (*l*) Replevin or detinue is preferable to trover, when it is important to obtain the goods themselves. (*m*)

The circumstance of a party having elected one of several remedies by *action*, will not in general preclude him from abandoning such suit, and after having duly discontinued it, he may adopt any other remedy. (*m*¹) It seems that an action for rent may be supported, although a distress has been made, provided it has not produced actual *satisfaction. (*n*) The plaintiff cannot in general bring a fresh species of action for the same cause whilst the former is depending, or after it has been determined by a *verdict*; and it is a rule that the party applying for an information shall be understood to have made his election, and waived his remedy by action, whatever may be the fate of the motion for the information, unless the court think fit to give him leave to bring an action. (*o*)

(*k*) Tidd, 9th ed. 573. But in many cases the writ of inquiry is, it seems, necessary even in debt; as in debt for use and occupation, on a *quantum meruit*, for not setting out tithes, or for foreign money. *Arden v. Connell*, 5 B. & Ald. 885; Tidd, 9th ed. 573; Chitty's Arch. Pr. 7th ed. 711.

(*l*) *Post*, vol. ii.

(*m*) *Ante*, 139, 185; *Dore v. Wilkinson & Sparvey*, 2 Stark. 288.

(*m*¹) [*Parker v. Hall*, 55 Maine, 362, 364, 365; *Taylor v. Thomson*, 5 Peters, 358.]

(*n*) *Vasper v. Eddowes*, 1 Ld. Raym. 719; *Derre v. Edmunds*, 2 Chit. Rep. 301; *Lear v. Edmunds*, 1 B. & Ald. 157; *Hudd v. Ravenor*, 5 Moore, 542.

(*o*) *The King v. Sparrow*, 2 T. R. 198; 1 Chit. Crim. Law, 855, 856; *Rex v. Sparrow*, Tidd, 9th ed. 10, note (*c*); *Caddy v. Barlow*, 1 M. & R. 278 b. See *ante*, 220.

* CHAPTER III.

OF PLEADING IN GENERAL. (a)

DEFINITION.

- I. THE FACTS NECESSARY TO BE STATED.
- II. THE MODES OF STATING SUCH FACTS.
- III. THE RULES OF CONSTRUING PLEADINGS.
- IV. THE DIVISION OF PLEADINGS.

PLEADING is the statement in a logical and *legal form* of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defence; it is the formal mode of stating that on the record, which would be the support of the action or defence of the party in evidence. (b) It is, as observed by Mr. Justice Buller, (c) "one of the first principles of pleading, that there is no occasion to state *facts*, which must be done for the purpose of informing the court, whose duty it is to declare the *law* arising from those facts, and of apprising the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse." The grand object contemplated by the system is the production of a certain and material issue (d) between the parties upon some important part of the subject-matter of dispute between them. The observations of Lord Chief Justice De Grey on the structure of an indictment

(a) I forbear, in this practical treatise, to observe upon the origin, antiquity, and history of pleading, or to notice the many observations in the books upon its utility and value; upon this subject the reader may consult 3 Reeves's Hist. Com. Law, 424; Hale's Hist. Com. Law, 173; Mr. Lawes's Treatise on Pleading, 1-33; and a tract intitled A Summary of Pleading, 1-7. See, also, Lord Erskine's Speeches, vol. i. 276, &c. and the valuable publication of Mr. Serjeant Stephen. ["We entertain a decided opinion, that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." Kent C. J. in Bayard v. Malcolm, 1 John. 471.]

(b) Per Buller J. in Read v. Brookman, 3 T. R. 159; and Hotham v. The East India Company, Dougl. 278; and see the observations in Com. Dig. Pleader, A.; Bac. Ab.

Pleas and Pleading, and the judgment of Lord Chief Justice De Grey in Horne, Cowp. 682, 683, &c. as to the general nature and object of pleading. The word "pleadings" includes the declaration as well as the plea filed. The pleadings begin with the declaration or count, which is a statement on the part of the plaintiff of the cause of action. Stephen on Pleading, 1. The mutual altercations which constitute pleadings in civil actions, consist of formal allegations and denials which are offered on one side for the purpose of maintaining the suit, and on the other for the purpose of defeating it. Burnham v. 47 Maine, 458, 459; Buddington v. 6 How. Pr. 401.]

(c) The King v. Lyme Regis, Doug. 681.
(d) "An *issue* is, when both the parties join upon somewhat that they refer to to make an end of the plea" (i. e. Finch's Law, 396.

are very forcible, and equally applicable to the pleadings in civil actions,—"the charge must contain such a description of the injury or crime, that the *defendant* may know what injury or crime it is which he is called upon to answer, that the *jury* may appear to be warranted in their conclusion of 'guilty' or 'not guilty' upon the *premises delivered to them, and that the *court* may see such a definite injury or crime, that they may apply the remedy or the punishment which the law prescribes. The *certainty* essential to the charge consists of two parts: the *matter* to be charged, and the *manner* of charging it." (e) Hence the science of special pleading may be considered under two heads: 1st, The *facts* necessary to be stated; and, 2dly, The *form* of the statement; and these, together with some general rules of construction, and the division of pleadings, we will consider in the present chapter.

I. THE FACTS NECESSARY TO BE STATED.

In general, whatever circumstances are necessary to constitute the cause of complaint or the ground of defence, must be stated in the pleadings, and all beyond is surplusage; (f) *facts* only are to be stated, and not arguments or inferences, or matter of law, (g) in which respect the pleadings at law appear to differ materially from those in equity. There are *some facts* of such a *public* or *general* nature, that the courts *ex officio* take notice of them, and which consequently ought not to be unnecessarily stated in pleading, (h) and therefore it is advisable to consider a few of the principal rules as to the facts of which the courts will *ex officio* take notice.

The courts will *ex officio* take notice when the *king* came to the

(e) *Rex v. Horne*, Cowp. 682, 683.

(f) *Ib.* 683; *Bellasis v. Burbriche*, 1 *Ld. Raym.* 171; *Bourne v. Taylor*, 10 *East*, 205; *Dennistoun v. Merchants' Bank*, 2 *Disney*, 52; *Cline v. Cline*, 3 *Oregon*, 355; *Tucker v. Randall*, 2 *Mass.* 283; *Brown v. Stimpson*, 2 *Mass.* 441, 444; *Tracy v. Dakin*, 7 *John.* 75. Under the practice act of Massachusetts, no averment need be made which the law does not require to be proved. *Genl. Sta. c. 129*, § 2, div. 2; *Knapp v. Slocomb*, 9 *Gray*, 73, 74; *Gardner v. Dyer*, 5 *Gray*, 22; *Mulry v. Mohawk Valley Ins. Co.* 5 *Gray*, 541. But every fact which the plaintiff must prove to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly stated. *Allen v. Patterson*, 7 *N. Y.* 478; *McMillan v. Saratoga &c. R. R. Co.* 20 *Barb.* 449; *Bristol v. Rensselaer &c. R. R. Co.* 9 *Barb.* 158; *Bailey v. Ryder*, 10 *N. Y.* 363; *Safford v. Drew*, 3 *Duer*, 627.]

(g) *Rex v. Horne*, Cowp. 683, 684; *Com. Dig. Pleader*, C. 78; [*Clark v. Lineberger*, 44 *Ind.* 223; *Watriss v. Pierce*, 36 *N. H.* 236; *Hale v. Dennie*, 4 *Pick.* 503; *Goshen Turnp. Co. v. Sears*, 7 *Conn.* 92; *Hurst v. Purvis*, 5 *Blackf.* 557; *Rakes v. Pope*, 7 *Ala.* 161; *Weed v. Hill*, 2 *Miles*, 122; *Thomas v. Van Doren*, 6 *Missou.* 201; *Fuller v. Delaven*, 20 *Wend.* 57; *Randall v. Shropshire*, 4 *Met. (Ky.)* 327.] "The general propositions necessary to the case of a party should be stated in plain terms, and not left to inference from particular circumstances." Per Lord Denman C. J. *Baynes v. Brewster*, 1 *G. & D.* 674.

(h) *Fitch v. Rawling*, 2 *H. Bl.* 398; [*Goelet v. Cowdrey*, 1 *Duer*, 132; *Harker v. New York*, 17 *Wend.* 199.] See *Steph. on Pleading*, 5th ed. 383; *Co. Litt.* 303 *b*; *Com. Dig. Pleader*, C. 78; *Daybel's case*, 4 *B. & Ald.* 243.

throne, (*i*) and of the king's proclamations of war, &c. (*k*) and of articles of war, which are an emanation from the crown, and the virtue of acts of parliament; (*l*) and consequently those matters need not be alleged in pleading. So the courts are bound to take notice of all the privileges of the crown. But private orders of council are not considered as matters of law, or of such public nature as to render it incumbent on the judges *ex officio* to take notice of them; (*n*) and a pardon under the great seal will not be judicially noticed; (*o*) nor will the courts take judicial notice of an existing war between foreign states, or a recently declared war in which this country is * engaged, but the fact must be proved unless recognized by some public statute. (*p*)

The time of holding every *parliament*, and the prorogations and sessions thereof, (*q*) and also where any parliament sat, will be taken judicial notice of; (*r*) and therefore neither of these facts should be stated in pleading. And if either be misstated, even in pleading a private act, not before the court, the pleadings will be defective, and a demurrer, or in the case of a private act, on the plea of *nul tiel recorde*, or any other plea, putting in issue the whole of the facts stated in the declaration; (*s*) but the mistake may be aided by verdict. (*t*) The courts will also take judicial notice of the course of proceedings in either house of parliament, (*u*) but not of the journals of either house, (*x*) which must be stated in pleading, and proved in evidence. (*y*)

Public statutes, and the facts which they recite or state, must be noticed by the courts, without their being stated in pleading; (*z*) and it is only necessary to state facts, which will appear to the court to be affected by the statute. (*a*) If, however, an *offence* be created

(*i*) *Holman v. Burrow*, 2 Ld. Raym. 791, 794.

(*k*) *Wells v. Williams*, 1 Ld. Raym. 282; but see *Van Omeron v. Dowick*, 2 Campb. 44, whence it appears that the proclamation will be required to be proved by the gazette. See *The King v. Sutton*, 4 M. & Sel. 532, 543. As to declaration of war, see *Dolder v. Lord Huntingfield*, 11 Ves. 292; *Wells v. Williams*, Ld. Raym. 282, 283.

(*l*) *Bradley v. Arthur*, 4 B. & C. 304; 6 D. & R. 424, 8 C.

(*m*) *Elderton's case*, 2 Ld. Raym. 980.

(*n*) 2 Lil. Prac. Reg. 303.

(*o*) 4 Bl. Com. 402.

(*p*) *The King v. De Berenger*, 3 M. & Sel. 67, 69; *Dolder v. Lord Huntingfield*, 11 Ves. 292; *Van Omeron v. Dowick*, 2 Campb. 44; *Blackburn v. Thompson*, 3 Campb. 61, 67.

(*q*) *Birt qui tam v. Rothwell*, 1 Ld. Raym. 343; *Partridge v. Strange*, Plowd. 77; *Bishop of Norwich's case*, Moore, 551; *The King v. Wilde*, 1 Lev. 296. See Bac. Ab. Statute, L. 5. Describing an act to have

passed in a reign, when, in fact, the act was passed in a reign in which the act was passed without being continued by prorogation to that reign, is a misdescription. *Rex v. Windsor*, 3 Rep. 513.

(*r*) *Birt qui tam v. Rothwell*, 1 Ld. Raym. 210, 343.

(*s*) *Ib.*; *Rann v. Green*, Cowp. 474.

(*t*) *Spring v. Eve*, 2 Mod. 240.

(*u*) 1 Saund. 131 a.

(*x*) *Rex & Regina v. Knollys*, 1 Ld. Raym. 15.

(*y*) *Jones v. Randall*, Cowp. 17; *title v. Funnican*, Dougl. 569.

(*z*) 1 Bl. Com. 85, 86; *Boyce v. Boyce*, Dougl. 97, note (12); Bac. Ab. Statute, L.; *Smith v. Cattell*, 2 Wils. 376; *W. v. Horne*, Willes, 210; [*McHarg v. Man*, 7 Rob. (N. Y.) 137.] See the note per Lord Ellenborough, *The King v. S.*, 4 M. & Sel. 542. A recital in a public statute is evidence of the facts recited. 4 M. & Sel. 532.

(*a*) *Spieres v. Parker*, 1 T. R. 145; *Dig. Pleader*, C. 76; *Bently v. Leigh*,

statute, and a penalty be inflicted, the mere statement of the facts constituting the offence will be insufficient, for there must be an express reference to the statute, as by the words "contrary to the form of the statute," &c. in order that it may appear that the plaintiff grounds his case upon and intends to bring it within the statute. (b) In the case of a *public* statute, it is not advisable to recite or set out any part of it, for a misrecital, (b¹) with a conclusion "contrary to the form of the statute *aforesaid*," would be fatal even in arrest of judgment. (c) If a statute be passed during a session extending into two years of the king's reign, yet it must be stated to have passed in that session when, by the king's assent, it became a law; and if a statute be described as passed in the 2d & 3d years of W. 4, it will be a fatal misdescription, and the judgment on an indictment containing such a misdescription would be arrested; though if the description had been of an act passed in a session holden in the second and *third years of the reign, it would be otherwise. (d) Where a statute has been *recently* made, it has been supposed to be necessary to allege that the facts took place after the passing of the act; (e) but if there be a proper conclusion, *contra formam statuti*, it is not necessary to aver that the offence was after the passing of the act. The courts will not *ex officio* take notice of *private acts* (e¹) of parliament, and consequently such parts of them as may be material to the action or defence must be stated in pleading, (f) and this in the first instance. (g) The misrecital of a private act can only be taken advantage of by a plea of *nul tiel record*, or in assumpsit, before the pleading rules, Hil. Term, 4 W. 4, under the general issue; (h) though

71; Stephen, 5th ed. 384. [Where the defence of a statute abrogating a common law right is relied on, the facts making the statute applicable must be explicitly averred, and not left to mere inference. *Miller v. Roemer*, 4 E. D. Smith, 234. "In setting up a defence under a public statute, it is not necessary to set forth the statute in the plea, or to allege the existence of a statute of which the court is bound to take notice judicially; it is sufficient to state the facts which are necessary to bring the case within the operation of the statute, and to insist that upon those facts the plaintiff's right or remedy is at an end, or never existed. The court will then judicially notice the existence of the statute, and declare its legal effects upon the case as made by the pleadings." *Bogardus v. Trinity Church*, 4 Paige, 178; S. C. 15 Wend. 111.]

(b) *Wells v. Iggulden*, 3 B. & C. 186; 5 D. & R. 13, S. C.

(b¹) [A misrecital in the title of a public statute, in a part which does not alter the sense, and when its date is duly set forth, is not a cause for arresting judgment, nor can it be assigned as error. *Murray v. Fitzpatrick*, 3 Caines, 38, 41.]

(c) *Platt v. Hill*, Ld. Raym. 382; *Boyce v. Whitaker*, Dougl. 97; *King v. Marsack*, 6 T. R. 776; Bac. Ab. Statute, L. 5. But the misrecital of the title of a statute does not vitiate a declaration. *Nixon v. Nanney*, 1 G. & D. 373. [Under the practice act of Massachusetts, a general statute may be referred to in declarations or other pleadings by specifying the chapter containing the provision referred to, or mentioning in general terms the subject of the statute, or referring to it in such manner as shall indicate with sufficient certainty the statute intended. Genl. Sts. c. 129, § 5.]

(d) *Rex v. Biers*, 1 Ad. & El. 327; 3 Nev. & Man. 475, S. C.; *Gibbs v. Pike*, 8 M. & W. 223; 9 Dowl. 731, S. C.

(e) 1 Saund. 309 a, note (5). *Sed quare*.

(e¹) [*Goshen Turnp. Co. v. Sears*, 7 Conn. 92.]

(f) 1 Bl. Com. 86; *Platt v. Hill*, 1 Ld. Raym. 381, 382; *Boyce v. Whitaker*, Dougl. 97; Bac. Ab. Statutes, L.

(g) *The King & Queen v. Larwood*, Carth. 306.

(h) Bac. Ab. Statutes, L. 5; *Platt v. Hill*, 1 Ld. Raym. 381; *Rann v. Green*, Cowp. 474.

we have seen that if the time or place of holding the parliament be misstated, it is a ground of demurrer. (i) By a clause in most writs that would otherwise be private, they are now declared to be public, and then the production of *any* copy without proof suffices. (j)

So the courts will *ex officio* notice the *ecclesiastical*, (k) *civil*, *marine laws*, (l) without any statement of them in pleading; and there be any misstatement of such laws, or of facts affected by them, the pleading will be held insufficient. Thus, where an administrator *durante minore ætate*, in his declaration averred that the infant was within the age of twenty-one years, the declaration was holden bad, because the court would take notice that by the ecclesiastical law the administration ceased at the age of seventeen, and perhaps the executor was of the age of eighteen, though not twenty-one, as alleged in the declaration; (m) and the forest laws are not *ex officio* taken notice of. (n).

But the courts *ex officio* will not take notice of *foreign laws*, or the laws of our plantations; and consequently they must in general, when material, be stated in pleading. (o)

The courts are also bound to take notice of all *common-law rights* and *duties*, and of *general customs*; and consequently they ought not to be stated in pleading. (p) Thus if in a return to a writ of *habeas corpus* to restore a burgess of a corporation, it be stated that the person was removed by the corporate body at large, it is unnecessary to state that the power of removal is vested in them, because by intendment the law such power exists in the body at large, unless vested by charter.

(i) *Ante*, 237; Rann v. Green, Cowp. 474.

(j) Woodward v. Cotton, 6 C. & P. 491; 1 Cr., M. & R. 44, S. C., overruling Broomhead v. Beaumont, MS.; Chit. Col. Stat. tit. Statutes.

(k) Bro. Quare Impedit, pl. 12; Re Heamans, March, 205; 1 Rol. Abr. 526; Pigot v. Gascoyne & Furthee, Cro. Eliz. 602; 5 Co. 29; Atkinson v. Cornish, 1 Ld. Raym. 338; Rex v. Johnson, 2 Ld. Raym. 1334.

(l) Chandler v. Grieves, in note (a) to Gienar v. Meyer, 2 H. Bl. 606.

(m) 5 Co. 29 a; Atkinson v. Cornish, 1 Ld. Raym. 338. But note, this was before the stat. 38 Geo. 3, c. 87, which appoints twenty-one as the age at which the executor may act.

(n) Russel & Brokers case, 2 Leon. 209.

(o) Collett v. Lord Keith, 2 East, 273, 274; Mostyn v. Fabrigas, Cowp. 174; Holman v. Johnson, Cowp. 343; Way v. Yally, Salk. 651; Robinson v. Bland, 2 Burr. 1077; Boucher v. Lawson, Rep. temp. Hardw. 85; Hunter v. Potts, 4 T. R. 182; Male v. Roberts, 3 Esp. Rep. 164; [Palfrey v. Portland, Saco & Portsmouth R. R. Co. 4 Allen, 56, 57.] See, also, James v. Catherwood, 3 D. & R. 190; Cowp. 343. It should seem the courts will not *ex officio* take notice of the law of Scotland. Mure v. Kay, 4 Taunt. 40, 44. See 2 D. & R. 280. As to foreign laws

in general, Harrison's Index, tit. Foreign Vattel L. Nat. by Chitty, *per tot.*; [1 Cr. Contr. (11th Am. ed.) 128-131, and cases cited. Courts cannot take judicial notice of any foreign law at variance with the common law. Holmes v. Boughton, Wend. 75. But where there is no evidence to the contrary, courts will presume foreign law to be the same as their own. Story, Conf. Laws, §§ 637, 637 a; Rex v. Kitchen, 2 Ir. C. L. Rep. 613; Palfrey v. Portland, Saco & Portsmouth R. R. Co. 4 Allen, 56; Chase v. Alliance Ins. Co. 8 Allen, 311; Legg v. Legg, 8 Mass. 1; Lloyd v. Guibert, 6 B. & S. 100. It has been held that a defendant who relies on a statute of another state must in his pleading set out the statute, in order that the court may see whether the proceedings were warranted by the statute or not; and the general allegation that the proceedings were warranted, is not sufficient. Walker v. Marshall, 1 Mass. 103. See Pearsall v. Dwight, 1 Mass. 34; Roots v. Merriwether, 8 Mass. 397; Hoyt v. McNeil, 13 Minn. 390.]

(p) Pinkney v. Hall, 1 Ld. Raym. 1543; Erskine v. Murray, 2 Ld. Raym. 1543; Carter v. Dowrish, Carth. 83; Williams v. Williams, Carth. 369; Co. Litt. 89 a, note See Stephen, 5th ed.

or otherwise in a select part of the corporation. (q) And it has been well observed, that in an action against a common carrier or innkeeper for the loss of goods, &c. which is a liability founded on the common law or custom of the realm, it is not only unnecessary, but improper, to recite such custom, because it tends to confound the distinction between special customs, which ought to be pleaded, and the general customs of the realm, of which the courts are bound to take notice without pleading. (r) So it is not only unnecessary, but improper, in a declaration on a bill of exchange, to set out or recite fully the custom of merchants, because it is part of the law of the land. (s) It is for the parties to confine their allegations to the *facts*, for *ex facto jus oritur*, the court will apply for themselves the *law* arising from the facts stated; and this principle applies, although the dispute between the parties involve and directly turn upon a matter of law. (t) And it is a consequence of this rule, that *mere* matters of law or legal conclusions from facts, if alleged by one party, should not be traversed by the other. (u)

Such of the *customs of gavelkind* and *borough-English* as are of the essence of the tenure, as the course of descent, need not be stated specially in pleading, nor should be prescribed for; because the common law takes notice of them, and it is sufficient to state in the pleading that the land is of the custom of gavelkind, or of the tenure of borough-English, and subject thereto; but in regard to other customs, though incident to these tenures, they must be stated. (x) And the courts will not *ex officio* take notice of any *particular local customs*; (y) nor of the customs of London, except where they have been certified by the recorder to either of the courts of record, (z) without which there must be either plea or an affidavit of the custom. (a) Thus, where a defendant pleaded that his debt was attached in London by one of the plaintiff's creditors, it was decided that the court could not take notice of the custom of foreign attachment, because * it was not pleaded, and consequently that the plea was bad; (b) but on a writ of error from the inferior court, the custom will be noticed. (c)

The courts take notice of the *days of the week*, &c. on which particular days fall, and the almanac is part of the law of the land,

(q) *The King v. Lyme Regis*, Dougl. 149; *Company of Feltmakers v. Davis*, 1 B. & P. 100; *Com. Dig. Pleader*, C. 78.

(r) *Co. Litt.* 89 a, note (7).

(s) *Erskine v. Murray*, 2 Ld. Raym. 1542.

(t) *Stephen*, 5th ed. 383.

(u) *Ib.* 230.

(x) *Co. Litt.* 175 b, note (4); *Clements v. Scudamore*, 2 Ld. Raym. 1025; 1 Bl. Com. 76; 2 Bl. Com. 82-84. As to tenancy by curtesy, *Rob. Gav.* 142.

(y) 1 Rol. Rep. 106. See *Kingsmill v. Ball*, 9 East, 185.

(z) *Argyle v. Hunt*, 1 Stra. 187; *Hartop v. Hoare*, 2 Stra. 1187; *Blacquiére v. Hawkins*, Doug. 380; *Driver v. Driver*, Andr. 304; 1 Bl. Com. 76.

(a) *Driver v. Driver*, Andr. 304; *Hartop v. Hoare*, 2 Stra. 1187.

(b) 1 Rol. Rep. 106; *Co. Ent.* 139 b; 1 Saund. 67, note (1); *Harrington v. Macmorris*, 5 Taunt. 228. *Sed quære*, the custom having been certified. *Blacquiére v. Hawkins*, Doug. 378.

(c) *Blacquiére v. Hawkins*, Doug. 380; *Redham v. Waters*, Salk. 269.

having been established by different statutes; (*d*) and if there misstatement, it will be fatal. (*e*) Therefore, where a writ of *in* was stated in pleading to have been executed on the 15th of *J* which was a Sunday, the proceeding was held defective; (*f*) where the defendant justified an arrest under process from an *inf* court, which he stated to be held every Friday, and the process appeared by the pleading to have been dated the 7th of August, which was Saturday, upon demurrer it was held bad. (*g*) So the court take notice what number of days there are in each month, (*h*) and leap-year, and of the movable feasts. (*i*) In pleading a *preac* right of common, limited as to its exercise from a certain feast, sufficient to claim it, "from the feast of St. Thomas," &c. without claiming it on the pleadings from Old St. Thomas's Day; for, although the alteration of the style took place within the memory of man, as the claim is from time immemorial, it shall be intended that the party meant the old style. But in general, "St. Thomas's Day" would signify the day appointed by the statute (*k*) for the celebration of the feast of St. Thomas. (*l*) Even before the statute (*m*) which fixes the terms, the courts took judicial notice of them as to their commencement and conclusion, whether movable or not; (*n*) and if it may be stated, not under a *videlicet*, (*o*) to have been issued on a day of vacation, and it be alleged that the court was then sitting, the pleading will, it seems, be bad on special demurrer. (*p*)

The *division of England* into counties will also be noticed by the court *ex officio*; (*q*) and the reason of this is, that the sheriff of each county is the person to whom the court directs its writs. (*r*) In pleading the court will not take judicial notice of the division of England into parishes, vills, or particular liberties, which must be stated in pleading; (*s*) nor will it take notice of the local situation and distance

(*d*) 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1; 1 Eliz. c. 2; but see *Mayor of Guildford v. Clark*, 2 Ventr. 247.

(*e*) *Brough v. Parkins*, 2 Ld. Raym. 994; 6 Mod. 81, S. C.; *The Queen v. Dyer*, 6 Mod. 41; Salk. 181, S. C.; *Harvy v. Broad*, Salk. 626.

(*f*) *Hoyle v. Lord Cornwallis*, Fortesc. 373; 1 Stra. 387.

(*g*) *Pugh v. Robinson*, 1 T. R. 116.

(*h*) 1 Roll. Abr. 524, C. pl. 4. In general, the term month, in law, is to be considered as a lunar month, but this may be explained by the intention of the parties to mean a calendar month. *Cockell v. Gray*, 3 B. & B. 186; *Lacon v. Hooper*, 6 T. R. 224; *Lang v. Gale*, 1 M. & Sel. 111; *Titus v. Lady Preston*, 1 Stra. 652; *Jocelyn v. Hawkins*, 1 Stra. 446.

(*i*) *Harvy v. Broad*, Salk. 626; *Brough v. Parkins*, 6 Mod. 81; 2 Ld. Raym. 994. The calendar upon which the courts proceed is that annexed to the Common Prayer Book. *Brough v. Parkins*, 6 Mod. 81.

(*k*) 24 Geo. 2, c. 23, s. 2.

(*l*) *Smith v. Flower*, 3 Bing. 401. A lease from or notice to quit at Michaelmas. *Doe d. Spicer v. Lea*, 11 East, 312; 1 Hinde v. Vince, 2 Campb. 256.

(*m*) 1 W. 4, c. 70, s. 6.

(*n*) *Pugh v. Robinson*, 1 T. R. 116. Saund. 300 d, note (7).

(*o*) It would not be bad if so. *Lockett v. Plummer*, 5 Moore, 538; 1 B. 659, S. C.

(*p*) *Hart v. Weston*, 5 Burr. 2586. *v. Broadbent*, 3 T. R. 184; 1 Saund. note (7). See *Harrington v. Taylor*, 15 378.

(*q*) 2 Inst. 557; *Thorndike v. Turpin*, March, 124; *Rex v. Greep*, Comb. [Courts of law are bound to recognize territorial divisions of the state into counties and towns. *Martin v. Martin*, 51 L. 366.]

(*r*) As to the misspelling a county. *Hodgkinson v. Hodgkinson*, 2 Dowl. 5.

(*s*) *Supra*, note (*q*).

the different places in counties in England from each other; (t) and though the courts will notice provinces and dioceses, they will not notice any particular place within each province or diocese, except that where the court sits. (u) The division of Ireland, or any other country than England, into counties, or the known towns or cities of such country, will not be judicially noticed by the courts; and the situation of such counties, towns, or cities, should be specially stated. (x) So the courts will take judicial notice of what towns are incorporated, (x¹) and of the extent of ports, and the River Thames, &c. (y) And if by charter, confirmed by act of parliament, a town is exempted from the jurisdiction of the sheriff of the county, and has peculiar liberties and privileges, the court will take judicial notice thereof. (z)

The courts will *ex officio* take notice of the *meaning of English words* (z¹) and terms of art, according to their ordinary acceptation, however vulgar and peculiar to a particular county or place in England; and consequently the meaning of such terms need not in general be averred, (a) unless the intendment of law be otherwise. (b) Thus in an action on a warranty of a carroom, it was held not necessary to aver what a carroom was, because it was a phrase then well known in London. (c) So in an action for words spoken in England, which are slanderous according to the phrase of the country in which they were uttered, though the court may not in fact know what they signify, it is not necessary to aver their signification, for the judges themselves will take judicial notice of English words in any county. (d)

(t) Deybell's case, 4 B. & Ald. 243; Kearney v. King, 1 Chit. Rep. 32. So the court will not notice that the Tower is within the city of London. Brune v. Thompson, 2 G. & D. 110. Where an attorney was described as of Featherstone Buildings, Holborn, in the county of Surry, the court would not take notice that there was no such place in Surry. Humphreys v. Budd, 9 Dowl. 1000.

(u) Adams v. Terre-tenants of Savage, 2 Ld. Raym. 854; The King v. Sympson, 2 Ld. Raym. 1379; Stra. 609; Mellor v. Barber, 3 T. R. 387.

(x) Kearney v. King, 1 Chit. Rep. 28, 32; 2 B. & Ald. 301, S. C.; Sprowle v. Legge, 2 D. & R. 15; 1 B. & C. 16, S. C. By the words "kingdom of Ireland" the court will understand that part of the United Kingdom of Great Britain and Ireland called Ireland. Whyte v. Rose, 4 P. & D. 199.

(z¹) [Martin v. Martin, 51 Maine, 366, 367, and cases cited.]

(y) Fazakerly v. Wiltshire, 1 Stra. 469; Rouse v. Bardin, 1 H. Bl. 356, 357. The court will take notice of the extent of a town which is a county of itself, and of the alteration of its limits by act of parliament. Rippon v. Dawson, 5 Bing. N. C. 206.

(z) See The Mayor of Berwick-upon-Tweed v. Shanks, 3 Bing. 460, 461.

(z¹) [In Berry v. Osborn, 28 N. H. 288, upon objection being made that the abbreviation "&c." is Latin, the court said, "we do not so consider it. We were early taught that its meaning is 'and so forth,' and though borrowed from the Latin, like many of the best words of the language, it has been naturalized in English for ages." The abbreviation "vs." and the word "versus" are properly used instead of the word "against" in giving the title of actions. They are, in legal practice, so far English words as not to be contrary to a statute requiring all writs and pleadings to be in the English language. Smith v. Butler, 25 N. H. 521. The letters "L. S." are a proper representation of a seal, in copying or in-rolling legal precepts. Smith v. Butler, *supra*.]

(a) 1 Roll. Abr. 86, 525.

(b) Hockin v. Cooke, 4 T. R. 314.

(c) 1 Roll. Abr. 525; 6 Vin. Abr. 492.

(d) 1 Roll. Abr. 86; 1 Vin. Abr. 531; 1 Saund. 242, note (1). *Quære*, whether it may not be necessary to give a translation of a foreign libel or instrument. See *Ib.* note (b), 5th ed.; The King v. Goldstein, 3 B. & B. 201.

The courts will also take notice of the names and quantity of weights and measures; (*e*) and of time according to ordinary expressions. (*f*) * But if the intendment of law be different to the state in the pleading, the real meaning of the term in the particular instance must be alleged, and therefore it was decided that proof that the defendant agreed to sell so many bushels, according to a particular measure, will not support an allegation in a declaration to sell so many bushels generally, because "bushels," without any other explanation signify the legal statute measure of a Winchester bushel. (*g*) And if an instrument be described as made here for the payment of a sum of money generally, it will be intended that English money was paid. (*h*)

Every court is bound to take judicial notice of its own *court proceedings*, (*i*) and of those of the other superior courts; (*k*) therefore in these cases it is not necessary in pleading to allege usage or prescription in support of such proceeding. (*l*) So where upon a motion in arrest of judgment, because the declaration had not shown out of what court a writ of latitat was issued, the court held that there being no writ properly called a latitat but what issued out of the king's bench, the declaration was sufficient; (*m*) and it was unnecessary to state matters antecedently alleged in the same declaration. (*n*)

The superior courts will also notice the *privileges they confer on their officers*, (*o*) and therefore, though in a plea of privilege it is usual to state the custom of the court, privileging attorneys, &c. such a statement appears unnecessary. In *Ogle v. Norcliffe*, Holt C. J. held that the privilege claimed by the defendant was due to the clerk of the common pleas of common right, of which the court of king's bench would take notice. (*p*) In one case where the customary privilege was mispleaded, it being urged for the defendant that the court would take notice of the privilege, and reject as surplusage the count which was pleaded, the court said, that whatever they would do, had it stood indifferent, they could not take notice of a privilege expressly contrary to what the defendant had stated. (*q*) But

(*e*) 1 Roll. Abr. 525.

(*f*) *Ib.*; *Holman v. Burrow*, 2 Ld. Raym. 794.

(*g*) *Hockin v. Cooke*, 4 T. R. 314. See *Doe d. Spicer v. Lea*, 11 East, 312; *Stevens v. Elizee*, 2 Campb. 256.

(*h*) *Kearney v. King*, 2 B. & Ald. 301.

(*i*) *Pugh v. Robinson*, 1 T. R. 118; *Dobson v. Bell*, 2 Lev. 176; *Throckmorton v. Tracy*, Plowd. 145, 163; 1 Roll. Rep. 106; *Astley v. Younge*, 2 Burr. 811. The court will not take judicial notice who is master of the king's bench. *Molling v. Poland*, 3 M. & S. 158.

(*k*) 2 Co. Rep. 18; *Worlick v. Massy*, Cro.

Jac. 67, 68; 1 Rol. Rep. 106; *Lordson v. Bourn*, Sir W. Jones, 417; Cro. 527.

(*l*) 2 Co. Rep. 16 a; Year Book, 23, p. 9, pl. 21; [*King v. Bank of Gettysburg*, 2 Rawle, 197.]

(*m*) *Odes v. Clark*, Ld. Raym. 397.

(*n*) Co. Litt. 303 b; *Rex & Reg. Knollys*, 1 Ld. Raym. 13.

(*o*) *Ogle v. Norcliffe*, 2 Ld. Raym. 898; *Dillon v. Harper*, 2 Ld. Raym. 898.

(*p*) 2 Ld. Raym. 869; *Stokes v. M. East*, 424; *Carrett v. Smallpage*, 8

339; *Chatland v. Thornley*, 12 East,

(*q*) *Dillon v. Harper*, 2 Ld. Raym.

decision seems questionable. (r) Each court takes judicial notice that an attorney or officer of *its own court* is its officer, without * affidavit, (s) though a plea of privilege by an attorney to be sued in *another court* requires an affidavit of its truth to be annexed. (t)

So the courts at Westminster will notice *courts of general jurisdiction*, and the course of proceedings therein, as that there was a court of exchequer in Wales, and the course of proceedings there, and they also notice the jurisdiction of the courts of the counties palatine. (u) But it has been decided, that the courts are not bound to take notice who were or are the judges of another court at Westminster, though perhaps they ought to take notice of the judges of their own court; (x) and therefore where the authority of a judge may be material to the action or defence, it should be expressly stated in pleading, (y) and in pleading a fine the names of the judges and their authority should be stated. (s)

The superior courts will not *ex officio* take notice of the customs, laws, or proceedings of *inferior courts of limited jurisdiction*, (a) unless reviewing their judgments upon a writ of error, when, for the purposes of justice, they must necessarily notice them. (b) In a return to a writ of *habeas corpus*, inferior courts must in their return set forth the law or custom of the place by which they justify their commitment, otherwise the court is not bound to take notice of it; but on a writ of error it is otherwise. (c)

Where the law presumes a fact, it need not be stated in pleading. (d) Thus, as it is an intendment of law, that a person is innocent of fraud, and every imputation affecting his reputation, the party insisting upon the contrary must state it in pleading. (e) Therefore in an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver that he is not a thief; (f) and in an action on the case for maliciously suing out a fiat in bankruptcy, it is not necessary to state in the declaration that the plaintiff was not indebted to the defendant, or that

2dly. Where the law presumes a fact, or it is necessarily implied, it need not be stated.

(r) *Stokes v. Mason*, 9 East, 424; *Carrett v. Smallpage*, 9 East, 339; *Chatland v. Thornley*, 12 East, 544.

(s) *Ex parte Hore*, 3 Dowl. 600.

(t) *Davidson v. Watkins*, 3 Dowl. 129.

(u) *Tregany v. Fletcher*, 1 Ld. Raym. 154; 1 Saund. 73; *Case of Elderton*, 6 Mod. 74; *Broughton v. Randall*, Cro. Eliz. 502, 503; *Gryffth v. Jenkins*, Cro. Car. 179; *Peacock v. Bell*, 1 Sid. 331.

(x) *Hook v. Shipp*, Andr. 74; *Wightman v. Mullens*, 2 Stra. 1226.

(y) *Ib. Ibid.*

(z) 2 Saund. 175, note (2).

(a) 1 Rol. Rep. 105; *Rex v. Chancellor &c. of Cambridge*, 2 Ld. Raym. 1334; *Broughton v. Randall*, Cro. Eliz. 502; *Redham v. Waters*, Salk. 269. The superior

courts are not bound to take notice of the practice of the county court. Per Tindal C. J. *Rider v. Edwards*, 3 M. & G. 208.

(b) *Gryffth v. Jenkins*, Cro. Car. 179; 1 Rol. Rep. 105.

(c) *Redham v. Waters*, Salk. 269.

(d) *Wilson v. Hobday*, 4 M. & Sel. 120; *Chapman v. Pickersgill*, 2 Wils. 147; *Stephen on Plead.* 5th ed. 391, 392; [*Frets v. Frets*, 1 Cowen, 335; *Allen v. Watson*, 16 John. 205; *Van Demark v. Van Demark*, 13 How. Pr. 372; *Cropey v. Sweeney*, 27 Barb. 310; *Farron v. Sherwood*, 17 N. Y. 227; *Keteltas v. Myers*, 19 N. Y. 231; *Stroebe v. Fehl*, 22 Wisc. 337.]

(e) Co. Litt. 78 b; *Heath's Max.* 207, 212.

(f) *Chapman v. Pickersgill*, 2 Wils. 147.

he never committed an act of bankruptcy. (*g*) It is a rule applied in some cases to pleading, that where the law presumes the affirmance of any fact, the negative of such fact must be proved by the averring it in pleading. Thus, where any act is required to be done by a person, the omission of which would make him guilty of a criminal neglect of duty, the law * presumes the affirmative, and throws the burden of proving the negative on the party who insists on the contrary. Illegality in a transaction is never presumed; on the contrary a thing is presumed to have been legally done till the contrary is proved. (*f*) And, as observed by Lord Coke, necessary circumstances implied by law need not be expressed or pleaded. (*g*) If a feoffment be pleaded, livery of seisin need not be alleged, as it is implied in the word "enfeoffed;" and in pleading the assignment of land for dower, it is not necessary to say that it was by metes and bounds, for it shall be intended a lawful assignment; and in pleading a surrender, the reëntry of the lessor need not be alleged, for it shall be intended; so where it is pleaded, that the sheriff issued his warrant, it is unnecessary to say that it was under his seal, as it could not be his warrant if it were not; so if a person pleads that he is heir to A., he need not say either that A. is dead, or that he had no son; and in pleading an acceptance by a corporation or assignee of the lessee as tenant, it is not necessary to show that the acceptance was by deed, for an acceptance being pleaded, every thing that would render it a good acceptance is implied. (*h*) And if a party pleads that a party to a reference "revoked the authority" of an arbitrator, it need not be alleged that the latter had notice of the revocation, for without such notice there would be no revocation. (*i*) In declaring on a contract it is sufficient if it be set forth according to its legal effect. (*k*)

Great care must be taken in the application of this rule to ascertain that the law intends the fact proposed to be omitted. Thus, in pleading a devise of land, it must be stated to have been in writing, though in point of law it could not otherwise be a will; (*l*) and it is said that when the *defendant* pleads that another person promised to be

(*g*) *Ib.* But in this case the declaration always avers that the defendant acted maliciously and without probable cause, &c.

(*e*) *Williams v. East India Company*, 3 East, 192; *The King v. Inhabitants of Haslingfield*, 2 M. & Sel. 561.

(*f*) *Bennett v. Clough*, 1 B. & Ald. 463.

(*g*) 8 Co. Rep. 81 b. See Bac. Ab. Pleas, I. 7; Com. Dig. Pleader, E. 9; Co. Litt. 303 b; 2 Saund. 305 a, note (13); *Sheers v. Brooks*, 2 H. Bl. 120; *Handford v. Palmer*, 2 B. & B. 361; 5 Moore, 74, S. C.; *Marsh v. Bulteel*, 5 B. & Ald. 507; *Steph.* 5th ed. 391, 392.

(*h*) 2 Saund. 305 a, note (13). [In cove-

nant for rent due, on a lease again assignee of the lessee, the plaintiff never aver that the lessee had not paid it. It is sufficient if he states that the rent accrued subsequent to the assignment of the defendant, and that the same was due owing to the plaintiff, and wholly in arrears and unpaid; for it is implied in the assignment, that the defendant owed it. *Dun v. Van Orden*, 6 John. 105.]

(*i*) *Marsh v. Bulteel*, 5 B. & Ald. 507. Rep. 81 b, S. P.

(*k*) See *post*.

(*l*) 1 Saund. 276 d, note (2); *post*.

swerable to the plaintiff for the debt, in lieu of the defendant, it must be shown to have been in writing, pursuant to the statute against frauds, so that it may appear to be such a contract as the plaintiff could enforce. (*m*) But clearly in *declaring* upon a contract within the statute against frauds, it need not be alleged, or specifically shown, that the contract was in writing. (*n*) And in a declaration on a bill of exchange, it need not be averred that the acceptance was in writing. (*o*) The distinction is, that a will is only valid by statute, and that statute requires it to be in writing, &c.; but as to contracts * and bills of exchange, they were valid at common law, and the statutes merely require a certain form. (*p*)

It is also a general rule of pleading, that matter which should come more properly from the other side need not be stated. (*q*) In other words, it is enough for each party to make out his own case or defence. (*q*¹) He sufficiently substantiates the charge or answer for the purposes of pleading, if his pleading establish a *prima facie* charge or answer. He is not bound to anticipate, and therefore is not compelled to notice and remove in his declaration or plea every possible exception, answer, or objection, which may exist, and with which the adversary may intend to oppose him. (*q*²) Thus, in a declaration on a bond, it is not necessary to aver that the defendant was of full age when he executed the bond. (*r*) In an action of debt on a bond conditioned that B.

3dly. A party need not state a fact, which is more properly to be stated by the other side.

(*m*) *Ib.*; *Case v. Barber*, Sir T. Raym. 450, *sed quare*; and see *Steph.* 5th ed. 412, 413; [*Taylor v. Hillary*, 1 Gale, 22; *Dewey v. Hoag*, 15 Barb. 365.]

(*n*) 1 Saund. 211, note (2), 276, notes (1), (2); [*Cross v. Everts*, 28 Texas, 523; *Elkott v. Jenness*, 111 Mass. 29; *Price v. Weaver*, 13 Gray, 272; *Champlin v. Parish*, 11 Paige, 408; *Reynolds v. Dunkirk & State Line R. R. Co.* 17 Barb. 613; *Walker v. Richards*, 39 N. H. 259; 1 Dan. Ch. Pr. (4th Am. ed.) 364, 365; *Stern v. Drinker*, 2 E. D. Smith, 401; *Hilliard v. Austin*, 17 Barb. 141; *Elting v. Vanderlyn*, 4 John. 237; *Livingston v. Smith*, 14 How. Pr. 490. Under the code of Indiana, if a contract is not alleged to be in writing, and no copy is filed with the complaint or answer, the presumption arises that the contract declared on is not a written one, and if the contract is such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer. *Harper v. Miller*, 27 Ind. 277; *King v. The Enterprise Ins. Co.* 45 Ind. 43; 2 Chitty Contr. (11th Am. ed.) 1447, note (*k*); *Piercy v. Adams*, 22 Geo. 109.]

(*o*) *Chalie v. Belshaw*, 6 Bing. 529.

(*p*) *Chalie v. Belshaw*, 6 Bing. 529. See *Steph.* 5th ed. 411, 412; *post*. The declaration on a demise of tolls by trustees of a turnpike road under 3 Geo. 4, c. 126, ss. 55, 57, must state that the demise was in writing

and signed by two or more trustees or their clerk; but it seems that it need not allege a detailed observance of the preliminaries enjoined in s. 55, as where a number of minute particulars are to be followed, a general allegation of observance is sufficient. *Oldroyd v. Crampton*, 4 Bing. N. C. 24.

(*q*) *Com. Dig. Pleader*, C. 81; *Stowell v. Lord Zouch*, *Flowd.* 376; 2 Saund. 62 a, note (4); *Hotham v. East India Company*, 1 T. R. 638; *Casseres v. Bell*, 8 T. R. 167; *Steph.* 5th ed. 387.

(*q*¹) [*Karthauss v. Owings*, 2 Gill & J. 441; *Goshen Turnp. Co. v. Sears*, 7 Conn. 92, 93; *Postmaster-General v. Cochran*, 2 John. 415, 416; *Hughes v. Smith*, 5 John. 168; *Griswoll v. National Ins. Co.* 3 Cowen, 96.]

(*q*²) [*Van Nest v. Talmage*, 17 Abb. Pr. 99; *Smalley v. Bristol*, 1 Mich. 153; *Wolfe v. Howes*, 20 N. Y. 197; *Elting v. Vanderlyn*, 4 John. 237; *Wolfe v. Richmond*, 11 Abb. Pr. 270; *Keteltas v. Myers*, 19 N. Y. 231; *Van Demark v. Van Demark*, 13 How. Pr. 372; *Butler v. Mason*, 5 Abb. Pr. 40; *Sands v. St. John*, 36 Barb. 628; *S. C.* 29 How. Pr. 574, note; *Washburn v. Franklin*, 28 Barb. 27; *Merwin v. Hamilton*, 6 Duer, 244.]

(*r*) *Walsingham's case*, *Flowd.* 564; *Sir Ralph Bovy's case*, 1 Vent. 217; *Steph.* 5th ed. 388.

should remit all moneys received for C. to C., or pay the same, to or his order, as should be directed, it is sufficient to state a non-averment to C.; and it is not necessary in a replication to a plea of general performance, to allege any order given by C.; for if an order has been given, it should be shown by the defendant. (s) So in an action on a *post obit* bond, the plaintiff need not aver the death of the person on whose death the money was payable. (t) So in an action on a promise made by a testator upon a good consideration that his executor should pay it, it is not necessary to aver in the declaration that the defendant has assets. (u) So in assumpsit on a contract to transfer stock to the plaintiff or his order on request, the plaintiff states the request, and averred that the defendant had not transferred; and on an objection being taken that the plaintiff should have averred that the defendant had not paid to the plaintiff's order, it was overruled because the averment of payment to such order ought to come from the other side. (x)

If the plaintiff allege a *condition subsequent* to his estate, he need not aver performance, but the breach must be shown by the defendant; * and matter in defeasance of the action need not be stated wherever there is a circumstance, the omission of which is to destroy the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must be shown in its nature be a matter of defence, and ought to be shown in pleading by the opposite party. (y) In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption, (y¹) but if there be an exception in a subsequent clause, that is matter of defence, and the defendant must show it to exempt himself from the penalty. (z) where an act of parliament in the enacting clause creates an offence and gives a penalty, and in the same section (a) there follows

(s) *The Irish Society v. Needham*, 1 T. R. 485.

(t) *Murray v. Earl of Stair*, 2 B. & C. 82; 3 D. & R. 231, S. C.

(u) *Powell v. Graham*, 7 Taunt. 580.

(x) *Marks v. Marriot*, 1 Ld. Raym. 114; *Freeman v. Bernard*, 1 Ld. Raym. 247; *Mitchell v. Broughton*, 1 Ld. Raym. 673; *Anonymous*, 2 Ld. Raym. 989. In a plea by carriers to an action for loss of goods, a plea in excuse, stating that the plaintiff had notice that the defendants would not be responsible unless the goods were insured, need not allege that the loss was not occasioned by such negligence as the defendants would be responsible for notwithstanding such notice, as such negligence should be replied, or, more properly speaking, new-assigned. *Wyld v. Pickford*, 8 M. & W. 459.

(y) *Per Ashurst J. Hotham v. East India Company*, 1 T. R. 645, 646; Com. Dig. Pleader, C. 81. See *Wynne v. Wynne*, 2 M.

& Gr. 8; *Johnson v. Faulkner*, 2 G. 184.

(y¹) [*Clough v. Shepherd*, 31 N. H. 494; *Teel v. Fonda*, 4 John. 304; *Gould v. Kelley*, 16 N. H. 551; *Muller's case*, 4 Ct. Cl. 61.]

(z) *Spieries v. Parker*, 1 T. R. 14; *The King v. Pratten*, 6 T. R. 559; *Barnes v. Stat. L.*; *The King v. Stone*, 1 East 647; *Ward v. Bird*, 2 Chit. Rep. 583; *Grand Junction Railway Company v. The State*, 8 M. & W. 221; [*Gould v. Kelley*, 16 N. H. 552; *Myers v. Carr*, 12 Mich. 63, 71; *Don v. Clark*, 1 John. 513; *Bennet v. Hart v. Cleis*, 8 John. 41; *Smith v. States*, 1 Gall. 261; *Donnelly v. Vandusen*, 3 John. 41, 42; *Muller's case*, 4 Ct. Cl. 61; *Guptill v. Richardson*, 62 Maine, 61.]

(a) Mere placing the proviso in the section of the printed act, does not necessitate notice in pleading, unless

proviso containing an exception, which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such exception. (b) The case of *Vavasour v. Ormrod* (c) well elucidates this doctrine. It was an action upon a lease, and the declaration described the *reddendum* as containing an *absolute* reservation of rent. In fact, the *reddendum* was "yielding and paying during the said term (*except as hereinafter mentioned*) the yearly sum, &c." In the latter part of the lease there was a covenant and proviso by which a deduction was to be made, if a certain event happened; and it was held that the declaration was bad. And Lord Tenterden said, "if an *act of parliament*, or a *private instrument*, contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception; and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance. This is a middle case. Here the exception is not in express terms introduced into the reservation, but by *reference only* to some subsequent matter in the instrument. The words are 'except as hereinafter mentioned.' The * rule here applies *verba relata inesse videntur*. And the clause thereafter mentioned must be considered as an exception in the general clause, by which the rent is reserved; and then, according to the rule above laid down, the plaintiff ought in his declaration to have stated the reservation and the exception. Not having done so, I am of opinion that the variance is fatal, and that there is no ground for setting aside the nonsuit."

So if the *law* raise an exception to a general right, it need not be stated in pleading. (d) Therefore, although the holding a market on certain feasts is prohibited by statute, yet in pleading a right to hold a market, it may be alleged that the party was entitled to hold it on certain specified days in the week, without any exception as to those feasts. (e) And it is a rule with respect to acts valid at common law, but regulated as to the mode of performance by statute, that it is suf-

also incorporated in the enacting sentence, for statutes are not divided into sections upon the rolls of parliament. Per Holroyd J. *Wells v. Iggulden*, 3 B. & C. 189; 5 D. & R. 19, S. C.

(b) *Steel v. Smith*, 1 B. & Ald. 94; [*Smith v. Moore*, 6 Greenl. 278, and American cases there collected.] Sometimes a clause apparently containing an exception is to be considered as merely explanatory of the enacting clause. See a decision upon the wilful tres-

pass act, 1 Geo. 4, c. 56; *Looker v. Halcomb*, 4 Bing. 183, 189.

(c) 6 B. & C. 430; 9 D. & R. 597, S. C. See *Tempany v. Burnard*, 4 Campb. 20; *Howell v. Richards*, 11 East, 640; *Sicklemore v. Thisleton*, 6 M. & Sel. 9. How to declare on an award, 1 Saund. 62 a, b, note.

(d) *Comyns v. Boyer*, Cro. Eliz. 485; *Carrett v. Smallpage*, 9 East, 339.

(e) *Mosley v. Walker*, 7 B. & C. 57; 9 D. & R. 863, S. C.

sufficient to use such certainty of allegation as was sufficient before statute. (*f*)

But in acting upon the rule, that the pleading need not show avoid distinct matter of defence or answer, which it is for the adversary to object, care should be taken to discriminate accurately whether the matter in question is not so intimately connected with the case as the party pleading, that its affirmation or denial is essential to the validity of *his* pleading, in reference to and in consequence of the pleadings upon the record. In case for disturbing a right of common by putting cattle thereon, the defendant pleaded a license from lord of the manor, but did not aver that there was left a sufficient common for the commoners; and on demurrer the court held, the plea was for this omission bad; for though it may be said, the plaintiff might reply that there was not enough common left, as he had already alleged in his declaration that his enjoyment of common was obstructed, the contrary of this should have been shown by the plea to render it a perfect defence. (*g*)

And there are certain pleas which are regarded unfavorably by courts: as pleadings in estoppel, (*h*) and a plea of alien enemy and as to these it is essential to their validity that they should (contrary to the general rule) show, not only a *prima facie* case or defence but should mention and affirm, or dispute, every matter which by possibility could afford the opposite party an answer to the pleading.

Although any particular fact may be the gist of a party's case, **the statement of it is indispensable, it is still a most important principle of the law of pleading, that in alleging fact, it is unnecessary to state such circumstances as merely tend to prove the truth of it.* (*i*) The dry allegation of fact, without detailing a variety of minute circumstances which

5thly. It is not necessary to state in pleading mere matter of evidence.

(*f*) 1 Saund. 276 *a*, and *c*, note (2), 211, note (2); Steph. 5th ed. 410.

(*g*) Smith *v.* Feverell, 2 Mod. 6; 1 Freem. 190, S. C.; Greenhow *v.* Halsey, Willes, 619; Steph. 5th ed. 389.

(*h*) Co. Litt. 352 *b*, 303 *a*; Dovaston *v.* Payne, 2 H. Bl. 530.

(*i*) Casseres *v.* Bell, 8 T. R. 167.

(*k*) See Steph. 5th ed. 390.

(*l*) 9 Rep. 9 *b*; Groenvelt *v.* Burnell, Carth. 491; Stephen, 5th ed. 379; per Lord Denman C. J. in Baynes *v.* Brewster, 1 G. & D. 674; and in Williams *v.* Wilcox, 8 Ad. & El. 331; [Ralston *v.* Strong, 1 Chip. 293; Church *v.* Gilman, 15 Wend. 650; Dyett *v.* Pendleton, 8 Cowen, 727; Fidler *v.* Delavan, 20 Wend. 87; Steuben Bank *v.* Mathewson, 5 Hill, 249; Colvin *v.* Burnet, 17 Wend. 504; Hobson *v.* M'Arthur, 3 McLean, 280; State *v.* Leonard, 6 Blackf. 173; Hartman *v.* Keystone Ins. Co. 21 Penn. St. 466; Cahill *v.*

Palmer, 17 Abb. P. 196; Williams *v.* Wilcox, 8 Ad. & El. 314; Hyatt *v.* M'M. 25 Barb. 457. The facts essential to the defence must in general be expressly and substantially alleged. The statement of evidence tending to prove a material fact is not sufficient. Such a mode of pleading, if admitted, would refer the matter of fact to the jury instead of the court. Thus, if in trover the plaintiff alleges a demand and refusal, but omits to aver a version, the declaration is ill, the demand and refusal being only evidence of a version, which is the gist of the action. See J. in Watriss *v.* Pierce, 36 N. H. 249, and see the cases there cited by him; S. *v.* Wiggin, 51 N. H. 156. But if the declaration states a good cause of action, no objection to its sufficiency that material evidence is needlessly set out in it. Cro. Rains, 10 Texas, 520.]

stitute the evidence of it, will suffice. The object of the pleadings is to arrive at a specific issue upon a given and material fact, and this is attained, although the *evidence* of such fact, to be laid before the jury, be not specifically developed in the pleading. Therefore if the question be, whether wheat, after it had been cut, was suffered to lie on the ground "a reasonable time," it is sufficient to allege generally that such was the fact, without showing specifically how many days the corn remained on the ground, and what was the state of the weather during that period; although such matters may be material to the due consideration and decision of the question. (*m*) So, under the common averment in a declaration upon a bill of exchange, that the defendant "had notice" of the dishonor, the plaintiff may show special circumstances or facts which render the notice valid, although it were given at a later period than would, in ordinary cases, have sufficed; for there is no need in pleading to state more than the legal effect of the facts. (*n*) And upon this principle it is often sufficient, in setting out a custom or privilege, which is exercisable only to a *reasonable* extent, or at *seasonable* times, to allege generally that such was the custom, &c. without showing specifically what was reasonable or seasonable, &c. (*o*)

This rule may indeed be difficult in its application, but it has been rightly said, (*p*) that it is so elementary in its kind, and so well observed in practice as not to have become frequently the subject of illustration by decided cases, and (for that reason probably) is little, if at all, noticed in the digests and treatises.

Though the general rule is, that facts only are to be stated, yet there are some instances in which the statement in the pleading is valid, though it does not accord with the real facts, the law allowing a *fiction*; as in the action of ejectment, in which the statement of the demise to the nominal plaintiff is fictitious. (*q*) So in trover and detinue, the usual allegation that the defendant found the goods, rarely accords with the fact; (*r*) and where the number, quantity, species, or value of a thing, need not be proved precisely as laid, it is usual to state a greater number than really was the case, in order to admit of greater latitude in evidence; but except in these and a few other well known instances, established and recognized in pleading for the convenience of justice, the pleading matter, known to the party to be untrue, is censurable. (*s*) And whenever the purposes of justice require that a fiction of law with re-

5thly. Statements of legal fictions, &c.

(*m*) *Eaton v. Southby*, Willes, 131.

(*n*) *Firth v. Thrush*, 8 B. & C. 387.

(*o*) *Elliott v. Hardy*, 3 Bing. 61, and cases there cited.

(*p*) *Stephen on Plead.* 5th ed. 382, 383.

(*q*) *Aslin v. Parkin*, 2 Burr. 667, 668.

(*r*) *Ante*, 138, 168; *Mills v. Graham*, 1 New Rep. 140.

(*s*) *Bac. Abr. Pleader*, G. 4; *Solomons v. Lyon*, 1 East, 372. See *post*, as to sham pleas.

gard to time, &c. should not be attended to, and that the real should appear, it is competent to a party to show the truth by ment in pleading. (t) Thus, a party might, before the rule ing judgments to be entered of the day when signed, show a judgment was actually signed in vacation, although by or intendment of law all judgments were supposed to be recover term, whilst the court, who were supposed to have formally nounced it, were sitting. (u) Where a bill was filed against a torney in vacation, which by fiction of law was supposed to take in term, it was competent to the party filing the bill to show the day it was filed. And so in the case of writs, which, before the formity of process act, 2 W. 4, c. 39, were supposed to issue in it was competent to a party to show the time when they actually if that became necessary, in order to avail himself of the statutory limitations, &c. (x)

We have before remarked that the object of the science of pleading is the production of a *single* issue upon the *same* matter of dispute. The rule relating to duplicity, or duplicity. matter of dispute. The rule relating to duplicity, or duplicity, tends more than any other to the attainment of this object. It precludes the parties, as well the plaintiff as the defendant, in their pleadings, from stating or relying upon more than one matter constituting a sufficient ground of action, in respect of the demand, or a sufficient defence to the same claim, or an answer to the precedent pleading of the opponent. (y) The plaintiff cannot, by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which is independently of the other, (y¹) amounts to a good cause of action in respect of such demand. (y²) Thus at common law, in a declaration upon a bond, the plaintiff could not assign two breaches of the

(t) *Lyttleton v. Cross*, 3 B. & C. 317.

(u) Ib.

(x) Per Abbott C. J. 3 B. & C. 324.

(y) Com. Dig. Pleader, C. 33, E. 2; Bae. Abr. Pleas, K. 2, 3; Tidd, 9th ed. 661, 694, 1174; 2 Enumos, 141; Steph. 5th ed. 285; 2 Saund. 49, 50. [Duplicity in a plea consists in alleging two or more distinct grounds of defence, when one of them would be as effectual in law as all of them; and in subsequent pleadings, in stating two or more matters in answer to the preceding pleading, when one of them would be sufficient. Gould Pl. 419; Bell J. in Tebbets v. Tilton, 24 N. H. 122, 123; Hunt v. Haven, 5 N. H. 162, 168; Bell v. Lamprey, 52 N. H. 51; Lord v. Tyler, 14 Pick. 156, 164; Dunning v. Owen, 14 Mass. 157; Austin v. Parker, 13 Pick. 222; Otis v. Blake, 6 Mass. 336, 337; Parker v. Parker, 17 Pick. 236; Welch v. Jamison, 1 How. (Mass.) 160; Benner v. Elliott, 5 Blackf. 451; Calhoun v. Wright,

dition, because the bond was forfeited by one breach, which was sufficient to support his action, though in covenant several breaches of different covenants might be stated. (z) And the same count must not contain two promises in respect of the same subject-matter, as a promise to pay a specific sum for a horse, and also to promise to pay for the same horse so much as it is worth. (a) The defendant could not, in answer *to a single claim, rely on several distinct answers; nor can he now do so in one plea. Thus, in a plea of outlawry, the defendant cannot state several outlawries, because one would be sufficient to defeat the action; (b) and on the same ground there cannot be a demurrer and a plea to the same part of a declaration or plea, &c. (c) The principle equally affects all pleadings; its application is, however, confined to instances in which there is, on the face of the pleading, one entire or single matter proposed to be supported or answered. Even at common law, the declaration may comprise several counts upon different distinct demands of the same nature, or distinct counts upon the same claim. (d) The latter is evidently an evasion of the doctrine of duplicity, but even in this instance the counts should *purport* to be founded on *distinct* demands; (e) and at common law a distinct plea to each distinct and divisible cause of action, (f) where several claims are combined in the same declaration, is admissible, although each plea differs in its nature from the others. As if there be a declaration with two counts on two bonds, the defendant might always plead *non est factum*, or other matter, to one count, and payment, or a release, or other matter, to the other count. And it is important to remember that several distinct facts or allegations, however numerous, may be comprised in the same plea, or other pleading without amounting to the fault of duplicity, if one fact,

(z) *Ib.*; 1 Saund. 58 and 58 a, note (1). What is not duplicity in assigning a breach of the condition of a replevin bond, Phillips v. Price, 3 M. & Sel. 182, 183.

(a) *Hart v. Longfield*, 7 Mod. 148. [But in *Cheetham v. Tillotson*, 5 John. 340, where two distinct causes of action were stated in what was in form one count, the court of errors chose to consider them as separate counts, and reversed the judgment because entire damages had been assessed.] According to the old form given in a note to *Webber v. Twill*, 2 Saund. 122, note (2), there may be several different considerations included in one count in *indebitatus assumpsit*, and in a late case in an action by the indorsee against the drawer of a bill of exchange, where the declaration alleged a presentment for acceptance, and that it was protested for non-acceptance, and also averred a presentment for payment and a default by the acceptor, and also contained a count on an account stated, and alleged one general promise to pay the moneys respectively on request, it was holden good on demurrer, the court being of opinion that if the first part

of the declaration were considered as two counts, then the word "respectively" attached a separate promise to each count (*Jourdain v. Johnson*, 2 Cr., M. & R. 564), and the only objection would be that the second count was informally commenced, with regard to which there was no special cause of demurrer assigned; and if, on the other hand, the declaration were viewed as one count only, it was equally good, for then there were different causes of action arising out of different considerations, all of which were executed. *Galway v. Rose*, 6 M. & W. 291; 8 Dowl. 239, S. C.

(b) *Trevellian v. Secomb*, Carth. 9.

(c) *Bac. Abr. Pleas*, K. 1, 3.

(d) See *post*, as to several counts.

(e) *Steph.* 5th ed. 312. See *post*.

(f) As in the case of a libel charging that the plaintiff had been thrice suspended, &c. as a proctor, for misconduct. *Clarkson v. Lawson*, 6 Bing. 587. [See *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502, *Chapman J.*; *Douglass v. Satterlee*, 11 John. 16-21.]

or some of the facts, be but dependent upon or be mere inducement or introduction to the others, or if the different facts form together but one connected proposition, or entire matter or point. (g)

It is ruled.

With regard to *declarations*, there has been a statutable relaxation of the rule in actions upon bonds, or any penal sum for non-performance of covenants contained in any instrument. The statute permits the plaintiff in such actions to assign as many breaches as he shall think fit, and this statute has been held to be compulsory upon the plaintiff. (i) And although the Reg. Gen. Hil. T. 4 W. 5, orders that there shall be only one count in *personal* actions of the same cause of action, yet it expressly allows several breaches of the same contract or duty to be assigned, for otherwise either the plaintiff would be precluded from recovering damages to the full extent of his injury, or the defendant would not be sufficiently apprised of the declaration of the extent of claim he would have to answer. With respect to *pleas in bar*, the statute (k) provides that "a defendant or tenant in any action, or a plaintiff in replevin, in any record, may, with leave of the court, plead as many several pleas thereto as he may think necessary for his defence." But the common law rule still affects each plea taken separately, and the statute does not extend to replications or subsequent pleadings.

The doctrine of duplicity, as it more immediately affects each count of pleading, will be fully explained, and illustrated by instances. We now consider the particular properties of each division of the plea.

(g) See *Rowles v. Lusty*, 1 M. & P. 102, 123; 4 Bing. 428, S. C.; *Carr v. Hinchliff*, 4 B. & C. 547. ["If a man plead two things, where he is compellable to show both, this does not make his plea double." Bac. Abr. Pl. K. 2; *Sargent J. in Bell v. Lamprey*, 52 N. H. 51. A plea of several facts is not double, if those several facts are necessary to constitute one single and complete answer to the action. *Galusha v. Cobleigh*, 13 N. H. 83; *Watriss v. Pierce*, 36 N. H. 232; *Russell v. Rogers*, 15 Wend. 353; *Tebbets v. Tilton*, 24 N. H. 120; *State Bank v. Hinton*, 1 Dev. 397; *Torrey v. Field*, 10 Vt. 353; *Patcher v. Sprague*, 2 John. 472; *Tucker v. Ladd*, 7 Cowen, 450; *Strong v. Smith*, 3 Caines, 160; *Beckley v. Moore*, 1 McCord, 464; *Potter v. Titcomb*, 10 Maine, 53; *Jackson v. Rundlet*, 1 Wood. & M. 381; *Maggott v. Hansbarger*, 8 Leigh, 532. In trespass it is not duplicity to plead to a part, and to justify or confess as to the residue. *Parker v. Parker*, 17 Pick. 236. Several pleas are not regarded as bad merely because they are inconsistent. *Gordon v. Pierce*, 11 Maine, 213. It is, however, otherwise, where inconsistent matters are alleged in the same plea. *Wann v. McGoon*, 2 Scam. 74. A plea by a vendor, that he was not requested to convey and did not refuse, is bad for duplicity on special demurrer. *Connolly v. Pierce*, 7 Wend. 129.

See *Welch v. Jamison*, 1 How. (M. & C.) 451. A plea of payment and release is bad for duplicity. *Calhoun v. Wright*, 3 Scam. 137. A plea in trover stating that the goods were sold by order of the plaintiff on credit, and that the defendant was discharged on the insolvent act, is bad for duplicity. *Nedy v. Strong*, 10 John. 289. A plea of fact and law is not present an issue of fact and law at the same time. And if a demurrer be overruled, he is considered as acquiescing in the decision upon the demurrer. *Gage v. Melton*, 1 Pike, 222; *Ing v. Burnett*, 10 Ohio, 137; *Pennell v. Canal v. Webb*, 9 Ohio, 136. Stephen, 5th ed. 288, 289, and there given; and *post*, under the qualities of pleas in bar, and of replication. If a plea contain two defences, it is not a sufficient answer to a charge of duplicity if one of the defences is improperly pleaded. *Pursford v. Peck*, 9 M. & W. 196; *v. Underwood*, 4 Bing. N. C. 655; 737, S. C.

(h) 8 & 9 W. 3, c. 11, s. 8.

(i) See 1 Saund. 58, note (1), and (a); and *post*.

(k) 4 Ann. c. 16, s. 4. The decision of the statute are noticed hereafter.

in a cause. It may here be remarked that in general the objection of duplicity can only be taken by special demurrer. (*l*) And if a plaintiff reply to a plea bad for duplicity, he must plead to *each* distinct material matter in the plea. (*m*) Where to debt on simple contract in an inferior court, not of record, viz. the county court, in which double pleas are not admissible, the defendant pleaded both the general issue and a set-off, and the plaintiff treated the latter as a nullity, and replied only to the first, and obtained a verdict and judgment, it was held on a writ of false judgment, that as the defendant could not plead double, and the first plea was complete in itself, the second was surplusage, and that the plaintiff was justified in taking no notice of it, and the judgment was therefore affirmed. (*n*)

The statement of immaterial or irrelevant matter or allegations, is not only censured, as creating unnecessary expense, (*o*) but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary. (*p*) If a party take upon himself to state in pleading a particular * estate, where it was only required of him that he should show a general or even a less estate, title or interest, the adversary may traverse the allegation, and if it be untrue, the party will fail. Thus a general freehold title, *liberum tenementum*, may be pleaded either in trespass or in an avowry in replevin, and under it the defendant may prove any estate of freehold, either in fee, in tail, or for life; (*q*) but if he state, though unnecessarily, a seisin in fee of a particular estate or interest, and the other side traverse the allegation, it must be proved as stated. (*r*) So in an action on the case against the sheriff for levying under an execution

7thly. Objections to unnecessary statements.

(*l*) 1 Saund. 337 *a*, note (3); Eyre v. Shelly, 6 M. & W. 274. [So, of argumentativeness in pleading. Quimby v. Melvin, 28 N. H. 250.] A special demurrer for duplicity must point out in what the duplicity consists. Smith v. Clinch, 2 G. & D. 225; [Briggs v. Grand Trunk Railway Co. 54 Maine, 375; Scott v. Whipple, 6 Greenl. 425; Otis v. Blake, 6 Mass. 336; Tubbs v. Caswell, 8 Wend. 129; Blanchard v. Hoxie, 34 Maine, 376; Walker v. Sargent, 14 Vt. 247; Onion v. Clark, 18 Vt. 363; Lomax v. Bailey, 7 Blackf. 599; Cunningham v. Smith, 10 Grattan, 255; Franklin Bank v. Bartlett, Wright, 741.]

(*m*) Bolton v. Cannon, 1 Vent. 272; Steph. 5th ed. 296; Eyre v. Shelley, 6 M. & W. 274; [Jewett v. Locke, 6 Gray, 233, 235; King v. Howard, 1 Cush. 141.]

(*n*) Chitty v. Dendy, 1 Har. & Wol. 619.

(*o*) Dundas v. Lord Weymouth, Cowp. 665; Price v. Fletcher, Cowp. 727; Dougl. 668, 669.

(*p*) 1 Saund. 233, note (2), 346, note (2); 2 Saund. 206, note (22), 366, note (1); Steph. 5th ed. 467; Bell v. Janson, 1 M. & Sel. 204; [Smith v. Boston, Conc. & M. R. R. 36 N. H. 485. Whatever is unnecessary to be proved on the trial, need not be alleged in the complaint or declaration. Decker v. Mathews, 12 N. Y. 320; Bank of United States v. Smith, 11 Wheat. 171. See Denistoun v. Merchants' Bank, 2 Disney, 52.]

(*q*) Steph. 5th ed. 352.

(*r*) Dyer, 365; Cockerill v. Armstrong, Willes, 102; 2 Saund. 206, note (22).

against the tenant, without paying the landlord a year's rent, plaintiff, though unnecessarily, profess to set out the terms tenancy as to the time of payment of rent, &c. and misdescribe the variance will be fatal, unless the judge amend on the trial. These are instances of *material* matter being alleged with an unnecessary detail of circumstances or particularity. The *subject-matter* of the averment is material and relevant, and the evil is, that the material and the immaterial parts are so interwoven as to expose the allegation to a traverse, and the consequent necessity of proof full extent to which it is carried by the pleading. (s¹)

If, however, the matter unnecessarily stated be *wholly foreign* to the cause, so that no allegation whatever subject was necessary, it will be rejected as surplusage. (t) it need not be proved; (u) nor will it vitiate (u) even a *special demurrer*, (x) it being a maxim that *utile per inutitium vitatur*. (y) As observed by Lord Mansfield, (z) "the distinction between that which may be rejected as surplusage, which may be struck out on motion, and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the n

(s) *Bristow v. Wright*, Dougl. 665; *Miles v. Sheward*, 8 East, 9. See, also, *Smith v. Dixon*, 7 Ad. & El. 10.

(s¹) [See *Jerome v. Whitney*, 7 John. 321; *United States v. Porter*, 3 Day, 283; *Commissioners v. Brevard*, 1 Brevard, 11; *Buddington v. Shearer*, 20 Pick. 477; *Stevens v. Aldridge*, 5 Price, 334.]

(t) *Dukes v. Gostling*, 1 Bing. N. C. 588. Thus the allegation of the performance of a condition subsequent, not being material, is not traversable, and may be wholly rejected. *Constable v. Clowbury*, Noy, 75; *Jenkins*, 260, pl. 59; *Edwards v. Hammond*, 3 Leon, 132; *Scatterwood v. Edge*, 1 Salk. 229; *Plow. 30 a*, 32 b; 2 Stark. Evid. 686, 2d ed.

(u) *King v. Pippet*, 1 T. R. 235; *Kellner v. Le Mesurier*, 4 East, 400; *Gilb. C. P.* 131, 132; *Com. Dig. Pleader, C. 28*; *Bac. Abr. Pleas, I. 4*; *Co. Litt. 303 b*; 2 Saund. 306, note (14); *Wigley v. Jones*, 5 East, 444; *Hoar v. Mill*, 4 M. & Sel. 474; and note, *Ib.* 475; *Heath's Maxims*, 4; [*Thomas v. Roosa*, 7 John. 462; *Woodford v. Webster*, 3 Day, 372; *Tucker v. Randall*, 2 Mass. 288; *Chapman v. Smith*, 13 John. 80; *Wilmarth v. Mountford*, 8 Serg. & R. 124; *Callison v. Semons*, 2 Porter, 145; *Evans v. Watrous*, 2 Porter, 205; *Russell v. Rogers*, 15 Wend. 351; *Hampshire Manuf. Bank v. Billings*, 17 Pick. 87; *Lord v. Tyler*, 14 Pick. 156; *Buddington v. Shearer*, 20 Pick. 477; *Wattertown v. Draper*, 4 Pick. 165; *Freeland v. McCullough*, 1 Denio, 414; *Castles v. McMath*, 1 Ala. 326; *Bequette v. Lasselle*, 5 Blackf. 443; *New Brunswick Co. v. Tiers*, 4 Zab. 697; *Perry v. Marsh*, 25 Ala. 659.]

The terms impertinent and immaterial are synonymous. Per Best J. *Draper v. Ratt*, 3 D. & R. 229. Matter immaterial and which may be rejected as surplusage will not make a pleading double. See *Co. Litt. 303 b*; *Lord v. Hous*, 5 East, 62, 65; *Steph. 468*, 5th ed.; *Ring v. Roxbrough*, 2 Tyr. 468; *Jer. 418*, S. C.; and *Hall v. Tappan*, 5 Ad. 635; *Alderson v. Johnson*, 5 W. 70; 5 Dowl. 294, S. C. *Contract* the declaration stated a promise to issue on 2d of January, 1832, and yet stated a grant of administration on 11th of Jan. 1831, held bad on special demurrer. *Ibid.*; and in *Hembro v. Bailey*, 152, it was held that surplusage in a special traverse was demurrable.

(x) *Co. Litt. 303 b*; *Lord v. Hous*, 5 East, 62, 65; *Steph. 468*, 5th ed.; *Ring v. Roxbrough*, 2 Tyr. 468; *Jer. 418*, S. C.; and *Hall v. Tappan*, 5 Ad. 635; *Alderson v. Johnson*, 5 W. 70; 5 Dowl. 294, S. C. *Contract* the declaration stated a promise to issue on 2d of January, 1832, and yet stated a grant of administration on 11th of Jan. 1831, held bad on special demurrer. *Ibid.*; and in *Hembro v. Bailey*, 152, it was held that surplusage in a special traverse was demurrable. *Bishton v. Evans*, 2 Cr. M. & R. 17, observed by Alderson B. that the inclusion of unnecessary matter into issues was bidden, in order to prevent the parties being embarrassed.

(y) *Com. Dig. Pleader, C. 29*; *Bac. Pleas, I. 4*; *Vowles v. Miller*, 3 Taun. Peppin v. Solomons, 5 T. R. 496. See *Palmer v. Gooden*, 8 M. & W. 895; *v. Osborn*, 28 N. H. 279, in which it was held that a plea, which has *actio non* in place where it is usually said, the *plaintiff's action ought not to maintain*, will not be rejected because those words are not *ex* but they will be regarded as inessential as such merely surplusage, and that they will not vitiate.]

(z) *Bristow v. Wright*, Dougl. 667; *Coare v. Gillett*, 4 East, 100.

on a reference to him, would strike out (irrelevant covenants for instance), that will be *rejected by the court, and need not be proved. (z¹) But if the very ground of the action be misstated, that will be fatal, for then the case declared on is different from that which is proved, and the plaintiff must recover *secundum allegata et probata*." Thus in an action against the marshal for an escape, the declaration, after stating the original judgment, set out a judgment in *scire facias* reviving the original judgment with the usual award of execution, as appeared by the record, and then averred that "thereupon" the party was committed; it was decided that the allegation of the judgment in *scire facias* was immaterial, and need not be proved. (a) Mr. J. Bayley observed, "a party is not bound to *prove* an immaterial allegation, unless he has, by his mode of pleading, so connected it with a material allegation as to make the latter depend upon it." And Mr. J. Holroyd said, "If the plaintiff state, as a cause of action, more than is necessary for the gist of the action, the jury may find so much proved, and so much not proved; and the court would be bound to pronounce judgment for the plaintiff upon that verdict, *provided the facts proved constituted a good cause of action*." So in trespass for driving cattle, where the defendant justified that he was lawfully possessed of the close, and took the cattle *damage feasant* therein; and the plaintiff replied specially, title in another, and that he entered by his command, and unnecessarily gave color to the defendant; it was decided that this did not render the replication insufficient, because the introduction of unnecessary words of form will not vitiate the rest of a replication which is good. (b)

In an action of replevin the defendants avowed the taking as a distress for rent due to one of them (Sharr) under a demise at £20 a year, payable quarterly, and the avowry averred that "because £10 of the rent aforesaid for two quarters, &c. at the time when, &c. was due from the defendant (instead of plaintiff) to the said Sharr, defendants avow, &c." To this there was a special demurrer on account of the mistake of the word *defendant* for *plaintiff*. The court held, that the mistake was not a ground of demurrer, for the matter demurred to was superfluous and repugnant. They observed that it would have sufficed to have said that £10 of the rent aforesaid was due, without saying from whom to whom, as that was a conclusion from the previous allegation; and that surplusage is never assignable as cause of demurrer. (c) The more recent decisions, however, estab-

(z¹) [Allaire v. Onland, 2 John. Cas. 52; Lyons v. Merrick, 105 Mass. 71, 77.]

(a) Bromfield v. Jones, 4 B. & C. 380.

(b) Taylor v. Eastwood, 1 East, 212.

(c) Peirse v. Sharr, K. B. 7th June, 1827, before the three judges, Busby for the plain-

tiff, Chitty for the defendant, MS. The following are instances of untrue allegations having been rejected as surplusage, and therefore considered as not prejudicing the case, viz. an untrue description (in a plea in abatement) of the privilege of an attorney to

lish * that surplusage in tendering an *issue* or in *other part* of pleading to embarrass the opponent, may be assigned specially a demurrer. (*d*)

It is a material part of the rule respecting superfluous allegations that if the party introducing them show, on the face of his own pleading, that he has no cause of action, his pleading will be defective. Thus in an action upon the case for a disturbance of an easement it is sufficient in many cases to allege a possessory right, but the plaintiff, instead of so doing, describe and rely upon a defective declaration. The declaration is bad. (*e*)

So, though the superfluous or irrelevant allegation be repugnant to what was before alleged, it is void and will be rejected; (*e*) whatever is redundant, and which need not have been put in the sentence, and contradicting what was *before* alleged, will not in general vitiate the pleading. (*f*) For, per Holt C. J. (*g*) "If a matter is nonsense, by being contradictory and repugnant to the thing precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected." As in ejectment, where the declaration of a demise the *second* of January, and that the defendant *scilicet* on the *first* of January ejected him; here the *scilicet* is rejected as being expressly contrary to the *postea* and the precedent matter. (*h*) So where in assumpsit by executors, in a count for money paid by the testator, B. B., for the defendant's use, the plaintiff alleged that "the defendant being indebted, *he the said B. B.* was obliged to pay the said B. B.," it was decided on a special demurrer that the words "he the said B. B." might be rejected as surplusage. But a material allegation, sensible and consistent in the place

be sued by bill in *K. B.*, *Stokes v. Mason*, 9 East, 424; as misdescription in an action for a malicious prosecution &c. of the record of acquittal with regard to the style of the court, *Bushy v. Watson*, 2 Bl. Rep. 1050; *Draper v. Garratt*, 2 B. & C. 4, 5; or of the time of acquittal, *Purcell v. Macnamara*, 9 East, 157; or in stating the judgment of discontinuance, *Judge v. Morgan*, 13 East, 547. A variance in stating the names of the suitors of the county court in averring in case against the sheriff for taking insufficient sureties in a replevin bond, that the tenant appeared at the next county court held before the suitors, considered immaterial. *Draper v. Garratt*, 2 B. & C. 2. The misdescription of record of judgment, with regard to the term in which judgment was recovered, is not material, and may be repudiated as surplusage, if the record be mere inducement, as in case for a false return, &c. *Stoddart v. Palmer*, 3 B. & C. 2. Distinctions between allegations of matter of substance, and allegations of matter of description, the latter only to be literally proved. *Stoddart v. Palmer*, 3 B. & C.

4. Many other instances will be noticed in considering the doctrine of variances.

(*d*) *Ante*, 252, note (*x*); *Hennell v. Bailey*, 3 Tyr. 152; *Bishton v. E. Cr., M. & R.* 16, 17. See *Palmer v. White v. Snell*, 9 Pick. 16.]

(*e*) *Dorne v. Cashford*, 1 Salk. 3. Com. Dig. Pleader, C. 29.

(*f*) [*Hapgood v. Houghton*, 8 Pick. 16.]

(*g*) *Gilb. C. P.* 132; *Co. Litt.* 30. East, 142.

(*h*) *Wyat v. Aland*, 1 Salk. 324, 325. Abr. Nonsense, A. pl. 3.

(*i*) *Ib.*; *The King v. Stevens*, 5 East, and see *ante*, 252. [The declaration note stated that it bore date "on the seventh day of April, one thousand and hundred and thirty-seven." The words "thousand" were held to be mere surplusage and no ground for arresting judgment. *Bequette v. Lasselle*, 5 Blackf. 443.]

(*j*) *Buxton v. Nancolas*, 11 Moore,

it occurs, and not repugnant to any *antecedent* matter, cannot be rejected, merely on account of there occurring *afterwards*, in the same pleading, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected; (*k*) and if by the rejection of the repugnant matter, the pleading would be left without an allegation of time, or * other material matter, though in some instances the pleading might be aided by verdict, yet it would be defective on special demurrer. (*l*)

The *general* rule is, that a pleading inconsistent with itself, or repugnant, is objectionable. (*m*) In trespass, the plaintiff declared for taking and carrying away certain timber, lying in a certain place for the completion of a house "then lately built;" this declaration was considered bad for repugnancy, for the timber could not be for the building of a house already built. (*n*) So if a count in assumpsit lay a promise to pay a specific sum, if the plaintiff would provide E. with necessaries, and also a promise to pay so much as the plaintiff reasonably deserved to have on the same account, such count is bad, not only for duplicity, but also for inconsistency or uncertainty. (*o*) It is only where the repugnancy is contained in an allegation capable of rejection as superfluous, or where there is a prior averment upon the subject, which is adequate to the support of the case, that it becomes of no moment, and unobjectionable even upon demurrer. In some cases the courts will on motion order superfluous matter to be struck out of the pleadings, and if there be any vexation, will make the party inserting it pay the costs of the application. (*p*)

II THE MODES OF STATING THE FACTS.

Having considered *what facts* are to be stated in pleading, we have now to consider the *manner* in which they should be stated. (*p*¹) The facts which constitute the cause of action or ground of defence, should be stated logically in their natural order, (*p*²) as on the part of the plaintiff, his right,

MODES OF
STATING
FACTS.

(*k*) *The King v. Stevens*, 5 East, 254; *Buckley v. Kenyon*, 10 East, 142; Vin. Abr. Nonsense, A. pl. 3.

(*l*) Gilb. C. P. 131, 132.

(*m*) Steph. on Pleading, 414, 5th ed.; [Barber v. Summers, 5 Blackf. 339.] Instance of repugnancy in stating time and place. *Denison v. Richards*, 14 East, 291.

(*n*) *Lawley v. Arnold*, cited in *Nevill v. Soper*, 1 Balk. 213.

(*o*) *Hart v. Longfield*, 7 Mod. 148.

(*p*) See *Tidd*, 9th ed. 616, 617, 1132; *Yates v. Carlisle*, 1 Bl. Rep. 270; *Stephen*, 5th ed. 469; *Alderson v. Johnson*, 2 M. & W. 70; 5 Dowl. 294, S. C.; *Bacon v. Ashton*, 5 Dowl. 94.

(*p*¹) [The facts should be stated according to their legal effect. *Bennett v. Judson*, 21 N. Y. 240; *Boyce v. Brown*, 7 Wend. 85;

Pattison v. Taylor, 8 Barb. 250; *Coggill v. American Exchange Bank*, 1 N. Y. 117; *Stewart v. Travis*, 10 How. Pr. 148.]

(*p*²) [Facts should be stated as they actually occurred or exist. *Farron v. Sherwood*, 17 N. Y. 227; *New York Central Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85; *S. C.* 20 Barb. 468; *Cady v. Allen*, 22 Barb. 388; *S. C.* 18 N. Y. 573; *Hall v. Southmayd*, 15 Barb. 32; *Ives v. Humphreys*, 1 E. D. Smith, 196; *Lee v. Ainslie*, 1 Hilton, 277; *Smith v. Leland*, 2 Duer, 509; *Cropsey v. Sweeney*, 27 Barb. 310; *S. C.* 7 Abb. Pr. 129. A pleading is not vitiated by bad grammar nor any other faults of style, unless it tends to produce so much obscurity as to mislead. *Holt v. Penobscot*, 56 Maine, 151. See *Crowther v. Elliott*, 7 Kansas, 235.]

the injury, and the consequent damage, and these with certainty, cision, and brevity. (q) A general statement of facts which admits almost any proof to sustain it is objectionable. (r) With regard to the language to be adopted, as observed by Lord C. J. De Grey, "there are cases where a direct and positive averment is necessary to be made in specific terms, as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary, and others;" so in trespass, the words *vi et armis* and *contra pacem* are necessary; "but except in particular cases, where precise technical expressions are required to be used, there is no rule of law that other words should be employed than such as are in ordinary* use, or that in pleadings a different sense is to be put upon them than what they bear in ordinary acceptation." (t) Thus, though in a declaration of slander it is usual to state that the words were "maliciously" spoken, the word "falsely" has been held to be sufficiently expressive of malicious intent. (u) However, where there has been a long-established form of pleading, applicable to the facts of the particular case, it should in general, for the sake of certainty and uniformity, be adopted, and the courts censure any unnecessary deviation from it. (x) As observed by Lord Coke, it is safer to follow good precedents, for *nihil simul inventum est, et perfectum*; (y) and there are cases where, although the court have overruled a demurrer, yet they have directed the plaintiff to amend, so that no deviation from

(q) *Bristow v. Wright*, Doug. 666, 667; Sir W. Jones, vol. iv. p. 34, 4to ed. See Stephen on Pleading, 5th ed. 370-413. [Under the practice act of Massachusetts, the substantive facts necessary to constitute the cause of action may be stated with substantial certainty, and without unnecessary verbiage. Genl. Sts. c. 129; § 2, div. 3; *Rogers v. Newbury*, 105 Mass. 533, 534; *Harrison v. Bailey*, 99 Mass. 621; *Warren v. Ferdinand*, 9 Allen, 357, 358; *Suffolk Bank v. Lowell Bank*, 8 Allen, 355; *Murdock v. Caldwell*, 8 Allen, 309, 310. Under the New York Code the complaint must contain "a plain and concise statement of the facts, constituting a cause of action, without unnecessary repetition." Code, § 147. The answer must contain "a statement of any new matter constituting a defence or counterclaim, in ordinary and concise language, without repetition." Code, § 149. Under the California practice act, the substantial allegations of the declaration or complaint must be the same as at common law. *Miller v. Van Tassel*, 24 Cal. 458. In North Carolina, the rules of the common law, as to materiality, certainty, prolixity, obscurity, are considered rules of logic, and have not been abrogated by their code. *Crump v. Mims*, 64 N. Car. 767.]

(r) *The King v. Kerrison*, 1 M. & Sel. 441; *Cook v. Cox*, 3 M. & Sel. 114; *Whit-*

more v. Wilkes, 1 M. & M. 218; *Johnson v. Stevens*, 11 Price, 235.

(s) *Rex v. Horne*, Cowp. 683.

(t) Per Lord Ellenborough, *The King v. Stevens & Agnew*, 5 East, 259, 260; *King v. Airey*, 2 East, 33; *Allan & Son v. Hundreds of Kirton and Ashwell*, 2 Bl. Rep. 843; *ante*, 241. Where a declaration stated a wrong which was the subject of an action of trespass, it was held to be a good count in trespass after verdict, though it contained no allegation of *vi et armis*, and was in point of form framed as a case for consequential injury. *Hudson v. Nicholson*, 5 M. & W. 437.

(u) 1 Saund. 242 a, note (2); *Rowe v. Nicholson*, 1 M. & Sel. 304.

(x) Co. Litt. 303 a, b; 1 Hale 1, L. 302; *King v. Fraser*, 6 East, 351-353; *Mills v. Sanders*, Cro. Jac. 386; *The King v. Kerrison*, 1 M. & Sel. 439, 441; and *ante*, 108; 8 Co. 48 b; Com. Dig. Abatement, G. 7; *Buckley v. Thomas*, Pick. 123; *Slade v. Dowland*, 2 B. & P. 2; *Dyster v. Battye*, 3 B. & Ald. 454; *Sutton v. Dyster*, 5th ed. 431.

(y) Co. Litt. 230 a. Precedent and practice ought to have great weight in the consideration of all points arising upon the propriety of forms, and in all legal instruments. Per Eldon C. 11 Price, 193.

usual form shall appear to have been sanctioned. (z) The statute (a) requires, that all the pleadings and proceedings shall be in English, (a¹) a regulation which, it has been observed, has occasioned the literature of the inferior part of the profession to recede. (b)

The principle rule, as to the mode of stating the facts, is, that they must be set forth with *certainty*; (c) by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment. (d)

(z) *Spencer v. Thomlinson*, Barnes, 167.

(a) 4 Geo. 2, c. 26.

(a¹) [*Smith v. Butler*, 25 N. H. 421, *ante*, 341, note (z¹).]

(b) *Hartop v. Juckes*, 1 M. & Sel. 710, 711.

(c) *Rex v. Horne*, Cowp. 682; *Slade v. Drake*, Hob. 295; [*Carpenter v. Alexander*, 9 John. 291; *Ward v. Clark*, 2 John. 12. Under the practice act of Massachusetts (Genl. Sts. c. 129) no averment need be made which the law does not require to be proved; but all the substantial facts, necessary to constitute the cause of action, must be stated with substantial certainty. *Colt J. in Brettun v. Anthony*, 103 Mass. 40; *Tebbetts v. Goding*, 9 Gray, 254; *Chenery v. Goodrich*, 98 Mass. 224. In *Read v. Smith*, 1 Allen, 520, 521, *Chapman J.* said: "The rule of pleading, before the practice act, was that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, and that the jury may be able to give a complete verdict upon the issue; and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. The practice act has made no change in this respect, for although by this act the facts may be briefly stated, yet all the facts must be stated which are necessary to constitute the cause of action. *Hollis v. Richardson*, 13 Gray, 392." "It is still important, in framing declarations and answers, so as to present causes properly for trial, that the principles of special pleading should be carefully regarded." It was observed by Lord C. J. De Grey, in *Rex v. Horne*, Cowp. 682, that we have no precise idea of the signification of the term certainty, which is as indefinite in itself as any word that can be used. See, in general, *Steph. 5th ed.* 374.

(d) *Rex v. Horne*, Cowp. 682; *Com. Dig. Pleader*, C. 17; *Co. Litt.* 303; *Ward v. Harris*, 2 B. 267; [*Kelly C. B.* and *Martin B.* in *Watling v. Oastler*, L. R. 6 Exch. 73, 76, 77; *Clark v. Lineberger*, 44 Ind. 238. Under the

practice act of Massachusetts, the answer, which occupies the place of a special plea, shall deny, in clear and precise terms, every substantive fact intended to be denied in each count of the declaration separately, or shall declare the defendant's ignorance of the fact, so that he can neither admit nor deny, but leaves the plaintiff to prove the same. It shall set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action; and when the answer sets up the statute of limitations, the statute of frauds, or any other legal bar, the defendant shall not be deprived of the benefit of such defence by reason of his not denying the facts set forth in the declaration. The allegations and denials of each party shall be so construed as to secure, as far as possible, substantial precision and certainty, and discourage looseness and vague generalities. Any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise terms, shall be deemed to be admitted. No party shall be required to state evidence or to disclose the means by which he intends to prove his case. Genl. Sts. c. 129, §§ 17, 20, 27. See *Granger v. Ilsley*, 2 Gray, 521; *Hawes v. Ryder*, 100 Mass. 216; *People's Equitable Mutual Fire Ins. Co. v. Arthur*, 7 Gray, 267; *Knapp v. Slocomb*, 9 Gray, 73; *Davidson v. Delano*, 11 Allen, 523; *Goodwin v. Daniels*, 7 Allen, 61; *Framingham Bank v. Gay*, 7 Gray, 241; *Willard v. Williams*, 7 Gray, 184; *Bradford v. Tinkham*, 6 Gray, 494; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541. Under this act, a general denial of each and every allegation in the plaintiff's declaration has been held sufficient to put in issue all the facts necessary to be proved by the plaintiff in order to make out a *prima facie* case. *Davis v. Travis*, 98 Mass. 222, 223; *Boston Relief and Submarine Co. v. Burnett*, 1 Allen, 410; *Estabrook v. Boyle*, 1 Allen, 412; *Hawes v. Ryder*, 100 Mass. 216. See "*Sham Pleas*," *post*. The difference between what the practice act requires in an answer, and the "general issue," which it abolished, has been fully stated in several recent cases. *Granger v. Ilsley*, 2 Gray, 521; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 432; *Bradford v. Tinkham*, 6 Gray,

In *Dovaston v. Payne*, (e) Mr. Justice Buller observed, that taint or precision in pleading has been stated by Lord Coke (j) to be of three sorts, viz. 1st, certainty to a common intent; 2dly, certainty to a certain intent in general; 3dly, to a certain intent in every particular; and that though these distinctions had been treated by Mr. Justice Aston as a jargon of words without meaning, they had long been made, and ought not altogether to be departed from.

* By certainty to a *common intent*, is to be understood, that words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail; it is simply a rule of construction, and not of addition; common intent cannot add to a sentence words which are omitted. (g) This description of certainty is sufficient in a plea in bar. (h) It is of the lowest degree, and yet we shall find that in some instances a statement which will suffice in a declaration will not in a plea; thus in a declaration on a contract to pay the debt of a third person, it is not necessary to show that it was in writing, but it is said to be otherwise in a plea; (i) and in a plea, the statement of a deed by way of recital "*testatum existit*," instead of a direct allegation, is insufficient; though it is otherwise in a declaration. (k)

494; *Libbey v. Downey*, 5 Gray, 299, 300, 301. A mere denial of the plaintiff's general conclusion of law or of fact, or of the leading averment in the declaration, is not sufficient to prevent the defendant being held to have admitted other specific allegations. *Van Buren v. Swan*, 4 Allen, 380. Thus, in an action upon a promissory note, alleged in the declaration to have been destroyed, an answer putting in issue the making of the note, and not distinctly denying its destruction, has been held, upon proof of the making of the note, to admit that it has been destroyed. *Boston Lead Co. v. McGuirk*, 15 Gray, 87. See *Thurston v. Oldham*, 6 Bush, 16. The defendant does not admit, by not denying in his answer, any statements by the plaintiff in his declaration which do not aver substantial facts necessary to constitute the cause of action. The defendant is bound to deny, under the penalty of admission, only those facts which the plaintiff is bound to aver. *Willard v. Williams*, 7 Gray, 184, 185. And the failure of the defendants to deny the allegations of the plaintiff shall not be deemed an admission of any fact not set forth in terms clear, full, unambiguous, and with legal precision. *Brown v. Wakefield*, 1 Gray, 450; *Tarbell v. Gray*, 4 Gray, 444. So an omission to deny, in the answer, a fact necessary to the maintenance of the action, but not alleged in the declaration, is not to be deemed an admission of that fact. *Tarbell v. Gray*, 4 Gray, 444. For other cases of admissions by failure to deny, see *Eastern Railroad Co. v. Benedict*,

10 Gray, 212; *Boston Acid Manuf. v. Moring*, 15 Gray, 211; *Geddes v. Adams*, 1 Gray, 384. The failure of a plaintiff to reply to a plea of confession and avoidance of the action, amounts to a discontinuance of the cause, and this may be taken advantage of by the defendant at any time before verdict. *Hogue v. Lewellen*, 42 Gray, 302.] Another reason for certainty, is that a second action for the same cause, the defendant may be better able to plead a full recovery, &c. *Andrews v. Whitehead*, 10 East, 107.

(e) 2 H. Bl. 530; *The King v. Moring*, 15 Gray, 211; *Geddes v. Adams*, 1 Gray, 384.

(f) Co. Litt. 303 a; 5 Co. 121.

(g) *Dovaston v. Payne*, 2 H. Bl. 530; *Saund.* 49, note (1); [*Royalton v. R. Turnp.* Co. 14 Vt. 311.]

(h) *Ib.*; *Rex v. Horne*, Cowp. 682; *King v. Lyme Regis*, Dougl. 158; 5 Co. Litt. 303 a; *Comm. Dig. Pleader*, C. Steph. 5th ed. 417; [*Oystead v. Shepley*, 9 Mass. 509; *Spencer v. Southwick*, 9 Gray, 314; *Rockefeller v. Donnelly*, 6 Cowen, 314; *Hildreth v. Baker*, 2 John. Cas. 339; *Vernon v. Mosely*, 22 Maine, 166. See also *v. Fisk*, 16 Maine, 132; *Brickett v. L.* 21 Pick. 404.]

(i) [*Elting v. Vanderlyn*, 4 John. 200; *i*] 1 *Saund.* 276 e, note (2); *Case v. Sir T. Raym.* 450; *ante*, 244.

(k) 1 *Saund.* 274, note (1). ["It is enough if there be certainty in pleading to a common intent, and we should presume all that reasonably can, in order to sustain a

Certainty to a *certain intent in general* is a greater degree of certainty than the last, and means what upon a fair and reasonable construction may be called certain, without recurring to *possible* facts (*k*¹) which do not appear, (*k*²) and is what is required in declarations, (*k*³) replications, and indictments in the charge or accusation, and in returns to writs of mandamus. (*l*) The charge, we have seen, must contain such a description of the crime, &c. that without intending anything but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict, and the court in the judgment they are to give. (*m*)

The *third* degree of certainty is that which precludes all argument, inference, or presumption against the party pleading; (*n*) and, as it has been well expressed, is that technical accuracy, which is not liable to the most subtle and scrupulous objection, so that it is not merely a rule of construction, but of addition: for when this certainty is necessary, the party must not only state the facts of his case in the most precise way, but add to them such facts as show that they are not to be controverted, and, as it were, anticipate the case of his adversary. (*o*) It has been said that this description of certainty has been rejected in all cases, as partaking of too much subtlety; (*p*) however, Buller J. expressed a different opinion; and it appears that it obtains in the case of estoppels, (*q*) and in pleas which are not favored in law, such as the plea of alien enemy, in which it must be stated, not only that the plaintiff is an enemy, but *that he came to England without letters of safe conduct (*q*¹) from our queen. (*r*)

The application of the rules as to the necessary certainty in the various parts of pleadings will be better considered when the qualities of the declaration and other parts of pleading are stated. It must be confessed that it is frequently difficult in practice to apply the rules to cases which occur.

Less certainty is requisite when the law presumes that the knowledge of the facts is more *properly* or *peculiarly* in the opposite party. (*s*) Therefore, where in an action on the case for not repair-

laration which substantially shows a breach of duty in a defendant, although its terms may be somewhat ambiguous." Kelly C. B. in *Watling v. Oastler*, L. R. 6 Exch. 76.]

(*k*¹) [*Spencer v. Southwick*, 9 John. 317.]

(*k*²) [*Fuller v. Hampton*, 5 Conn. 423.]

(*k*³) [*See Hildreth v. Becker*, 2 John. Cas. 339; *Parsons C. J. in Coffin v. Coffin*, 2 Mass. 363.]

(*l*) *The King v. Lyme Regis*, Dougl. 159; *Andrews v. Whitehead*, 13 East, 107.

(*m*) *Rex v. Horne*, Cowp. 682.

(*n*) Co. Litt. 352 b; *The King v. Lyme Regis*, Dougl. 159.

(*o*) Lawes on Pleading, 54, 55.

(*p*) *Rex v. Horne*, Cowp. 682.

(*q*) *Dovaston v. Payne*, 2 H. Bl. 530; *The King v. Lyme Regis*, Dougl. 159; Com. Dig. Estoppel, E. 4; Co. Litt. 352 b. See *Vooght v. Winch*, 2 B. & Ald. 662.

(*q*¹) [*See Clark v. Morey*, 10 John. 70; *Russell v. Skipwith*, 6 Binney, 247; *Bagwell v. Babe*, 1 Rand. 270; *Cope v. Gulick*, 5 Halst. 328.]

(*r*) *Casseres v. Bell*, 8 T. R. 167.

(*s*) *Andrews v. Whitehead*, 13 East, 112; Com. Dig. Pleader, C. 26; *Gale v. Reed*, 8 East, 85; *The King v. Dixon*, 3 M. & Sel.

ing a private road leading through the defendant's ground, the declaration stated that the defendant, by reason of his possession, ought to have repaired, &c.; on general demurrer it was objected, that he did not show by what right or obligation the defendant was bound to repair, and that he was not bound of common right merely as a possessor, but the court held that the declaration was sufficient; Buller J. said, the distinction is between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate; in the former the plaintiff is presumed to be ignorant of the defendant's title, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set out such estate. (*t*) So in a declaration against the assignee of a lease, it is sufficient to aver generally that "the remainder of the term of the estate of the lessee, &c. came to the defendant by assignment," and the plaintiff cannot reasonably be presumed to know the particulars of the defendant's title. (*u*) So less certainty is required, and general words are sufficient, where it is to be presumed that the party pleading is not acquainted with the minute circumstances. (*x*) Thus where a person's house is burnt, general words are sufficient in the declaration of goods thereby destroyed, because he is not presumed to be able to set forth with certainty the goods destroyed. (*y*) So in a case for passing for breaking, &c. a close with cattle and eating the plaintiff's peas there, the quantity eaten need not be stated. (*z*) But in a declaration on the statute of hue and cry, it was held necessary to set out the particulars of the goods taken. (*a*)

It is also a rule of pleading, that where a subject comprehends a multiplicity of matter, and a great variety of facts, there, in order to avoid prolixity, the law allows general pleading. (*b*) Thus, an allegation * in a declaration for necessities supplied to a third person, in answer to the defendant's request, or in a replication to a plea of infancy, that "necessaries" were supplied, is sufficient, without showing specifically what the necessities were. (*c*) And in charging in a declaration, that a party has not accounted for sums he received in any particular capacity from time to time, it is sufficient to allege generally that

14; *ante*, 245; Steph. 5th ed. 407; [The People v. Dunlap, 13 John. 437.]

(*t*) Rider v. Smith, 3 T. R. 766.

(*u*) Merceron v. Dowson, 5 B. & C. 482.

(*x*) Steph. 5th ed. 407-410.

(*y*) Bac. Ab. Pleas, B. 5; Prior v. Tufts, 1 Keb. 825; Partridge v. Strange, Plowd. 85; *sed vide* 2 Saund. 379.

(*z*) Bac. Ab. Pleas, B. 5.

(*a*) 2 Saund. 379.

(*b*) J'Anson v. Stuart, 1 T. R. 753; per Buller J. 2 Saund. 411, note (4); 1 Saund. 116, 117, note (1); Bac. Ab. Pleas, 1, 3, B. 5; Com. Dig. Pleader, C. 42, E. 26; Holmes

v. Rhodes, 1 B. & P. 640, note (*a*); Com. Dig. 303 b, 304; Steph. 5th ed. 392; [See Boston, Conc. & M. R. R. 36 N. H. Hughes v. Smith, 5 John. 173.] No greater particularity is required than the nature of the thing pleaded will conveniently admit of. Steph. 5th ed. 404; *vide* the instances put in illustration of this rule; and 1 B. & P. 61; *ante*, 248, as to pleading a custom or right at reasonable times, &c.

(*c*) Cryps v. Baynton, 3 Bulst. 31; Gains v. Wiseman, Carth. 110.

time to time he received divers sums, amounting to a certain sum, not stating on what particular days or from named persons, and hath not accounted, &c. (*d*) As there are many instances in which this rule does not apply, especially in justifications of slander, and very often in pleas of performance, we will hereafter give the rule further consideration in treating of the particular parts in pleading. (*e*)

It will be explained in a subsequent part of the work, that much particularity is required in the statement of *special damage*. (*e*¹)

When the facts are not really stated with sufficient certainty, the introduction of the word "*certain*" is of no avail. (*f*) Thus a declaration in debt for a sum of money forfeited "by virtue of a *certain* by-law," or "for money *due* on a *certain* bond," without stating it, is sufficient. (*g*) So where the declaration stated that in consideration that the plaintiff had sold to the defendant a "*certain*" horse of the plaintiff, at and for "a *certain* quantity of *certain* oil," to be delivered within a "*certain* time," which had elapsed, though it was holden that the declaration was good after verdict, it was considered that it could not have been supported on demurrer. (*h*) And a justification in trespass, "by virtue of a *certain* writ," &c. but not setting it forth, is sufficient. (*i*) So the words "*duly*," "*lawfully*," "*sufficient*," &c. without showing the matter of fact with convenient certainty, are seldom of avail in pleading. (*k*) So a plea justifying an imprisonment, on the ground of a suspicion of felony, should state the grounds of suspicion, and the averment, that the plaintiff "*suspiciously*" did such an act, is not sufficient. (*l*) But in some cases the statement that the defendant "*unlawfully*" or "*unjustly*," did the wrong complained of, without showing the particular acts, * may be sufficient to designate that to be a crime or injury which might otherwise stand indif-

(*d*) *Shum v. Farrington*, 1 B. & P. 640; *Barton v. Webb*, 8 T. R. 459; *Cornwallis v. Savery*, 2 Burr. 772; *Steph.* 5th ed. 395.

(*e*) *Vide* Index, Certainty.

(*e*¹) [See *Corey v. Bath*, 35 N. H. 530, 546, 547; *Read v. Chelmsford*, 16 Pick. 128.]

(*f*) *Andrews v. Whitehead*, 13 East, 102. As to the word reasonable, *Elliott v. Hardy*, 3 Bing. 61, 67.

(*g*) *Company of Felt Makers v. Davis*, 1 B. & P. 98, 102. See *White v. Wilson*, 2 B. & P. 120; *Andrews v. Hardy*, 13 East, 116.

(*h*) *Ward v. Harris*, 2 B. & P. 265.

(*i*) 1 Saund. 298, note (1); [but see *Ben-net v. Fixley*, 7 John. 249.]

(*k*) 9 Co. 25 a; *Rex v. Richardson*, 1 Burr. 540; *The King v. Lyme Regis, Dougl.* 79; *Williams v. Germaine*, 7 B. & C. 468; *Brazier v. Jones*, 8 B. & C. 124. In an action on a bond conditioned to perform an award to be made under the hands of referees, an averment that they "*duly* made their award" is not sufficient. *Everard v.*

Paterson, 6 Taunt. 645; 2 Marsh. 304, S. C. See *Dudlow v. Watchorn*, 16 East, 39; *Sandon v. Proctor*, 7 B. & C. 800. [If "*duly*" has any clear, legal signification, the question whether an act was *duly* done, is one of law, and must be determined from the facts. *Graham v. Machado*, 6 Duer, 514. That an execution was "*duly* issued" is sufficient. *French v. Willet*, 10 Abb. Pr. 102; S. C. 4 Bosw. 469; S. C. 10 Bosw. 566. For other cases of the use of the word "*duly*" in pleading, see *Platt v. Stout*, 14 Abb. Pr. 178; *Sere v. Coit*, 5 Abb. Pr. 481; *Myers v. Machado*, 6 Abb. 198; S. C. 14 How. Pr. 149; *Cruger v. Halliday*, 11 Paige, 314; *Crane v. Ryder*, 12 N. Y. 433; *Fowler v. New York Indemnity Ins. Co.* 23 Barb. 143; S. C. 26 N. Y. 422; *Woodbury v. Sackrider*, 2 Abb. Pr. 402; *People v. Jackson*, 24 Cal. 630.]

(*l*) *Mure v. Kay*, 4 Taunt. 34; *Hedges v. Chapman*, 2 Bing. 523; *Steph.* 5th ed. 376, 377. [See also, *Van Ness v. Hamilton*, 19 John. 349.]

ferent; as in an action on the case for unlawfully procuring a wife to leave her husband. (*m*) The want of certainty, (*n*) and an ambiguous expression in a declaration, (*o*) are cured by verdict. (*o*¹)

To these rules affecting the *mode* of stating facts may be added the following, which are ably collected and observed upon by Mr. Serjeant Stephen in his valuable work on Pleading; (*p*) viz. that pleadings must not be insensible (*q*) or repugnant; (*r*) nor ambiguous or doubtful in meaning; (*s*) nor argumentative; (*t*) nor in the *alternative*. However, the pleading rules of Hil. T. 4 W. 4, reg. 1, permit in some cases an *alternative* allegation, as that several named persons, "*or one or more of them were or was,*" interested in the property insured by a policy of insurance, which exception was introduced in order to avoid several counts varying the statement of the interest in the subject insured. (*u*) The other rules are, that pleadings must not be hypothetical; (*v*) nor by way of recital, but positive, (*x*) and that they should be stated according to their *legal effect or operation*. These rules, indeed, will be more fully considered hereafter in the different parts of the work which treat of the qualities of declarations and of other parts of pleadings in particular.

(*m*) Winsmore v. Greenbank, Willes, 577.

(*n*) Ward v. Harris, 2 B. & P. 265; Elliott v. Hardy, 3 Bing. 61.

(*o*) Huntingtower v. Gardiner, 1 B. & C. 297; Avery v. Hoole, Cowp. 825.

(*o*¹) [See Yolo County v. San Francisco, 36 Cal. 193.]

(*p*) 5th ed. 414-427.

(*q*) Com. Dig. Pleader, C. 23; 1 Salk. 324; Vin. Ab. Nonsense, A. pl. 3. See, however, *ante*, 252.

(*r*) See *ante*, 254.

(*s*) Co. Litt. 303 *b*; Purcell v. Bradley, 10 Yelv. 36; Dovaston v. Payne, 2 H. Bl. 530; Thornton v. Adams, 5 M. & Sel. 38; Huntingtower v. Gardiner, 1 B. & C. 297; Fletcher v. Pogson, 3 B. & C. 192; and also examine Steph. 5th ed. 415. Thus, in trespass, a plea that the close was defendant's freehold, not stating at the time of the trespass, is bad. Com. Dig. Pleader, E. 5.

(*t*) Bac. Ab. Pleas, &c. 1, 5; Com. Dig. E. 3; Co. Litt. 303 *a*; 5 B. & Ad. 215. In trespass *de bonis asportatis*, a plea that the plaintiff never had any goods is bad. Doct. pl. 41; Dyer 43 *a*; other instances, Steph. 5th ed. 422; Bourne v. Taylor, 10 East, 205. [Argumentativeness in a pleading is a defect in form only, and is not fatal as general demurrer. Mackay v. Gordon, 34 N. J. (Law) 286; Hawk v. Segraves, 34 N. J. (Law) 355.]

(*t*¹) [Under the New York Code, a denial in the answer must not be in the alternative.

Otis v. Ross, 8 How. Pr. 193; Corbett v. George, 2 Abb. Pr. 465.]

(*u*) Reg. Gen. Hil. Term, 4 W. 4, Pleading in Particular Actions, Reg. 1. [Under the practice act of Massachusetts, a party may allege any fact or title alternatively, declaring his belief of one alternative or the other and his ignorance whether the one or the other. Genl. Sta. Mass. 129, § 26. See Turner v. First & Second Nat. Bank of Iowa, 562.]

(*v*.) Griffiths v. Eyles, 1 B. & P. 265; Cook v. Cox, 3 M. & Sel. 114; Steph. 5th ed. 426. If "*any*" is bad on special demurrer as not confessing and avoiding the cause of action. Gould v. Lashbury, 4 M. & W. 863. But the word "*supposed*" is a sufficient admission of a cause of action. Eavestaff v. Russell, 1 Dowl. N. R. 952; M. & W. 365, S. C.

(*x*) Bac. Ab. Pleas, &c. B.; Steph. 5th ed. 427. Mr. Serjeant Stephen states, in instances of this rule, that it is bad in trespass to charge that whereas the defendant assaulted, &c.; and that in a plea, in stated by deed, it should not be stated that it was witnessed by the deed that the plea was granted.

(*y*) Bac. Ab. Pleas &c. 1, 7; Com. Dig. Pleader, C. 37; 2 Saund. 97 *b*, note (2); Saund. 235 *b*, note (9); Moore v. The Corporation of Plymouth, 3 B. & Ald. 66; Steph. 5th ed. 428.

III. THE RULES OF CONSTRUING PLEADINGS.

It is a maxim in pleading, that everything shall be taken most strongly against the party pleading, (2) or rather, that if the meaning * of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading; (a) because it is to be presumed that every person states his case as favorably to himself as possible. (b) But in applying this maxim, the other rules must be kept in view, and particularly those relating to the degree of certainty or precision required in pleading. (c) The maxim must be received with this qualification, that the language of the pleading is to have a reasonable intendment and construction; (d) and where an expression is capable of different meanings, that shall be taken which will support the declaration, &c. and not the other, which would defeat it. (e) Thus, in debt on bond, conditioned to procure J. S. to surrender a copyhold "to the use of the plaintiff," a plea that J. S. surrendered and released the copyhold to the plaintiff in full court, and that the plaintiff accepted it, without alleging that the surrender was "to the

III. RULES
OF CON-
STRUCTION.

(2) 1 Saund. 259, note (8); De Symonds v. Shadden, 2 B. & P. 155; Co. Litt. 303 b; Purcell v. Bradley, 3 Yelv. 36; Dovaston v. Payne, 2 H. Bl. 530; Thornton v. Adams, 5 M. & Sel. 38, 40; Steph. 5th ed. 415, and cases there collected.

(a) Per Buller J. Dovaston v. Payne, 2 H. Bl. 530; Hobson v. Middleton, 6 B. & C. 302; Steph. 5th ed. 415. Instances of this in a plea, *Id.* and post.

(b) Co. Litt. 303 b; per Parke B. in *Pearse v. Champneys*, 3 Dowl. 276; [Watriss v. Pierce, 36 N. H. 238; Fuller v. Hampton, 5 Conn. 422, 423; Halligan v. Rock Island R. R. Co. 15 Ill. 558; Ware v. Dudley, 16 Ala. 742; Slocum v. Clark, 2 Hill, 475; Ferris v. N. A. Fire Ins. Co. 1 Hill, 71; United States v. Lynn, 1 How. (U. S.) 104; S. C. 17 Peters, 88; Burrows v. Yount, 6 Blackf. 458; Terry v. Strain, 2 Carter (Ind.), 113; Requa v. Guggenheim, 3 Lansing, 51; Hawes v. Ryder, 100 Mass. 216, 218; Dendy v. Powell 3 M. & W. 442; Bartlett v. Prescott, 4 N. H. 500; Bates v. Rosecrans, 23 How. Pr. 98; S. C. 34 How. Pr. 626, note; Camidge v. Allenby, 6 B. & C. 573; Beach v. Bay State Co. 10 Abb. Pr. 71; S. C. 30 Barb. 433; Ridder v. Whitlock, 12 How. Pr. 208; Munger v. Hess, 28 Barb. 75; Winter v. Quarles, 43 Ala. 692; Stephens &c. Transportation Co. v. Central R. R. Co. 33 N. J. (Law) 229. Thus in pleading a right of way, it is necessary to state that the privilege of passing extends to servants, or the justification will not extend to them. Bartlett v. Prescott, 41 N. H. 493, 500. If it is material to allege the place where a transaction happened, and the pleading is ambiguous in this respect, the presumption will be against the pleader. Beach v. Bay State Co. 10 Abb.

Pr. 71; S. C. 30 Barb. 433.] The same rule holds in construing deeds, &c. Platt on Cov. 141.

(c) *Ante*, 256; [Jewett J. in *Allen v. Patterson*, 7 N. Y. 476. Words in a pleading are to be understood and construed in their ordinary and popular sense, and it should be so plain, that a person understanding the language can comprehend it. Mann v. Morewood, 5 Sandf. 557; Woodbury v. Sackrider, 2 Abb. Pr. 402. A pleader must say what he means, and the court will not search out a meaning for him. In the construction of a pleading, the court will be governed by what is alleged, and not by what may have been intended to be alleged. Gould v. Glass, 19 Barb. 179; Ogdensburgh Bank v. Van Rensselaer, 6 Hill 240.] As to rule of *reddendo singula singulis*, see *Rex v. Leafe*, 2 Campb. 139.

(d) Com. Dig. Pleader, C. 25; The Duke of Newcastle v. Wright, 1 Lev. 190; per Lord Ellenborough, *The King v. Stevens & Agnew*, 5 East, 259, 260; *Amhurst v. Skynner*, 12 East, 263; [Hastings v. Wood, 13 John. 482; *Foster v. Elliott*, 33 Iowa, 216.]

(e) *Vernon v. Keyes*, 4 Taunt. 492; *Wyat v. Aland*, 1 Salk. 325; *The King v. Stevens & Agnew*, 5 East, 244, 257; *Amhurst v. Skynner*, 12 East, 270; [Moore v. Forster, 5 M., G. & S. 220; *Pender v. Dicken*, 27 Miss. 252; *Olcott v. Carroll*, 39 N. Y. 436.] As to the effect of *predictus* and *idem*, and construction of them, see *Woodford v. Ashley*, 11 East, 513. So in the case of a deed, exposition shall be made of it so as to support rather than annul the transaction; *ut res magis valeat quam pereat*. *Shep. Touch.* 166; *Smith v. Packhurst*, 2 Atk. 136.

plaintiff's use," is sufficient; for this shall be intended. (*f*) debt on bond, conditioned that the plaintiff shall enjoy certain &c. a plea, that "after the making of the bond, until the exhibiting the bill," the plaintiff did enjoy, is good, though it alleged that *continually* during that time he enjoyed; for intended. (*g*)

But the matter must be *capable* of different meanings; for the court cannot, in order to support the proceeding in which the particular term occurs, arbitrarily give it a meaning against which the habits, and understanding of mankind would plainly revolt. (*g*¹) If it be *clearly capable* of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in that sense in which the party framing the pleading must be understood to have used it, if he intended that his pleading should be consistent with itself. (*h*) Every indictment, &c. ought to contain a complete description of such facts and circumstances as constitute the crime, &c. without inconsistency or repugnancy; but except in particular cases where precise technical expressions are required to be used, there is no rule that other words shall be employed, such as are in ordinary use, or that in indictments * or other pleadings a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the sense may be ambiguous, it is sufficiently marked by the context, or other means, in what sense the words are intended to be used, no objection can be made on the ground of *repugnancy* which only exists where a sense is annexed to words which is either absolutely inconsistent therewith, or being apparently not accompanied by anything to explain or define them. (*h*¹) If the sense be clear, nice exceptions ought not to be regarded. (*i*)

(*f*) Hamond v. Dod, Cro. Car. 6.

(*g*) Harlow v. Wright, Cro. Car. 195; Steph. 5th ed. 418.

(*g*¹) [And this is the rule in regard to actions for words, either spoken or written, that the court is to understand them according to their ordinary acceptation among mankind. Backus v. Richardson, 5 John. 584; Respublica v. De Longchamps, 1 Dall. 114, 117; Rue v. Mitchell, 2 Dall. 58; Brown v. Lamberton, 2 Binney, 37; Pelton v. Ward, 3 Caines, 76; Walton v. Singleton, 7 Serg. & R. 449.]

(*h*) Per Lord Ellenborough C. J. The King v. Stevens, 5 East, 257. See Woolnoth v. Meadows, 5 East, 463.

(*h*¹) [The plea of "no award," means no valid award. Dresser v. Stansfield, 14 M. & W. 822; Gisborne v. Hart, 5 M. & W. 50. "Taking" signifies wrongful taking. Childs v. Hart, 7 Barb. 372. A "conversion," *ex vi termini*, means a *wrongful* conversion. Young v. Cooper, 6 Exch. 259, 262. "Indorsed" means indorsed according to law. Mechanics Bank Association v. Spring Val-

ley Shot & Lead Co. 25 Barb. 419. It includes delivery. Bank of Lowville v. Ward, 11 How. Pr. 216. When it is said that goods have been sold, a delivery is implied. Clark v. Meigs, 13 Abb. 1. If an entry on real estate is pleaded, a *lawful* entry is always intended. The King v. McCarthy, 4 E. D. Smith, 247. The expression "and thereupon," used in pleading, marks the succession of events of time. It does not exclude the possibility of other facts than those which have previously stated. Dennehey v. Worcester, 100 Mass. 195.]

(*i*) Per Lord Ellenborough C. J. The King v. Stevens, 5 East, 259, 260. The King v. Airey, 2 East, 33; [St. John v. Griffith, 1 Abb. Pr. 39. Under the New York Code (§ 150), the allegations in a pleading are to be liberally construed, and substantial justice shall be rendered between the parties; and where the statements are uncertain and indefinite that it is not the proper remedy of the adverse party.]

also a rule relating to the mode of stating facts, and the form of the pleading on either side, that the court are *ex officio* bound after verdict to give such judgment as appears upon the *whole* record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; (*k*) and on the same ground we shall hereafter see, that when there is a demurrer to a plea, replication, &c. if the prior pleading be defective in substance, judgment will be given against the party pleading it. After verdict, an expression must be construed in such sense as would sustain the verdict: (*l*) and although in general in pleading, an equivocal expression is to be construed against the party using it, yet where the opposite party has *pleaded over*, that is an admission that the expression is to be taken in that sense which will support the previous pleading. (*m*) These rules will be fully explained hereafter. Words of reference, as "*there*" and "*said*" in an indictment, will not be referred to the last antecedent where the sense requires that they should be referred to some prior antecedent. (*n*)

IV. THE DIVISION OF PLEADINGS.

The *parts* of pleading have been considered as arrangeable under two heads; *first*, the regular, being those which occur in the ordinary course of a suit; and *secondly*, the irregular, or collateral, being those which are occasioned by mistakes in the pleadings on either side. (*o*)

IV. DIVISION
OF PLEAD-
INGS.

The *regular* parts are, 1st. The *declaration* or count. — 2dly. The *plea*, which is either to the jurisdiction of the court; or in suspension of the action, as in the case of parol demurrer; or in abatement; or in bar of the action; or in replevin, an avowry or cognizance. — 3dly. The *replication*; and in case of an evasive plea, a *new assignment*; or in replevin, the *plea in bar* to the avowry or cognizance. — 4thly. * The *rejoinder*; or in replevin, the replication to the plea in bar. — 5thly. The *surrejoinder*, being in replevin the rejoinder. — 6thly. The *rebutter*. — 7thly. The *surrebutter*. — And 8thly. *Pleas puis darrein continuance*, where the matter of defence arises *pending* the suit.

The *irregular* or *collateral* parts of pleading are stated to be, (*p*) 1st. *Demurrers* to any part of the pleadings above-mentioned. — 2dly.

application by motion to have the pleading made more certain and definite. *Olcott v. Carroll*, 39 N. Y. 436. Under the Massachusetts practice act "the allegations and denials of each party shall be so construed by the court as to secure, as far as possible, substantial precision and certainty, and discourage vagueness and loose generalities. Genl. Sta. c. 129, § 27.

(*k*) *Le Bret v. Papillon*, 4 East, 502; *Charlley v. Winstanley*, 5 East, 270, 271;

The King v. Shakspeare, 10 East, 87; [*Havens v. Bush*, 2 John. 387.]

(*l*) *Lord Huntingtower v. Gardiner*, 1 B. & C. 297; *Avery v. Hoole*, Cowp. 825; *Hobson v. Middleton*, 6 B. & C. 302, 303.

(*m*) *Wright v. The King*, 3 Nev. & Man. 892.

(*n*) *Hobson v. Middleton*, 6 B. & C. 295.

(*o*) *Vin. Ab. Pleas*, &c.; *Bac. Ab. Pleas*, &c. A.

(*p*) *Vin. Ab. Pleas*, &c. C.

Demurrers to evidence given at trials. — 3dly. *Bills of exception*. — 4thly. *Pleas in scire facias*. — And 5thly. *Pleas in error*. The particular nature of each of these parts of pleading, together with *claim of consanguinity*, *demand of oyer*, and *imparlances*, &c. will be considered in the following chapters.

* CHAPTER IV.

OF THE DECLARATION. (a)

I. DEFINITION AND DIVISION OF SUBJECT.

II. THE GENERAL REQUISITES AND QUALITIES OF DECLARATIONS.

III. THE FORMS AND PARTICULAR PARTS AND REQUISITES OF DECLARATIONS.

I. THE DEFINITION AND DIVISION OF THE SUBJECT.

A DECLARATION is a specification in a methodical and legal form of the circumstances which constitute the plaintiff's *cause of action*, (b) which necessarily consists of the statement of a legal right, or in other words, a right recognized in courts of law, and not merely in a court of equity, and of an *injury* to such right remediable at law by *action* as distinguished from the remedy by bill in equity. A declaration may conveniently be examined, *First*, with reference to those *general requisites* and *qualities* which govern the *whole* declaration in general, and *Secondly*, to the *forms* and *parts*, and *particular requisites*, as well in *assumpsit*, *debt*, *covenant*, and *detinue*, as in *case*, *trover*, *replevin*, *trespass*, and *ejectment*.

I. DEFINITION AND DIVISION OF SUBJECT.

II. THE GENERAL REQUISITES OR QUALITIES.

The *general requisites* or *qualities* of a declaration are, 1st, that it *correspond* with the *process*; (c) 2dly, that it contain a statement of *all the facts* necessary in point of law to sustain the action, and no more; (d) and, 3dly, that these circumstances be set forth with certainty and truth. (e) The pleader, before he commences drawing * a declaration, should have before him a copy of the writ or *præcipe*, and very full instructions as to the facts of the case, as they can be assuredly proved by evidence already carefully ascertained.

II. THE GENERAL REQUISITES, &c.

(a) As to the proper instructions for declarations, and the time when the plaintiff may or must declare, and other practical points, see fully Chitty's Arch. Prac. 7th ed. and 3 Chitty's General Practice, by Lush.

(b) Co. Litt. 17 a, 303 a; Bac. Ab. Pleas, B.; Com. Dig. Pleader, C. 7; Heath's Maxims, 1, 2; [Burnham v. Ross, 47 Maine, 458, 459; ante 235, note (b).]

(c) Com. Dig. Pleader, C. 13. As the writ of summons is now the commencement

of all personal actions, and the arrest of a defendant on a writ of *capias* under a judge's order is merely a collateral proceeding, and not noticed in the declaration, any irregularity in the *capias* does not affect the declaration, which is always founded on the writ of *summons*.

(d) Co. Litt. 303 a; Partridge v. Strange, Plowd. 84; Buckley v. Thomas, Plowd. 122.

(e) Ib. Ibid.

Regularly the declaration should correspond with the process respect to, 1st, the *names* of the parties to the action; 2dly, the *number* of such parties; 3dly, the *character* or *rank* which they sue or are sued; 4thly, the *cause* and *form* of the action: and under each of these heads the *consequences* of a defect from the process will be noticed.

1st. The general rule is, that the declaration should pursue the same in regard to the *Christian and surnames of the parties*. (f) If a person enter into a bond or deed by a wrong name, he should be sued by such name; and it will not be correct to declare against him in *his real name*, although there be an averment that he executed the instrument by the untrue description. (g) Where in an action on a bond the plaintiff by his declaration pleaded against W. F. B., sued by the name of W. B., and at trial it appeared that the defendant did in fact execute a bond in the name of W. B., and that *at the time of the execution he was known by that name*; it was held, that this proof was sufficient to sustain the issue, and that there was no variance; and that even if the objections were valid, it was one of which the defendant could not avail himself under the plea of *non est factum*. (h) Where the obligor of a deed is described in the body of the instrument by a different name by which he subscribes it, it is safer to issue the writ and declare against him by the name in the body of the bond than by the name by which he subscribed it, for signature is not essential to the validity of a deed at common law. (i) If the *defendant*, having been sued by a wrong name, appear by such name, the plaintiff should declare in that name; but if the defendant appear by his right name, the plaintiff should declare in the right name, stating that the defendant had been served with process by the wrong name. If a defendant sued by a wrong name has not appeared, the plaintiff may amend

(f) As to the description of the names of the parties in the writ, see 3 Chitty's Gen. Prac. 3d ed. by Lush, 139-159.

(g) [In New Hampshire, where a town corporation is described as "the town of L," and not, as in some other jurisdictions, "the inhabitants of the town of L," a writ containing a description of the town, as plaintiff, in the latter mode is defective, but subject to amendment. *Lebanon v. Griffin*, 45 N. H. 558, 563; *Flanders v. Stewartstown*, 47 N. H. 549. See *Lowell v. Morse*, 1 Met. 473; *post*, 271. The names of all the parties, plaintiffs and defendants, should be fully stated. *Hill v. Thaxter*, 3 How. Pr. 407; *post*, 271; *Sistermans v. Field*, 9 Gray, 331. Under the New York Code (§ 175), if the plaintiff is ignorant of the true name of the defendant, he may designate him by any name; and when his true name shall be discovered

covered the pleading may be amended accordingly. The plaintiff may give two names — Christian and surname. *Levi*, 5 Rob. 599. So in *Mass. Genl. Sts. c. 123, § 16*; *Fitzgerald v. Stone*, 10 Met. 436. If the defendant uses by two different names, he may be sued by either. *Eagleston v. Son*, 5 Rob. 61. (g) *Gould v. Barnes*, 3 Taunt. 50; *Stone v. Lord Palmerston*, 2 C. & J. 1; *Bonner v. Wilkinson*, 5 B. & Ald. 6. The name by which a party signs a deed may be adopted, see *Mayelstone v. Lord*, 1 M. & M. 6; 2 C. & P. 4. [See *Templeton v. Crane*, 5 Gre. 1; *Meredith v. Hinsdale*, 2 Caines, 363.]

(h) *Williams v. Bryant*, 5 M. & W. 100. See the judgment in this case.

(i) 3 Chitty's Gen. Prac. by Lush, 139.

him, and declare against him in the name by which he was described in the writ ; (*k*) or the plaintiff may (at least where the mistake is in the Christian name only) appear and declare in the defendant's right name, stating the defendant to have been sued in the wrong name ; and by adopting the latter method he will save himself from the * liability of the costs of an amendment upon the application of the defendant. (*l*)

Where the name of the *plaintiff* has been mistaken in the process, it is advisable, as in the case of a mistake in the *defendant's* name, to correct the error in the commencement of the declaration ; (*m*) for if the plaintiff's misnomer be continued, the defendant may take out a summons to compel him to amend and state the correct name, and the plaintiff may be liable for the costs of the application. At no time, even in the case of a corporation, was misnomer of the plaintiff pleadable in bar. (*n*) But a mistake in the name of a *third person* in matter of description will sometimes be fatal to the proceedings as a variance. (*o*) A misnomer of the *plaintiff* is not and never was a ground for setting aside the proceedings ; (*p*) or for a motion in arrest of judgment ; (*q*) or of nonsuit at the trial, at least if it appeared that the defendant was aware that the action was brought by the person who actually sues. (*r*) It seems now to be settled that when the parties have been once named in the declaration, it is sufficient to describe them afterwards by the terms "*plaintiff*" and "*defendant*." (*s*) If instead of the plural *plaintiffs*, the word *plaintiff* in the singular be adopted in a material part of the *body* of a declaration, it has been supposed that the declaration will be subject to a special demurrer ; but if merely in the *commencement* it would be otherwise. (*t*)

As to the consequence of any mistake in the parties' names, as the

(*k*) Ibid. 135.

(*l*) *Hobson v. Wadsworth*, 8 Dowl. 601.

(*m*) *Murray v. Hubbard*, 1 B. & P. 647 ; ante, 265 ; and see form of commencement, post, vol. ii. 5. As to mistakes in names once correctly stated, see *Hughes v. Sutton*, 3 M. & Sel. 178 ; Com. Dig. Pleader, C. 18.

(*n*) *Mayor &c. of Stafford v. Bolton*, 1 B. & P. 40 ; *Gardner v. Walker*, 3 Anstr. 935 ; *Jowett v. Charnock*, 6 M. & Sel. 45. [See *Medway Cotton Manuf. v. Adams*, 10 Mass. 360, 362, 363. Where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them by the name therein mentioned. *African Society v. Varick*, 13 John. 38 ; *Alloway's Creek v. String*, 5 Halst. 323 ; *President, Managers &c. v. Myers*, 6 Serg. & R. 12. Under the Massachusetts practice act, if the declaration be upon a written contract, a copy must be annexed, or the legal effect of the contract set forth in the declaration. In such case, if the contract be with the plaintiff by

another name than that in which he sues, this fact must be made to appear by proper averments, or there will be a variance between the declaration and the proof. *Hoar J. in Charman v. Henshaw*, 15 Gray, 294.]

(*o*) *Harvey v. Stokes*, Willes, 5 ; *Accro v. Petroni*, 1 Stark. 100 ; *Mayelstone v. Lord Palmerston*, 1 M. & M. 6. See, also, *Finch v. Cocken*, 3 Dowl. 678 ; but see *Forman v. Jacob*, 1 Stark. 47.

(*p*) *Morley v. Law*, 4 Moore, 369 ; 2 B. & B. 34, S. C.

(*q*) *Clerk of the Trustees of Taunton Market v. Kimberly*, 2 Bl. Rep. 1120.

(*r*) *Boughton v. Frere*, 3 Campb. 29 ; *De Tastet v. Rucker*, 6 Moore, 141 ; 3 B. & B. 65, S. C. ; *Langridge v. Brewer*, 7 Moore, 522 ; 1 Bing. 143, S. C.

(*s*) *Davidson v. Savage*, 6 Taunt. 121 ; 2 Marsh. 301, S. C. ; *Stevenson v. Hunter*, 6 Taunt. 406 ; [*Stanley v. Chappell*, 8 Cowen, 235.]

(*t*) *Tyndall v. Ullesthorpe*, 3 Dowl. 2 ; but see *Lyng v. Sutton*, 4 Moore & Scott, 417.

3 & 4 W. 4, c. 42, abolishing pleas of misnomer in abatement, enables a defendant to compel the plaintiff to amend his declaration by stating the real name, that is now the only ill consequence of a mistake of a name in the process. (u)

2dly, With respect to the declaration corresponding with the *ess* in the *number* of the parties, it has been held that the writ be sued out in the name of *one plaintiff*, the declaration must not vary, and if it be delivered in the name of *two plaintiffs* the proceeding will be set aside for irregularity. (x) And even in an action in *autre droit*, as by an executor, the court will not permit amendment by adding the name of a co-executor, unless the *number of limitations* will otherwise be a bar. (y) The first general Mich. Term, 3 W. 4, orders that every writ of summons, capias, detainer, *shall contain* the names of *all the defendants* (if more than one) in the action, and shall *not contain* the name or names of any defendant or defendants in *more actions than one*. However numerous the defendants in a joint action may be, they must all be named in each and *every* writ issued against them, though they greatly exceed four, (z¹) and when very numerous there be not room in the printed blanks for all the names and descriptions of residences, then the whole writ must be written; and if one or more defendants be in one county, and the others in another county, then there must be at least as many *concurrent* writs, printed alike, as there are counties; and there must be as many copies of the writ as there are defendants in that county, unless there has been an attorney's written undertaking to appear for them.

Upon the affirmative or first part of this rule, it is clear that a declaration naming *more* defendants than were named in one writ is irregular. (a) But on the latter part of the rule, it has been held that in process against several defendants, the plaintiff may require to declare in a joint action against *some* of them, provided he has no act showing any intention to proceed against the other defendants, and especially so when the plaintiff has entirely discontinued his proceeding against such other defendant. (b) So that unless the plaintiff has *declared* on his joint process, no irregularity appears which could be taken advantage of, and therefore a defendant cannot object until after declaration. But where the names of two defendants have been inserted in a writ of summons, and afterwards they were declared against *separately*, the court set aside the declaration.

(u) See section 11.

(x) Rogers v. Jenkins, 1 B. & P. 383.

(y) Lakin v. Watson, 2 Cr. & M. 685.

(z) See Rule, Jervis's Rules.

(z¹) [Irwin v. Devine, 1 J. J. Marsh. 205.]

(a) Chitty's Archb. Pr. 7th ed. 10.

(b) Tidd's Sup. 1833, p. 467; Whitehead, 2 M. & R. 367; Bowles 2 C. & J. 474; Knowles v. Johnson, P. C. 653; and R. E. 8 G. 4; Co. Blake, 3 Dowl. 656; 1 Gale, 157, S.

subsequent proceedings for irregularity, although there were two writs and the defendants had entered separate appearances, which it was insisted waived the irregularity. (c) And where a husband and his wife had been arrested on *joint process*, and the latter had been discharged out of custody upon entering a common appearance, and afterwards the plaintiff declared against the husband alone, the court held the proceedings irregular. (d)

Instances have occurred in which the name of a defendant, improperly * joined with others, has been struck out upon amendment. (e) But since the uniformity of process act, 2 W. 4, c. 39, the courts have resolved not to permit any amendment of writs, unless the statute of limitations would be a bar to a fresh action, or for the purpose of making the writ accord with the *præcipe*. (f)

The uniformity of process act, 2 W. 4, c. 39, as well in its enactments as in the prescribed forms in the schedule, is silent upon the necessity of inserting any description of the *character or right* in which the plaintiff sues or the defendant is sued, (g¹) and it is probable that it was intended by that statute merely to require that the *form of action* should be stated, and the amount of the debt indorsed, which it was perhaps considered would sufficiently inform the *defendant* in all actions what was the nature of the claim and supposed liability. Since that act, it was considered by the courts of Q. B. and C. P., with reference to prior decisions, that upon a writ, not stating the character in which the plaintiff sued, or the defendant was sued, the plaintiff was afterwards at liberty to *declare specially* in any particular character or right, as *quæ tam*, or as *executor*, or administrator, or as an *assignee* of a bankrupt : (h) or as assignee of a bail-bond ; (i) and also it was held in the common pleas, that on such *general process* the plaintiff may declare *against* a defendant *as* an executor or administrator. (k) And where the *affidavit* stated the debt to be due to the intended plaintiff *as* executor, but the process was general, the court of exchequer refused to order the bail-bond to be cancelled. (l) It was also held, that although the process had described the plaintiff or defendant generally

The character or right in which parties sue or are sued. (g)

(c) *Pepper v. Whalley*, 1 Bing. N. C. 71 ; *Chitty's Archb. Pr.* 7th ed. 106.

(d) *Castarne v. Player*, 3 Dowl. & Ry. 47.

(e) *Ante*, 15, note (x).

(f) *Lakin v. Watson*, 2 C. & M. 685 ; *Kirk v. Dolby*, 6 M. & W. 636 ; 8 Dowl. 767.

(g) See fully as to the necessity for correctly describing forms of actions in all process, and consequences of deviations. 1 *Chitty's Archb. Pr.* 7th ed. 107.

(g¹) [An averment that the defendant "is a company doing business in this state, and under the laws thereof" was held a sufficient

averment of the incorporation, in a petition against the defendant as a corporation. *Root v. Illinois &c. R. R. Co.* 29 Iowa, 102.]

(h) *Ashworth v. Ryall*, 1 B. & Ad. 20 ; *Ilseley v. Ilseley*, 2 Cr. & Jer. 300 ; 2 Tyr. Rep. 214, S. C.

(i) *Knowles v. Johnson*, 2 Dowl. 653 ; and see 3 *Chitty's Genl. Prac.* by Lush, 145.

(k) *Watson v. Pilling*, 3 Brod. & B. 4 ; 6 Moore, 66, S. C. [See *Beal v. Batta*, 31 Texas, 371.]

(l) *Ilseley v. Ilseley*, 2 Tyr. 214 ; 2 C. & J. 330, S. C.

as being executor, administrator, or assignee, without introducing words denoting that he sued *as such*, the plaintiff might *declare* generally in his *own right*, or against the defendant on his own liability, treating the description as a mere superfluous addition, just as the word "carpenter" had been idly introduced. (*m*) But that by introducing into the writ any express statement that the plaintiff intended to sue in a particular character, as by using the word "executor," or "*as assignee*," &c. then the plaintiff having so expressly limited his proceeding, could not declare generally, and that if he did so, then, at least in a bailable action, the defendant would be discharged out of custody, and the proceedings be set aside for irregularity. (*n*)

The uniformity of process act, 2 W. 4, c. 39, imperative required that the *form of action* shall be concisely stated in each writ thereby prescribed, (*n*¹) and if the form should be omitted or *substantially vary* from one of those enjoined by writ would, on summons or motion, be set aside, though the writ "promises," omitting "*on*" or "*upon*," has been holden a mere technical mistake. (*o*) The proper forms are—

In assumpsit, "in an action on promises."

In debt, "in an action of debt."

In covenant, "in an action of covenant."

In detinue, "in an action of detinue."

In a joint action of debt and detinue, "in an action of debt and detinue."

In case or trover, "in an action on the case."

In trespass, "in an action of trespass."

It was the intention of the legislature that every writ, whether bailable or bailable, should apprise the defendant of the *form of action* by which he would afterwards be declared against, and therefore the statement of the *form of action* is an *indispensable requisite of every declaration that it substantially conforms to the form of action stated in the process*, and if it deviates from the form of action, the defendant may apply to the court or a judge to set aside the declaration for irregularity; so that the plaintiff must abandon his first declaration and issue a fresh writ stating a form of action adapted to the facts of his declaration. But the objection is not a ground of demurrer to the declaration, but merely of a summary application to set aside the declaration for irregularity. (*p*) It has been usual in the common

(*m*) 1 Dowl. Rep. 97; Knowles v. Johnson, 2 Dowl. 653; and see Henshall v. Roberts, 5 East, 150.

(*n*) Douglas v. Irlam, 8 T. R. 416; Rogers v. Jenkins, 1 B. & P. 383; 1 Dowl. P. C. 98, 99; but see Ashworth v. Ryall, 1 B. & Ad. 20.

(*n*¹) [See the suggestions of Potter J. in

Sloccomb v. Powers, 10 R. I. 257, as to practice in Rhode Island in this respect.]

(*o*) Cooper v. Wheale, 4 Dowl. 281.

(*p*) Anderson v. Thomas, 9 Bing. 411; Thompson v. Dicus, 2 Dowl. 94; M. v. Thomas, 2 Dowl. 208; Rotton v. Jones, 2 Dowl. 637; Reynolds v. Walsh, 1 C. & R. 580; Hargreaves v. Holder, 1 Cr.

ment of the declaration to state the form of action precisely as in the writ; but the forms of commencements of declarations prescribed by Reg. Gen. Mich. Term, 3 W. 4, (q) conclude with an *ſc.*, and hence it is probable that it was not intended by the judges to state the form of action, but that the declaration should immediately proceed to state the substance of the cause of action; (r) and according to the observations in recent cases, the form of action ought not to *be stated in the commencement. (s) If the *body* of the declaration state a cause of action that is not, nor could be, properly declared for in the form of action stated in the writ, then the deviation would constitute an irregularity and ground for setting aside the declaration, but not a ground of demurrer.

The declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, (s¹) and the time; and in trespass *quare clausum fregit*, the name or abutments of the close; (t) though in other actions venue is no longer to be repeated in the body, but is

2dly. The declaration must state all the facts essential to the support of the action.

R. 580; Ward v. Tummon, 1 Ad. & El. 619; and 3 Chitty's Gen. Prac. by Lush, 388. [In New Hampshire, where a declaration for breach of promise of marriage alleged that the defendant, on, &c. promised to marry the plaintiff on request, and that the plaintiff afterwards, on the 20th day of November, 1849, requested the defendant to marry her, and the summons merely required the defendant to appear, &c. and answer in a plea of the case on contract for breach of marriage promise with the plaintiff, when she was sole and unmarried, in the year 1849; it was held that the summons did not give to the defendant the same information which the declaration gave more at large, nor contain the substance thereof, and that this was sufficient cause to abate the writ. Grant v. Duncan, 45 N. H. 167, and cases cited.]

(g) See the forms, post.

(r) See 3 Chitty's Gen. Prac. 388.

(s) Ball v. Hamlett, 1 Cr., M. & R. 575; Reynolds v. Welsh, 1 Cr., M. & R. 580; Hargreaves v. Holder, 1 Cr., M. & R. 580, note (a); and see 3 Chitty's Gen. Prac. by Lush, 388. [The form of the action is determined by the matter set forth in the declaration, and not by the name which the plaintiff may give it. Cornes v. Harris, 1 Comst. 223; New Orleans &c. R. R. Co. v. Hurst, 36 Miss. 660; State v. Dehlinger, 46 Missou. 106. Where the facts set forth in the complaint or declaration will support either of two actions, and it is doubtful which the plaintiff intends to bring, the summons and the demand for judgment may be consulted, in order to as-

certain which action was intended. Rodgers v. Rodgers, 11 Barb. 595; Cornes v. Harris, 1 Comst. 1; Chambers v. Lewis, 2 Hilton, 591.]

(s¹) [See Pelton v. Ward, 3 Caines, 77; Carpenter v. Alexander, 9 John. 291; Rogot v. Merritt, 2 Caines, 116; Shaw C. J. in Sidermans v. Field, 9 Gray, 332; Chapman J. in Read v. Smith, 1 Allen, 520, 521; Hollis v. Richardson, 13 Grav. 392; Rogers v. Newbury, 105 Mass. 533; Dickinson v. Lane, 107 Mass. 548; Colton v. King, 2 Allen, 317; Upton v. Winchester, 106 Mass. 330. The declaration must set out a good and sufficient cause of action; Mackall v. Jones, 5 Gill & J. 65; United States Bank v. Smith, 11 Wheat. 172; and every fact material to constitute the ground of action should be stated; Drown v. Stimpson, 2 Mass. 441, 444; Tracy v. Dakin, 7 John. 75. The declaration should show a cause of action in the plaintiff. Sidermans v. Field, 9 Gray, 331. The declaration is good if it contains all that is necessary to a recovery under a plea of the general issue. Beardaley v. Southmayd, 2 Green, 534. Under the practice act of Massachusetts, no averment need be made which the law does not require to be proved. Genl. Sts. c. 129, § 2, second clause. If the plaintiff avers more than is necessary to make out his case, he is not obliged to prove the superfluous allegations, unless they are essentially descriptive, or so connected with material averments that they cannot be separated. Lyons v. Merrick, 105 Mass. 71, 77; McDonald v. Snelling, 14 Allen, 290; Decker v.

(t) Reg. Gen. Hil. Term, 4 W. 4, r. 5. A description of a close by two abutments is

sufficient. North v. Ingamella, 9 M. & W. 249; 1 Dowl. N. R. 151, S. C. See post.

to be stated only once in the margin. (*u*) These and all other circumstances essential in law to the action must be stated with precision, certainty, and clearness, that the defendant, knowing what he is called upon to answer, (*u*¹) may be able to plead a direct unequivocal plea; and that the jury may be enabled to give a complete verdict upon the issue; and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. (*x*) The general rules as to *what facts must be stated* have been considered in the preceding chapter, (*y*) as well as the inconvenience which may arise from the statement of *superfluous* or *unnecessary* matter. (*z*) The *requisites* of the declaration in each particular case so much depend upon circumstances, that any general observation at this place upon the structure of a declaration would be but of little utility. We will presently consider the requisites in each form of declaration, and the precedents in the second volume must also be consulted, and, when applicable, should be followed on Lord Coke's principle, "*nam nihil simul inventum est et perfectum*," i. e. nothing at the same instant that it is discovered or invented is perfect, but becomes so only by frequent use and perhaps correction.

We have already considered the different *degrees of certainty* required in pleading, and we have seen that the certainty necessary in a declaration is to a *certain* intent in general, which should pervade the whole declaration, and is particularly required in setting forth the parties, time, and other circumstances necessary to maintain the action. (*c*) In *assumpsit*,

3dly. Of the certainty required in declaration. (*a*)

Gammon, 44 Maine, 322. In *Hunter v. Powell*, 15 How. Pr. 221, the complaint was so drawn that it contained allegations constituting two causes of action, one for a wrong, and the other for a breach of contract, and it was held that all the allegations in tort might be stricken out, on motion, as irrelevant and uncertain.]

(*u*) Reg. Gen. Hil. Term, 4 W. 4, r. 8.

(*u*¹) [*Coffin v. Coffin*, 2 Mass. 363.]

(*z*) *Rex v. Horne*, Cowp. 682; Vin. Abr. Declarations; [*Read v. Smith*, 1 Allen, 520, 521; *ante*, 255, and notes. The practice act of Massachusetts has made no change in this respect, for although by this act the facts may be briefly stated, yet all the facts must be stated which are necessary to constitute the cause of action. *Hollis v. Richardson*, 13 Gray, 392. The principal changes made by that act, in respect to declarations, were, (1) it adopted a suggestion which was originally made by Mr. Long to the British commissioners, that the number of personal actions should be reduced to two; (2) that no averment need be made which the law does not require to be proved. As incident to these changes, some other formal changes were made. But the act distinctly requires

that the substantive facts necessary to constitute the cause of action shall be set forth with substantial certainty. And though changes the forms of pleading and disposes of technicalities, it is still important in framing declarations and answers, so as to present causes properly for trial, that the principles of special pleading should be fully regarded. *Chapman J.* in *Read v. Smith*, 1 Allen, 521. In *Holt v. Penobscot*, 56 Maine, 15, it is said not to be indispensable that the plaintiff should state his cause of action with syllogistic accuracy. If the grammar does not vitiate a declaration, other faults of style ought not to have effect, unless they produce such a degree of obscurity as to give rise to the belief of the tribunal before which the cause is heard, that it might be misled as to the true issue.]

(*y*) *Ante*, 238, 255.

(*z*) *Ante*, 251, 252.

(*a*) *Ante*, 256-260.

(*b*) *Ante*, 257; *Partridge v. Stra*, 10 Plowd. 84; *Co. Litt.* 303 *a*; *Marsh*, 1 B. & C. 173.

(*c*) *Com. Dig. Pleader*, C. 18-27 C.; *T. 1*, 9th ed. 451.

description of the contract, &c. by **whereas*, or recital, is not demurrable, (d) though it would be otherwise in trespass *vi et armis*. (e)

1st. It must be stated with certainty who are the *parties* to the suit; (f) and therefore a declaration by or against "C. D. and Company," not being a corporation, is insufficient; (g) Certainty of parties. so though property be vested in trustees, (h) even by an act of parliament, yet, if they be not incorporated, they must be described by their proper names as individuals, and their character as trustees subjoined, as a description of the capacity in which the legislature authorized them to act; (i) on the other hand, a corporation must be described in all legal proceedings by their corporate name. (k) The statute 3 & 4 W. 4, c. 42, sect. 12, authorizes the plaintiff to declare against a defendant upon a bill or note, or other *written instrument*, by the same initial or contraction of Christian name used therein. (k¹) But where there are several plaintiffs or defendants, whose names have been once described, it is sufficient and proper, when the names are numerous, afterwards to adopt the word "*plaintiffs*" or "*defendants*," without again enumerating all the names. (l) But accuracy must be observed; for if in an action at the suit of several persons, the word *plaintiff* in the singular be used in stating the debt,

(d) *Ring v. Roxbrough*, 2 Cr. & Jer. 418; 2 Tyr. 468.

(e) *Hore v. Chapman*, 2 Salk. 636; *Amyon v. Shore*, 1 Stra. 621; Com. Dig. Plead. C.; *Goodright v. Hodgson*, Andr. 282. When the proceedings were by original, and the writ recited in declaration, it was otherwise. *Douglas v. Hall*, 1 Wils. 99; *Barnes*, 452, S. C.; *White v. Shaw*, 2 Wils. 213.

(f) Com. Dig. Plead. C. 18. See *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466, as to a declaration by a corporation.

(g) *The King v. Harrison*, 8 T. R. 508; *Bentley v. Smith*, 3 Caines, 170. Actions, to be properly brought, must be commenced and prosecuted in the proper *Christian* and *surname* of the parties, and not in the name of the company or firm. *Seeley v. Schenck*, 1 Penn. 75; *Crandall v. Denny*, 1 Penn. 137; *McCreedy v. Wareman*, 2 Penn. 870; *Burns v. Hall*, 2 Penn. 894; *Tomlinson v. Burke*, 5 Halst. 295; *Revis v. Lamme*, 3 Misaou. 207; *Davis v. Hubbard*, 4 Blackf. 50; *Hughes v. Walker*, 4 Blackf. 50; *Marshall v. Hull*, 8 Yerger, 101; *Norcross v. Clark*, 15 Maine, 80; *Hill v. Thaxter*, 3 How. Pr. 407; *Proprietors of Mexican Mill v. Yellow Jacket &c. Co.* 4 Nev. 40. It is a good plea in abatement that a party sues or is sued in his surname only. *Chappell v. Proctor*, 1 Harper, 49; *Seeley v. Boon*, Cox, 138; *Labat v. Ellis*, 1 Taylor, 148. But in the case of two or more partners of the same surname, it is not error, if the surname be not added to every Christian name. *Chance v. Chambers*, 1 Penn. 384. It has,

however, been decided, in Virginia, that a declaration by a firm, in the name of the firm, without mentioning the names of the partners, is good after verdict for the plaintiff on the general issue. *Pate v. Bacon*, 5 Munf. 219; *Totty v. Donald*, 4 Munf. 430; *Burnet v. Watson*, 1 Wash. 372. By statute in Connecticut, it was provided (St. 1838), that a suit may be commenced by or against parties in the name of the company, and the names of the partners may be inserted by amendment within the first three days of the court.]

(h) See *ante*, 15-17.

(i) 1 Leach, 4th ed. 513; Vol. xxii. MS. Paper Books of Mr. J. Ashurst, 216.

(k) 1 Leach, 4th ed. 253; [*Taylor v. Green*, 7 Halst. 124. An incorporated city need not sue in the name of "the inhabitants of the city;" but may sue by its corporate name. *Lowell v. Morse*, 1 Met. 473; *ante*, 265.]

(k¹) [Where a promise is made to a person or corporation by a wrong name, an action may be brought in the true name, setting forth that the parties are the same. *Lowell v. Morse*, 1 Met. 473; *Charitable Association v. Baldwin*, 1 Met. 369; *Commercial Bank v. French*, 21 Pick. 686; *Medway Cotton Manuf. Co. v. Adams*, 10 Mass. 360; *Mil. & Chil. Turp. Co. v. Brush*, 10 Ohio, 111.]

(l) *Meeke v. Oxlade*, 1 New Rep. 289; *Davison v. Savage*, 6 Taunt. 121; 2 Marsh. 301, S. C.; *Stevenson v. Hunter*, 6 Taunt. 406; *ante*, 266.

instead of plaintiffs, the defendant may demur specially, (*m*) though it would be otherwise if the mistake merely occurred in the commencement. We have already seen when the declaration may vary from the process in the name of the plaintiff or defendant, and the consequence of variance. (*n*) In declarations upon contracts, it should be expressed by and with whom the contract was made; (*o*) and where there are two or more persons of the same name, they should be distinguished from each other by the insertion of some appropriate allegation, "the now plaintiff," or "the now defendant," or "the said E. F. ceased," &c. (*p*) In general, however, the neglect thus to distinguish the parties will be aided by intendment, particularly upon a general demurrer, or after verdict. (*q*) But where the plaintiff's name by mistake been inserted instead of the defendant's, or *vice versa*, the declaration will be bad upon special demurrer; (*r*) though it will be aided by verdict, or upon general demurrer, by the statute of jeofails; (*s*) and if the part of the declaration in which the mistake has occurred can be treated as surplusage, then no advantage can be taken even by special demurrer. (*t*) But it has been decided that statutes of jeofails do not extend to the names of *third persons*; (*u*) and a plea of judgment recovered, stating that in the former suit the plaintiff impleaded the defendant in a plea, &c. to the damage of the "defendant," is bad on *general* demurrer. (*x*) When a debt arose on record or specialty, it was formerly usual to state as such in the writ as declaration the defendant's description in the record, specially under an *alias dictus*; but this is no longer the practice.

2dly. The declaration in personal actions must in general state the *time* when every material or traversable fact happened, and whenever heretofore a venue was necessary, time must also have been mentioned. (*a*) The statement of the

Time, certainty in statement of.

(*m*) Tyndall v. Ullesthorpe, 3 Dowl. 2; but see Lyng v. Sutton, 4 M. & Scott, 417.

(*n*) *Ante*, 265, 266.

(*o*) Sheer v. Brown, 2 Ld. Raym. 899; Com. Dig. Action on the Case for Assumpsit, H. 3; Pleader, C. 18, *post*.

(*p*) Connor v. Connor, 2 Wils. 386; Polland v. Lock, Cro. Eliz. 267; Com. Dig. Pleader, C. 18.

(*q*) *Ib.* *Ibid.*; Marshall v. Birkenshaw, 1. New Rep. 172.

(*r*) Morgan v. Sargent, 1 B. & P. 59; Harvey v. Stokes, Wilses, 8. [If the plaintiff have the same Christian name as the defendant, and the declaration, after stating the name of each party correctly at full length, use the Christian name only, as "the said James being in custody," it is certain to a common intent, and good on special demurrer. Hildreth v. Hawes, Kent C. J. cited 3 Caines, 170, note.]

(*s*) 16 & 17 Car. 2, c. 8; 4 Ann. c. 16;

Com. Dig. Action on the Case for Assumpsit, H. 3; Harvey v. Stokes, Wilses, 5.

(*t*) *Ante*, 252, 253; Lyng v. Sutton, 4 M. & Scott, 417.

(*u*) Harvey v. Stokes, Wilses, 8, 9.

(*x*) Mill v. Pollon, 7 Taunt. 271.

(*y*) 1 Saund. 14 a, note (1).

(*z*) Ring v. Roxbrough, 2 Cr. & 418, 2 Tyr. 468. [In Andrews v. The 40 Conn. 157, Park J. said: "It is an elementary principle of the law of pleading, there must be an allegation in the declaration of the time when any material or traversable fact took place. If no time should be stated, the declaration would be ill on demurrer, and in this case a special demurrer was allowed to a declaration, in which the only allegation of time was that 'the defendant heretofore did seize,' &c.]

(*a*) Per Buller J. The King v. Hollis, T. R. 620, 624, 625; Com. Dig. Pleader, 19; Colthirst v. Bejershin, Plowd. 24;

or precise time, however, is not necessary even in criminal cases, (b) unless it constitute a material part of the contract, &c. declared upon, (b¹) or unless the date, &c. of a written contract or instrument is professed to be described; (c) and except in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff (c¹) and his right of entry accrued. (d) And in stating that a deed, bill, or a promissory note, &c. "bears date" on a certain day, or in describing an usurious contract where time is the very gist of the matter, the real day must be truly stated. (e) In general, the day on which a promise is laid to pay a bill of exchange is not material, unless it be expressly alleged to have been its date; (f) and it is no objection that the day of the promise appears to have been more than six years before the commencement of the action. Thus in assumpsit upon a contract, the day upon which it is made being alleged only for form, the plaintiff is at liberty to prove that the contract, whether it be express or implied, * was made at any other time. (g) And where it is not essential that the day laid in the pleading should accord with the truth, it is not material that the time stated be so distant that in fact the parties could not have then been alive, (h) if in point of law there is no intrinsic impossibility that the

ion v. Richardson, 14 East, 291; Steph. 5th ed. 328; [Gordon v. Myers, 3 Halst. 69; Vanguilder v. Stull, 5 Halst. 233; Bend v. Central Bank of Georgia, 2 Kelly, 92. Where an impossible date is alleged in a declaration, it will be rejected, provided enough be left to give sufficient certainty to the pleading. Pangburn v. Bull, 1 Wend. 345.]

(b) *Ib.*; 1 Saund. 24, note (1); Co. Litt. 263 a; 2 Saund. 5, note (3), 259, note; 2 Hawk. Pl. Cr. B. 2, c. 25, s. 81; Cooke v. Birt, 5 Taunt. 765; Corporation of Arundel v. Bowman, 2 Moore, 91; [Backus v. Clark, 1 Kansas, 303; United States v. Vigol, 2 Dall. 346; Cheetham v. Lewis, 3 John. 43; Tiffany v. Briggs, 13 John. 253; Hill v. Robeson, 2 Sm. & M. 541; Andrews v. Chadbourne, 19 Barb. 147; Simpson v. Talbot, 25 Ala. 469; Brown v. Smith, 3 N. H. 299.]

(b¹) [Allen v. Smith, 7 Halst. 159.]

(c) Pope v. Foster, 4 T. R. 590; Stafford v. Forcer, 10 Mod. 313; Jones v. Mars, 2 Campb. 307, 308; [Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 252, 262.]

(c¹) [Van Allen v. Rogers, 1 John. Cas. 283.]

(d) Doe dem. Whatley v. Telling, 2 East, 257; ante, 212, 213.

(e) Carlisle v. Trears, Cowp. 671; Matthews v. Spicer, 2 Stra. 806; Stafford v. Forcer, 10 Mod. 313; Tate v. Wellings, 3 T. R. 531; Steph. 5th ed. 330. [Where the time of doing a thing is material it must be proved as laid; but it is otherwise when the time is immaterial. Jordan v. Cooper, 4 Serg. & R. 576. An instrument having no

date, or where the date is in blank, may be set forth as executed on a certain day, without stating expressly that it was without date. Grannis v. Clark, 8 Cowen, 36.]

(f) Hawkey v. Borwick, 1 Younge & Jerv 376.

(g) Matthews v. Spicer, 2 Stra. 806; Stafford v. Forcer, 10 Mod. 313; Hawkey v. Borwick, 1 Y. & J. 376; [Hill v. Robeson, 2 Sm. & M. 541; National Lancers v. Lovering, 30 N. H. 511; Stout v. Russell, 2 Yeates, 334.]

(h) Atkins v. Warrington, 7th June, 1827, K. B. before the three judges, MS. Declaration in assumpsit on the common counts: 1st, stated that the defendant heretofore, to wit, on the 1st day of November, A. D. one thousand eight (omitting hundred) and twenty-six, at London, was indebted, &c. and afterwards stated on the day and year aforesaid; special demurrer, assigning as cause that the time mentioned was nonsensical and absurd, and no year was mentioned; and joinder. Chitty for plaintiff, and Watson for defendant. Bayley, J. held this to be no ground of demurrer; first, because the year A. D. 1826 was clearly intended, for as the year one thousand was mentioned, and then eight and twenty-six, the word *eight* must mean *hundred*; and, 2dly, at least the words must mean 1000, 8 and 26, which would be 1034, and the law does not recognize the impossibility of defendant living ever since that time, and consequently there was nothing impossible in declaration. Holroyd and Littledale, Justices, concurred. Judgment for plaintiff.

time laid is correct. (i) So in an action against the acceptor of a bill payable after sight, an allegation that it was accepted on the day of the date will be proved, though it appear that it was accepted on a subsequent day. (k) And an allegation in case by a reversioner that his tenant was, "and still is," possessed of the land, is supported by proof that at the time of the *injury* the tenant occupied; and a subsequent change of tenancy is not material; (l) so that the words "and still is," being immaterial, may be rejected as surplusage. The deed also may be stated in pleading to have been made on a day different from that on which it bears date, provided in such case the words "*bearing date*," &c. be omitted, (m) and it be merely stated that "on &c." the deed was made. So in an action on a bill or note, though it be payable at a particular time "after date," it is not necessary to describe the instrument as "*bearing date*" on a given day; it suffices to state that "heretofore, to wit, on &c." it was made, and the court said they would intend that the date of the instrument was the day on which it was alleged to have been made. (n) In an action of trespass the time is not material; (o) and where several trespasses are stated to have been committed on divers days and times between a particular day and the commencement of the action, the plaintiff is at liberty to prove a single act of trespass anterior to the first day, though he cannot give in evidence repeated acts of trespass, unless committed during the time stated in the declaration. (p) Whether in one continued sentence, or in several sentences connected by the conjunction "and," several facts are stated, the time, though only alleged, will apply to each fact; as in trespass, that the defendant &c. at, &c. made an assault on the plaintiff, *and took* and carried away a bag. (q) And it is said that in averring *the performance of a contract, it is not necessary to state any particular day, unless the time be material; (r) and to a negative matter no time need be alleged.

(i) Steph. 5th ed. 329, 344. See 2 Saund. 291 c, note (1); 2 Saund. 171 a, note (1).

(k) Forman v. Jacob, 1 Stark. 46.

(l) Vowles v. Miller, 3 Taunt. 137.

(m) Hall v. Cazenove, 4 East, 477.

(n) Giles v. Bourne, 6 M. & Sel. 75; [Marshall v. Russell, 44 N. H. 509.]

(o) Co. Litt. 283 a; [Pierce v. Pickens, 16 Mass. 472; Knapp v. Slocomb, 9 Gray, 73. Under the practice act of Massachusetts, (Genl. Sta. c. 129, § 2, div. 2), a declaration in tort for breaking and entering a close need not contain any averment of time. Knapp v. Slocomb, *supra*.]

(p) 1 Saund. 24, note (1); Hume v. Oldacre, 1 Stark. R. 351; [Powell v. Bagg, 15 Gray, 507; Pierce v. Pickens, 16 Mass. 470. But he may give evidence of successive trespasses of the same kind committed within that time. Folger v. Fields, 12 Cush. 93.]

(q) Taylor v. Welsted, Cro. Jac. 566; Webb v. Turner, Andr. 251; Com. Pleader, C. 19; Garret v. Johnson, Raym. 576; Lowe v. Kirby, Sir W. Jones, 56. It has been decided to be unnecessary to state a declaration containing the common counts to allege in those counts a time when the goods were sold and delivered, the time of payment, or the account stated. Lane v. Wall, 4 Dowl. 705; 1 M. & W. 140; Jackson v. Cawley, 6 Dowl. 388; Blount v. Durham, 1 P. & D. 58; Leaf v. Lees, 1 M. & W. 579; 7 Dowl. 189; Webb v. Ball, Ad. & El. 841.

(r) The Lady Shandois v. Simpson, 10 Ad. & El. 880.

(s) The King v. Holland, 5 T. R. 149; Colthurst v. Bejushin, Plowd. 24 a; Dlg. Pleader, C. 19.

But there should in general be a distinct averment of time to every material fact. (t)

In framing the declaration, care must be taken that no material part of the cause of action, or damages resulting from the injury, or other material fact, appear to have accrued after the time to which the declaration by its date at the top refers, for otherwise it will be subject to a demurrer, (u) and where it was positively and expressly averred in the declaration that the plaintiff had sustained damage from a cause subsequent (u¹) to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury gave entire damages, judgment was arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to judgment. (x) And after verdict, judgment will not be stayed or reversed for a mistake of the day, month, or year, in any bill, declaration, or pleading, where the right time in any writ, plaint, roll, or record preceding, or in the same roll or record where the mistake is committed, is once alleged; (y) and this provision was afterwards extended to judgment by confession, *nil dicit*, &c. in courts of record, (z) and to penal actions. (a)

Moreover, the pleader must take care, in stating time, that there be no *inconsistency* in dates. Thus where a declaration at the suit of an administrator, after stating a promise to the intestate on the 2d January, A. D. 1832, afterwards stated that the letters of administration were granted to the plaintiff at a *prior date*, viz. the 2d January, 1831, this obvious inconsistency was holden fatal on special

(t) Denison v. Richardson, 14 East, 300; Pippin v. Sheppard, 11 Price, 400; and see note (b), post, 275. As to the legal import of the words "immediately," and "then and there," see Com. Rep. 480; 1 Chit. Crim. Law, 219.

(u) 2 Saund. 291, note (1), c; [Maynard v. Talcott, 11 Barb. 569; Hare v. Van Deusen, 32 Barb. 92; Smith v. Holmes, 19 N. Y. 271; M'Cullough v. Colby, 4 Bosw. 603; Watson v. Thibon, 17 Abb. Pr. 184; Lowry v. Lawrence, 1 Caines, 69; Cheetham v. Lewis, 3 John. 42; Warring v. Yates, 10 John. 119. The action cannot be commenced before the cause of it accrues. Swift v. Crocker, 21 Pick. 241; Hsley v. Jewett, 2 Met. 168; Church v. Clark, 21 Pick. 310. Whether the mistake is cured by verdict, see Cheetham v. Lewis, 3 John. 44; Bemis v. Faxon, 4 Mass. 263; Crouse v. Miller, 10 Serg. & R. 155.] When the exact day is immaterial, the statement of a day after the writ issued is no ground for arresting the judgment, although it may be ground of special demurrer. Thus, in an action of assumpsit for money lent, the writ was issued on the 20th of February; in the declaration, which was

delivered on the 8th of March, the cause of action was alleged to have accrued on the 27th February, and it was held no ground for arresting the judgment. Arnold v. Arnold, 3 Bing. N. C. 81; 5 Dowl. P. C. 203. [Under the practice act of Massachusetts an answer or replication may allege facts which have accrued since the institution of the suit, and the plaintiff and defendant may be allowed by the court to make a supplemental declaration, answer, or replication, alleging material facts which have occurred or come to the knowledge of the party since the former declaration, answer, or replication. Genl. Sts. c. 129, § 25; Robinson v. Trofitter, 106 Mass. 51.]

(u¹) [Langer v. Parish, 8 Serg. & R. 134, and cases cited in the opinion of the court.]

(x) 2 Saund. 171 c; Com. Dig. Pleader, C. 19; [Shaw v. Wile, 2 Rawle, 280; Crouse v. Miller, 10 Serg. & R. 158, 159.]

(y) 16 & 17 Car. 2, c. 8; Com. Dig. Pleader, C. 19; [Allaire v. Onland, 2 John. Cas. 56.]

(z) 4 Anne, c. 16.

(a) 4 Geo. 2, c. 26; Myddleton v. Wynn, Bart., Wille, 600.

demurrer, although the latter date was preceded by an all
 * that the grant was after the death, and the time was laid
videlicet. (b)

Since the uniformity of process act, 2 W. 4, c. 39, the
 considered the commencement of the action, and not
 fore mere process to bring the defendant into court;
 now, if the writ be issued before the cause of action
 plete, the plaintiff would be nonsuited, if the defendant plead
 raise the objection; (c) and the above expressly requires that t
 day of issuing the process shall be stated therein; and Reg. G
 Term, 4 W. 4, No. 1, requires the *issue* to state the actual date
 writ as well as of the declaration. The Reg. Gen. Mich. Term
 4, reg. 15, and of Hil. Term, 4 W. 4, reg. 1, expressly requ
 declaration in all *personal* actions to be intituled of the very
 the month and year when the same is filed or delivered. But t
 lect to intitule the declaration of the proper day, month, and
 no ground of demurrer, but merely an irregularity to be tak
 vantage of by summons or motion. (d) The declaration need
 pressly notice the date of the writ, (e) though care must be o
 to state all facts to have occurred on a day before the writ iss
 at least not on a subsequent date. (f)

It is also essential that no material fact be stated in the decl
 to have happened after the *date or teste of the writ*, (f¹) w
 now in all cases considered the commencement of the action, a
 not legally be issued until after the cause of action is complet

(b) *Ring v. Roxbrough*, 2 Tyr. 468; 2 Cr. & Jer. 418, S. C. See *Holmes v. Newlands*, 3 P. & D. 128, where in trespass it was held, as the dates were under a *videlicet*, and not in their nature material, that the replication was not contradictory, on the ground that it admitted a right of entry to have accrued since 1820, the action being tried in 1839, and denied it to have accrued within twenty years.

(c) *Alston v. Underhill*, 1 Cr. & M. 492; *Thompson v. Dicas*, 1b. 768; 3 Tyr. 427; *Steward v. Layton*, 3 Dowl. 430; 3 Chitty's Gen. Prac. by Lush, 125; [*Nickerson v. Babcock*, 29 Ill. 497; *Church v. Clark*, 21 Pick. 310; *Ilsey v. Jewett*, 2 Met. 168; *Wingate v. Smith*, 20 Maine, 287; *Collier v. Crawford*, Minor, 100; *Reed v. Brewer*, Peck, 275. The plaintiff cannot, in an action of assumpsit, recover on a note not yet due. *Child v. Eureka &c. Works*, 44 N. H. 354; *Rainey v. Long*, 9 Ala. 754.]

(d) *Neal v. Richardson*, 2 Dowl. 89; *Hodson v. Pennell*, 4 M. & W. 373; 7 Dowl. 208, S. C.; 3 Chitty's Gen. Prac. by Lush, 385.

(e) *Du Pré v. Langridge*, 2 Dowl. 584; 3 Chitty's Gen. Prac. by Lush, 385.

(f) *Ante*, 274; *Boyce v. Morgan*, 3 Caines, 133; [*Warring v. Yates*, 10 John.

119; *Harper v. Montgomery*, 5 L. Roud v. Griffith, 11 Serg. & R. 1. don v. Kennedy, 2 Binn. 287; Faxon, 4 Mass. 263.]

(f¹) [See *Bemis v. Faxon*, 4 Ma

(f²) [*Warring v. Yates*, 10 Jo Gordon v. Kennedy, 2 Binn. 287; Griffith, 11 Serg. & R. 130; Lang ish, 8 Serg. & R. 134; *Bryce v. M Caines*, 133; *Harper v. Montgomery* (Ky.) 347; *Swift v. Crocker*, 21 P Church v. Clark, 21 Pick. 310; Jewett, 2 Met. 168. In most su suing out of the writ is regarded as mencement of the action. Cox v. Ala. 256; *Carpenter v. Butterfield* Cas. 145; *Bird v. Caritat*, 2 Jol Cheetham v. Lewis, 3 John. 42; v. Sharp, 15 John. 326; *Ross v. l Cowen*, 158; *Hogan v. Cuyler*, 8 203; *Gardner v. Webber*, 17 Pi Bunker v. Shed, 8 Met. 150; Swift er, 21 Pick. 241; *Ford v. Phillips*, 202; *Thompson v. Bell*, 6 Monroe, 5 v. Lamb, 7 Vt. 426; *Chiles v. Jones*, 545; *Caldwell v. Heitsahu*, 9 Watts Pindell v. Maydwell, 7 B. Mon. 314 v. Colcord, 2 N. H. 36; *Whitaker bull*, 3 Harr. 172; *Feazle v. Simpson*, 30. Under this rule, the date of th

The Reg. Gen. Hil. Term, 4 W. 4, prescribes that the date of the first writ shall be stated in the *issue*, and consequently it will afterwards appear on the face of the *nisi prius* record. The pleader should therefore always ascertain the date of the first writ, and state every fact to have occurred before that day. When, however, the exact day is immaterial, as in an action for verbal slander, the statement by mistake in the declaration that the words were uttered after the writ issued, but before the title of the declaration, would be aided by verdict, and would not afterwards constitute a ground of motion in arrest of judgment or writ of error, because it will be inferred that the judge would not have suffered the plaintiff to have obtained a verdict, if the evidence had shown that the action was prematurely brought. (g)

*3dly. The pleading rules, Hil. Term, 4 W. 4, in order to abolish all unnecessary statements, enjoin that the *venue* shall be stated only in the *margin*, and not be repeated in the body, excepting when local description is essential; and that in trespass *quare clausum fregit*, the name of the close or abutments must be stated, or a special demurrer will be sustainable; (g¹) and in a declaration in an inferior court, or upon a judgment or proceeding of an inferior court, every material fact must be averred to have accrued *within the jurisdiction*. (h) We will presently consider the doctrine of *venues*.

4thly. It is still more material that certainty and accuracy be observed in the *more substantial parts* of the declaration, which

primé facie evidence of the true time when the action was commenced, even though the date is only a day or two before the action would be barred by the statute of limitations, and though the writ is not served until several weeks after its date, and no reason is shown for the delay. *Bunker v. Shed*, 8 Met. 150; *Johnson v. Farwell*, 7 Greenl. 373; *Day v. Lamb*, 7 Vt. 426; *Bronson v. Earl*, 17 John. 63; *Gardner v. Webber*, 17 Pick. 407. See *Houghton v. Leary*, 3 Dev. & B. 21; *Boughton v. Bruce*, 20 Wend. 234. In Connecticut and Vermont the service of the writ is the commencement of the action; *Clark v. Helms*, 1 Root, 487; *Jencks v. Phelps*, 4 Conn. 149; *Spalding v. Butts*, 6 Conn. 30; *Gates v. Bushnell*, 9 Conn. 530; *Downer v. Garland*, 21 Vt. 362; except in Vermont, for the purpose of avoiding the statute of limitations; *Kirby v. Jackson*, 42 Vt. 552; and the return is evidence of the time of commencement; *Perkins v. Perkins*, 7 Conn. 558. For other states, see *Underwood v. Tatham*, 1 Ind. 276; *Caldwell v. Heitsch*, 9 Watts & S. 51; *Sharp v. Maguire*, 19 Cal. 577; *Hancock v. Ritchie*, 11 Ind. 48; *Hogan v. Burch*, 8 Iowa, 309; *Reed v. Chubb*, 9 Iowa, 178; *Elliott v. Stevens*, 10 Iowa, 418. Under New York Code of Procedure, see

Wiggin v. Orser, 5 Duer, 118; *Lee v. Averill*, 1 Sandf. 731. In some cases, although the writ is actually made, yet the action will not be considered as commenced until the plaintiff elects to use it; as where a demand and refusal are necessary to give a right of action, and the writ is made not to be used until such demand and refusal, the actual use of it will be the commencement of the action. *Graves v. Ticknor*, 6 N. H. 537; *Robinson v. Burleigh*, 5 N. H. 225. So where a writ is filled up provisionally, and delivered to an officer with instructions not to serve it until after a certain time, or the happening of a certain event, the action will not be deemed to have been commenced until the service of the writ. *Seaver v. Lincoln*, 21 Pick. 267; *Badger v. Phinney*, 15 Mass. 359.]

(g) *Steward v. Layton*, 3 Dowl. 430. See, also, *Arnold v. Arnold*, 3 Bing. N. C. 81; 5 Dowl. 203, S. C.; [*Bemis v. Faxon*, 4 Mass. 263; *Crouse v. Miller*, 10 Serg. & R. 155; *Shaw v. Wile*, 2 Rawle, 280. But see *Cheetham v. Lewis*, 3 John. 44.]

(g¹) [See *Palmer v. Tilton*, 39 N. H. 488; *Noyes v. Colby*, 30 N. H. 143; *Moody v. Hinkley*, 34 Maine, 200; *Hall v. Mayo*, 97 Mass. 419, 420.]

(h) *Read v. Pope*, 1 Cr., M. & R. 302.

to wit, an attorney of the court of our lady the queen, before the queen herself. And thereupon heretofore, to wit, on the — day of —, A. D. —, in consideration that the plaintiff, at the request of the defendant, *would* retain and employ the defendant as such attorney, to commence and prosecute a certain action, to wit, an action at the suit of the plaintiff against one G. H., for the recovery of a certain sum of money, to wit, the sum of £—, then claimed by the plaintiff to be due to him from the said G. H., for fees and reward to be therefore paid to the now defendant; he, the now defendant, then promised the plaintiff to observe and perform his duty as such attorney for the plaintiff in the premises. And the plaintiff saith that he, confiding in the said promise of the defendant, did afterwards, to wit, on the day and year aforesaid, at the request of the defendant, retain and employ him as such attorney to commence and prosecute the said action against the said G. H. in the court of Q. B. at Westminster, for the recovery of the said sum of money, and for fees and reward to be therefore paid to the now defendant, and the defendant then accepted the said retainer and employment, and in pursuance thereof then commenced and prosecuted the said action. And although such proceedings were thereupon had in the same action, and afterwards, to wit, on, &c. a certain issue [or, "issues," *if several*], before then joined between the same parties, was about to be tried, according to the course and practice of the said court, and thereupon it then became and was the duty of the now defendant as such attorney, and in pursuance of his said retainer and employment, to cause and procure *due care* to be observed in ascertaining and adducing sufficient evidence to enable and entitle the plaintiff to obtain and recover a verdict in the said action against the then defendant therein; yet the defendant, disregarding his said duty and his promise in that behalf, did not nor would cause or procure *due care* to be observed in so ascertaining and adducing sufficient evidences to enable or entitle the plaintiff to obtain a verdict in the action against the said then defendant, but wholly neglected and omitted so to do. And by reason and in consequence thereof, and of the careless and improper conduct of the now defendant in and about the conduct of the said action for the plaintiff, afterwards, to wit, on, &c. the plaintiff became and was nonsuited therein. And by reason thereof the plaintiff hath been and is greatly delayed and hindered in the recovery of the said money so claimed by him as aforesaid, and the plaintiff hath incurred and paid, and hath become liable to pay, to the said G. H., divers sums of money amounting to a large sum, to wit, the sum of £100, as and for his costs of the defence of the said action. And thereby also the plaintiff hath incurred great trouble and expense, to wit, an expense of £100 in and about the said action, which hath been and is by means of the said negligence and improper conduct of the defendant in the premises become abortive and unproductive as aforesaid. To the damage of the plaintiff of £—, and thereupon he brings suit, &c.

Inducement.

Consideration.

Promise.

Averments.

Defendant's breach.

Consequent damage.

Division and arrangement of parts of a declaration in assumpsit.

* We will consider the above form, and its several *parts*, and those of a declaration in general, under the following heads, viz.

1. The title of the declaration as to the *court*.
2. The title of the declaration as to the *time* when it is filed or delivered.
3. The *venue* in the *margin*.
4. The *commencement*.
5. The *body*.

Inducement.

Consideration.

Promise.

Averments.

Breach.

Consequent damage.

6. The *conclusion*.

7. The *profert* of deeds, probates, and letters of administration &c.
8. The statement of *pledges* to be discontinued.
9. Other *miscellaneous* points.

The Reg. Gen. Mich. T. 3 W. 4, I. reg. 15, orders that the declaration shall *be intituled in the proper court,* that title be omitted or be merely *indorsed*, the court aside the declaration for irregularity. (t)

Every declaration in a *personal* action commenced in either superior courts (Reg. Gen. Mich. T. 3 W. 4, reg. Hil. T. 4 W. 4, reg. 1), is to be intituled of the day, Title as to time. month and year when actually filed or delivered. The neglect to intitule the same would in general only be an irregularity and not a ground even of special demurrer, (u) or for a summons to the plaintiff to state the proper title. (x) The *date* of the writ now we have seen, be stated in the declaration, though it must be stated in issue. (y) As the above rules extend only to *personal* actions commenced in the superior courts, and not to ejectment, a declaration in ejectment is to be intituled usually of the preceding term as before, (z) unless where the right of entry has accrued pending the term, or an issuable term, when the statute 1 W. 4, c. 70, sect. 36, gives a new and peculiar right of declaring. (a) When an action has been removed from an * inferior court, the title is to be of the term in which the removing process was returnable.

As the courts, by Reg. Gen. Hil. T. 4 W. 4, at length ventur- Repetition of time still essential. ed to promulgate that there should be no *statement or repetition* of *venue* or place in the body of a declaration when immaterial, except in trespass *quare clausum fregit*, or when location of the description is requisite; it is to be hoped that ere long there will be a similar rule abolishing the necessity for repetition of *time*, which in every case time is immaterial, but till then time must be repeated, as the word *then*, in every distinct sentence. (b)

Immediately after the title of the term follows the statement of the *margin* of the *venue* or county in which the facts are alleged to have occurred, and in which the cause is to be tried. Bally. The venue.

(t) Rippling v. Watts, 4 Dowl. 290.
 (u) Neal v. Richardson, 2 Dowl. 89; Hodson v. Pennell, 7 Dowl. 208; 4 M. & W. 373, S. C.; 3 Chitty's Gen. Prac. by Lush, 385; [Dougherty v. Edwards, 25 Ark. 84.]
 (x) Wilkes v. Halifax, 2 Wils. 256; Thompson v. Marshall, 1 Wils. 304.
 (y) Du Pré v. Langridge, 2 Dowl. 584.
 (z) Doe dem. Fry v. Roe, 3 Moore & Scott, 370; Doe dem. Gillet v. Roe, Ib. 376; 1 Cr.

M. & R. 19; 4 Tyr. S. C.; Doe v. Ad. & El. 11; Doe dem. Ashman v. Bing. N. C. 253; Anonymous, 1 Proceedings in *scire facias* have been held to be within the rule. Collins v. B. 5 Dowl. 700.

(a) 1 W. 4, c. 70, s. 36.

(b) See ante, 275, note (b).

(b¹) [If the venue is substantially sufficient. Gassett v. Palmer, 3

The doctrine of *venues* was explained and elucidated by Lord Mansfield in the case of *Fabrigas v. Mostyn*, (c) and in Co. Litt. 125 a, note (1). "There is a *substantial* and a *formal* distinction as to the *locality of trials*. The *substantial* distinction with regard to matters arising *within the realm* is where the proceeding is *in rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place; as in the case of *ejectments*, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, and the officers are county officers, the judgment could not have effect if the action were not laid in the proper county. (d) So, with regard to matters that arise *out of the realm*, there is also a *substantial* distinction of locality, for there are some cases that arise out of the realm, which ought not to be tried anywhere but in the country where they arise: as if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the queen, but the breach of the peace is merely local, though the trespass against the person is transitory. (e) So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality." (f)

"The *formal* distinction arises from the *mode* of trial; for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is *absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county to bring a jury from thence to try it. (g) This matter of form goes to all cases that arise abroad; but the law makes a distinction between transitory and local actions. If the matter which is the cause of a transitory action arise within the realm, it

105. When no venue is laid in the body of the declaration, reference must be had to the margin, and the venue there is sufficient. *Slate v. Post*, 9 John. 81; *Clapp v. Gilman*, 2 Blackf. 45. In Massachusetts the venue in a transitory action is matter of form, and an amendment changing the venue, made after general issue was pleaded, may be allowed. *Gay v. Homer*, 13 Pick. 535. In *Briggs v. Nantucket Bank*, 5 Mass. 96 (1809), Parsons C. J. said: "In this commonwealth venues are of no use. In the early days of our law they were not averred; and tradition has handed down the first case in which they were held necessary. It happened about sixty years ago. Since that time they have been considered a necessary part of technical form, but not as a substantive part of the writ. We therefore hold a declaration without a venue, or with a wrong one, as bad in form when specially demurred

to for this cause; but for no other reason that I can devise, but a long usage." See *Gilbert v. Nantucket Bank*, 5 Mass. 97.]

(c) *Cowp.* 176, 177. See *Goodlike v. Lammiman*, 2 Campb. 274. And as to venues in general, see *Com. Dig. Action, N. and Pleader, C. 20*; *Bac. Abr. Action, A. a.*; *Vin. Abr. Trial, H. a. 2, &c. and Place*, 7 Co. 3; *Stephen*, 5th ed. 315.

(d) *The Mayor &c. of London v. Cole*, 7 T. R. 587, 588; *post*, 280.

(e) *Sed quare*, for the *contra pacem* is not now traversable. See *Rafael v. Verelst*, 2 Bl. Rep. 1058; *Vin. Abr. contra pacem*; [*Smith v. Bull*, 17 Wend. 323.]

(f) *Shelling v. Farmer*, 1 Stra. 646; *Daulson v. Matthews*, 4 T. R. 503. *Sed quare*, if there be no court of judicature to resort to abroad. *Ib. Ibid.*; *The King v. Johnson*, 6 East, 599.

(g) Co. Litt. 125 a, b.

may be laid in any county, the place not being material; as if an imprisonment be in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, it does not at all prevent the plaintiff from recovering damages. The place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the proper county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue, but if they go to trial without it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county; but there are occasions which make it absolutely necessary to state in the declaration that the cause of action really happened abroad: as in the case of specialties, where the date must be set forth, if the declaration state a specialty to have been made at Westminster, in Middlesex, and upon producing the deed, it bear date at Bengal, the action is gone, (*h*) because it is such a variance between the deed and the declaration as makes it appear to be a different instrument; (*h*¹) but the law has in that case invented a fiction, and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial by a *videlicet* in the county of Middlesex, or any other county." From these observations it appears that the points as to venues may be considered practically with reference, 1st, To where, or in what county, the venue is to be laid; 2dly, How, and in what parts of the declaration, it is to be stated; and 3dly, The consequences of mistake, and when they are aided.

1st. The venue is either *local* or *transitory*; (*h*²) if local, it must be laid and the cause be tried in the county in which the cause of action arose, or the injury was really committed, although even then subject to be tried by the court or a judge in any other county or place under 3 & 4 W. 4, c. 42, sect. 22. And if the venue be transitory, it may be laid in the declaration and the cause tried in any county, (*i*) subject also then to its being changed by the court in some cases, if not laid in the county where the cause of action really arose. (*k*) We will consider when the venue is local or transitory at common law, and when it is local by statute.

(*h*) *Sed quære*; and *vide post*, 282.

(*h*¹) [*Alder v. Griner*, 13 John. 450.]

(*h*²) [As to the distinction between local and transitory actions, see *Mason v. Warner*, 31 Missou. 508; *Henwood v. Cheeseman*, 3 Serg. & R. 503; *Phelps v. Decker*, 10 Mass. 267; *Livingston v. Jefferson*, 1 Brock. 203. If an action be brought in the wrong county, that fact may be pleaded in abatement or taken advantage of by motion. But the general issue is a waiver of whatever

might have been so pleaded or taken advantage of by motion. *Webb v. Goddard*, 46 Maine, 505; *Demuth v. Cutler*, 50 Maine, 298.]

(*i*) 1 Saund. 74, note (2); Gilb. C. P. 84.

(*k*) See Chitty's Arch. Prac. 7th ed. and 3 Chitty's Gen. Prac. by Lush, 538-548, for the recent decisions as to changing venue. See, also, *Mondel v. Steele*, 1 Dowl. N. S. 155.

* When the cause of action could only have arisen in a particular place or county, it is *local*, and the venue must be laid therein. As in real actions, mixed actions, waste, *quare impedit*, or ejectment, for the recovery of the seisin or possession of land, or other real property. (*l*) So actions, though merely for damages, occasioned by injuries to real property, are local, as trespass, (*l*¹) or case for nuisances, (*m*) or waste, &c. to houses, lands, water-courses, right of common, ways or other real property, unless there were some contract between the parties on which to ground the action. (*n*) And if the land, &c. be out of this kingdom, the plaintiff has no remedy in the English courts; at least if there be a court of justice in the country in which the land is situate to which he may resort. (*o*) When the parties consent, with leave of the court, to try a local action in another county, such consent should appear upon the record, (*p*) as it does by suggestion when the court or a judge order the trial or inquiry to take place in another county under 3 & 4 W. 4, c. 42, sect. 22. Where, however, an injury has been caused by an act done in one county to land, &c. situate in another; (*q*) or whenever the action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either. (*r*) The venue in replevin is local. (*s*)

When the venue is local.

In an action of debt on a judgment of a court of record, the venue must be laid in the county where the record is; (*s*¹) as in Middlesex, upon the judgment or recognizance of either of the superior courts at

(*l*) *Daulson v. Matthews*, 4 T. R. 504; *The Mayor &c. of Berwick v. Ewart*, 2 Bl. Rep. 1070; *Com. Dig. Action, N.*; *The Mayor of London v. Cole*, 7 T. R. 587, 588; *Fabrigas v. Mostyn*, *Cowp.* 176; 7 Co. 2 *b*; *Freeman v. Booth*, 3 Lev. 141; *Bac. Abr. Actions, Local and Transitory, A.*; *The Company of the Mersey & Irwell Navigation v. Douglas*, 2 East, 498, 499.

(*l*¹) [*Putnam v. Bond*, 102 Mass. 370; *Loeb v. Mathis*, 37 Ind. 306.]

(*m*) *Warren v. Webb*, 1 Taunt. 379; *Jefferies v. Duncombe*, 11 East, 226; *The Company of the Mersey & Irwell Navigation v. Douglas*, 2 East, 497; *Hamer v. Raymond*, 5 Taunt. 789; [*Sumner v. Finegan*, 15 Mass. 284; *Livingston v. Jefferson*, 1 Brock. 203; *Roach v. Darnon*, 2 Humph. 425; *Graves v. McKeon*, 2 Denio, 639. The right to property in chattels, that has become such by severance from the freehold cannot be tried in a transitory action. *Powell v. Smith*, 2 Watts, 127; *Brown v. Caldwell*, 10 Serg. & R. 114; *Baker v. Howell*, 6 Serg. & R. 476. By statute in Virginia, trespass *quare clammum* is a transitory action. *Livingston v. Jefferson*, 1 Brock. 203.]

(*n*) *Warren v. Webb*, 1 Taunt. 379. [See *Sumner v. Finegan*, 15 Mass. 284; *Livingston v. Jefferson*, 1 Brock. 203; *Lewis v. Martin*, 1 Day, 263.]

(*o*) *Daulson v. Matthews*, 4 T. R. 503;

Shelling v. Farmer, 1 Stra. 646; *Mostyn v. Fabrigas*, *Cowp.* 180; *The King v. Johnson*, 6 East, 598, 599.

(*p*) *Co. Litt.* 125 *b*, 126 *a*, note (1); *Tidd*, 9th ed. 606.

(*q*) *Sutton v. Clarke*, 6 Taunt. 29.

(*r*) *Pope v. Davis*, 2 Taunt. 252 (which overrules 2 Campb. 266, S. C.); 7 Co. 1; *Archbold & Bonnell's case*, 3 Leon. 141; *Scott v. Brest*, 2 T. R. 241; *The Mayor of London &c. v. Cole*, 7 T. R. 583; *Com. Dig. Action, N.* 3, 11; [*Bogert v. Hildreth*, 1 Caines, 2; *Marshall v. Hosmer*, 3 Mass. 23.] In debt *qui tam* for usury, the venue should be laid where the interest was taken, although the contract was made in another county. *Pearson v. M'Gouran*, 3 B. & C. 700; 5 D. & R. 616, S. C.

(*s*) 1 Saund. 347, note (1). [Although brought for a cause of action for which trespass *de bonis asportatis* would lie. *Robinson v. Mead*, 7 Mass. 353; *Williams v. Welch*, 5 Wend. 290; *Atkinson v. Holcomb*, 4 Cowen, 46, 46. In Pennsylvania, replevin is a transitory action. *Powell v. Smith*, 2 Watts, 127.]

(*s*¹) [*Barnes v. Kenyon*, 2 John. Cas. 381; *Smith v. Clark*, 1 Pike, 63. An action on a foreign judgment, where the plaintiff is not an inhabitant of the state, may be brought in any county in Maine. *Mitchell v. Osgood*, 4 Greenl. 124.]

Westminster. (*t*) A *scire facias* on a judgment, being only a continuation of the former suit, and not an original proceeding, must be laid in the county where the venue was first laid, (*t*¹) the defendants being supposed to reside in that county; (*u*) and by the rule of H. T. 2 W. 4, reg. 80, a *scire facias* upon a recognizance taken in Sergeants' Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and the form of the recognizance shall not express where it was taken. Debt for arrears of a rent-charge against the pernor of the profits, not being the original * grantor, is local, the defendant being chargeable in respect of his possession, and not on the contract. (*x*) And it has been decided that an action for a breach of a custom or by-law of a town is local, but that debt on a charter is not. (*y*)

In all actions for injuries *ex delicto* to the person or to personal property, the venue is in general transitory, (*y*¹) and may be laid in any county, though committed out of the jurisdiction of our courts, (*z*) or of the queen's dominions. (*a*) Thus, actions for assaults, batteries, (*a*¹) and false imprisonment; (*b*) and for words and libels; (*c*) even for setting up a defamatory mark on the plaintiff's house, denoting that it was a house of ill-fame, being a personal injury to the plaintiff's character, and not considered as an injury to the building; (*d*) and for taking away or injuring personal property; (*e*) and for escapes and false returns; (*f*) and upon bailbonds; (*g*) are transitory. In general, also, actions founded upon contracts are transitory, though made and even stipulated to be per-

When the venue is transitory.

(*t*) Tidd, 9th ed. 1122; Vin. Ab. Trial, H. a. 2, pl. 17; Hall v. Winckfield, Hob. 196. As to venue in an action on a recognizance taken before a commissioner at Durham, see Hartley v. Hodson, 2 Moore, 66.

(*t*¹) [M'Gill v. Perrigo, 9 John. 259.]

(*u*) Tidd, 9th ed. 1122.

(*x*) Pine v. Countess of Leicester, Hob. 37; Vin. Ab. Trial, H. a. 2, pl. 16.

(*y*) The Mayor of Berwick v. Ewart, 2 Bl. Rep. 1068.

(*y*¹) [Glen v. Hodges, 9 John. 67; Gardner v. Thomas, 14 John. 134; Shaver v. White, 6 Munf. 112. An action against a town to recover damages caused by defects in a highway is transitory. Titus v. Frankfort, 15 Maine, 89; Hunt v. Pownall, 9 Vt. 411.]

(*z*) Mostyn v. Fabrigas, Cowp. 161; Com. Dig. Action, N. 12. [In Ohio, all personal actions are transitory, and may be brought in any county in which process can be served on the defendant. Genin v. Grier, 10 Ohio, 209.]

(*a*) Ib.; Raphael v. Verelst, 2 Bl. Rep. 1058; *sed quare*, Mostyn v. Fabrigas, Cowp. 176. [An action will lie in any state for a trespass committed on board a foreign vessel, on the high seas, where both parties are foreigners; but it is a matter of discretion

in the court to exercise jurisdiction or not according to circumstances. Gardner v. Thomas, 14 John. 134; Johnson v. Dalton, 1 Cowen, 543.]

(*a*¹) [Watts v. Thomas, 2 Bibb, 458; Redgrave v. Jones, 1 Harr. & M. 195; Smith v. Bull, 17 Wend. 323.]

(*b*) Mostyn v. Fabrigas, Cowp. 161; Co. Litt. 282.

(*c*) Pinkney v. Collins, 1 T. R. 571.

(*d*) Jefferies v. Duncombe, 11 East, 226; 2 Campb. 3, S. C.

(*e*) Com. Dig. Action, N. 12; Heathcoat's case, Salk. 670; Vin. Ab. Trial, H. a. 2, pl. 12; Smith v. Milles, 1 T. R. 479.

(*f*) Griffith v. Walker, 1 Wils. 336; Heathcoat's case, Salk. 670; The King v. The Mayor of Newcastle, 1 East, 114; [Bogert v. Hildreth, 1 Caines, 1; Jones v. Pemberton, 7 N. J. (Law) 350. An action against the sheriff for misfeasance is transitory. Foeter v. Baldwin, 2 Mass. 569; Marshall v. Hoamer, 3 Mass. 23; French v. Judkins, 7 Mass. 229; Pearce v. Atwood, 13 Mass. 324; Dennett v. Kneeland, 6 Greenl. 460. But, as to New York, see Seely v. Birdsall, 15 John. 267.]

(*g*) Gregson v. Heather, Fort. 366; 2 Strange, 727; Ld. Raym. 1455, S. C. See 1 Saund. 74, note (A), 5th ed.

formed out of the kingdom, for *debitum et contractus sunt nullius loci*. (h) Thus, account, assumpsit, and covenant between the original parties to the deed, and their executors; and debt, even for use and occupation, (i) and detinue, are in general transitory. (k) In those transitory actions also in which the court would change the venue on the defendant's application, and where the plaintiff might wish to bring it back again to the county where it was first laid, upon the usual undertaking to give material evidence in that county, it was necessary to lay the venue in the first instance in the county in which such material evidence could be given. (l)

In an action upon a *lease* for non-payment of rent, or other breach of covenant, when the action is founded on the *privity of contract*, it is *transitory*, and the venue may be laid in any county; but when the action is founded on the *privity of estate*, it is *local*, and the venue must be laid in the county where the estate lies. (m) These * points may be considered as they arise; 1st. Between the *original parties* to the lease; 2dly. In a case of an alienation of the estate of the *lessor*; and, 3dly. Where the estate of the *lessee* has been assigned.

1st. In an action of debt or covenant by the *lessor*, or his executor or administrator, against the *lessee*, or by the *lessee* against the *lessor*, the action being founded on the mere *privity of contract*, is *transitory*, and though the land lie abroad, the action may be brought in England; (n) and debt for use and occupation in the *detinet* only, by the lessor against the executor of the lessee is transitory; (o) but if the action against the executor be in the *debet* and *detinet*, he being charged as assignee, the venue is local. (p) An action of assumpsit against a party who succeeds an original tenant, and impliedly engages to observe the original terms of tenancy, is transitory and not local. (q)

2dly. An action of *covenant* by the *assignee of the reversion* against the lessee, or by the lessee against the assignee of the reversion, upon

(h) Com. Dig. Action, N. 12; 1 Saund. 74, 241 b; *Mostyn v. Fabrigas*, Cowp. 180; *The Dutch West India Company v. Henriquez*, 1 Stra. 612; S. C. in error, 2 Ld. Raym. 1532.

(i) *Egler v. Marsden*, 5 Taunt. 25; [New York v. Dawson, 2 John. Cas. 325; *Low v. Hallett*, 2 Caines, 374; *Henwood v. Cheeseman*, 3 Serg. & R. 500.]

(k) Gilb. C. P. 84; 1 Saund. 74, note (2); [Lewis v. Martin, 1 Day, 263.]

(l) *Price v. Woodburne*, 6 East, 433, 434; *Jones v. Davis*, 1 Chit. Rep. 691 a; *Jones v. Perks*, 1 Chit. Rep. 377; *Wood v. Perkes*, 2 B. & Ald. 618.

(m) [Clark v. Scudder, 6 Gray, 122; *Lienow v. Ellis*, 6 Mass. 331; *White v. San-*

born, 6 N. H. 220; *Birney v. Haim*, 2 Litt. 262.] As to the four different descriptions of privities, and in general how far they affect the venue, see the argument in *Webb v. Russell*, 3 T. R. 394; *Walker's case*, 3 Co. 23; and 1 Saund. 237-242, and the notes (5) and (6); and see *Tidd*, 9th ed. 429; *Mayor of Berwick-upon-Tweed v. Shanks*, 3 Bing. 460.

(n) 1 Saund. 241 b, note (6); *Patterson v. Scott*, 2 Stra. 776; *Stevenson v. Lambard*, 2 East, 579; [Henwood v. Cheeseman, 3 Serg. & R. 500.]

(o) Gilb. Debt, 403; Gilb. C. P. 91.

(p) *Ib.*; *Connel v. Lisset*, 2 Lev. 80; *Vin. Ab. Trial*, H. a. 2, pl. 22.

(q) *Buckworth v. Simpson*, 1 Cr., M. & R. 834.

an express covenant contained in the lease, and running with the estate in the land, is transitory by the operation of 32 Hen. 8, c. 34; (r) which transfers the privity of contract with respect to such covenants, to and against the assignee of the lessor, in the same plight as the lessor had them against the lessee, or the lessee against the lessor. (s) But in *debt* by the assignee, (t) or devisee, (u) of the lessor against the lessee, which is sustainable at common law, and is founded on the privity of estate, the action is local. (u¹)

3dly. If an action of debt or covenant be brought by the lessor; (x) or his personal representatives; (y) or by the grantee of the reversion; (z) against the assignee of the lessee; (z¹) or in an action of debt against the executor of the lessee in the *debet* and *detinet*; (a) the venue is local, and must be laid in the county where the land lies. (b) And in a case in *covenant* against the assignee of the lessee of premises, described in the declaration as situate within the liberties of *Berwick-upon-Tweed*, it was held that the venue could not be laid in Northumberland. (c) If the land be out of England, no action on the privity of estate can in general be supported in this country. (d) The * action at the suit of the lessor against the assignee of the lessee, was given by the common law, and was local in respect of the *privity of estate*, the privity of contract being destroyed by the assignment; (e) and the assignee of the reversion must also sue the assignee of the term in the county where the land lies, because the statute 32 Hen. 8 transfers the privity of contract to the assignee in the *same manner* as the lessor had it. (f) For the same reason, covenant *by* the assignee of the *lessee* against the lessor, or the grantee of the reversion is local; for it lies at common law only in respect of the privity of *estate*, in which case the venue is always local. (g)

The statute 31 Eliz. c. 5, s. 2, enacts, "That in any declaration or information, the offence against any *penal statute* shall not be laid to be done in any other county but where the *con-*

(r) 1 Saund. 237, 241 b, note (6); Barker v. Damer, Carth. 183; Thrale v. Cornwall, 1 Wils. 165; 3 T. R. 394. Privies in blood, as the heir of lessor, might sue in covenant at common law. Webb v. Russell, 3 T. R. 395.

(s) Ib. Ibid.; 1 Saund. 237, 241 b, note (6); Webb v. Russell, 3 T. R. 401, 402.

(t) 1 Saund. 238, 341 c, note (6); Sir Stephen Bord v. Cudmore, Cro. Car. 183; Thrale v. Cornwall, 1 Wils. 165.

(u) Vin. Ab. Trial, H. a. 2; Bayly v. Bugs, Latch, 271; Tidd, 9th ed. 429.

(u¹) [New York v. Dawson, 2 John. Cas. 335.]

(x) Stevenson v. Lambard, 2 East, 579, 580; Wey v. Yalley, 6 Mod. 194; The Mayor of London v. Cole, 7 T. R. 583.

(y) Smith v. Wayt, Latch, 197.

(z) 1 Saund. 241 c, note (6); The Mayor of London v. Cole, 7 T. R. 583; Stevenson v. Lambard, 2 East, 580; Barker v. Dormer, 1 Show. 191; [White v. Sanborn, 6 N. H. 220; Clarkson v. Gifford, 1 Caines, 5.]

(z¹) [See New York v. Dawson, 2 John. Cas. 335.]

(a) *Ante*, 282, note (m).

(b) Stevenson v. Lambard, 2 East, 580.

(c) The Mayor &c. of Berwick-upon-Tweed v. Shanks, 3 Bing. 459.

(d) Barker v. Dormer, 1 Show. 191, 199; Bac. Ab. Actions, Local and Transitory, A. a.; and see Douleson v. Matthews, 4 T. R. 503; *ante*, 279, note (f).

(e) Kightly v. Bulkly, Sid. 339.

(f) 1 Saund. 241 c; Barker v. Dormer, 1 Show. 199.

(g) 5 Co. 17 a; 1 Saund. 241 d, note (6).

tract or other *matter alleged to be the offence was in truth done* ;” (*h*) and the statute 21 Jac. 1, c. 4, s. 2, enacts, “That in all informations, declarations, &c. for any offence against any *penal statute*, whether on the behalf of the king or any other person, the offence shall be laid and alleged to have been committed *in the county where such offence was in truth committed*, and not elsewhere ; or the defendant, upon the general issue, shall be found not guilty.” And in a penal action for the *omission* of a *local duty*, prescribed by a statute, the venue is local. (*i*) Lord Holt’s opinion appears to have been, that the statute 21 Jac. 1, c. 4, s. 2, extended to *subsequent* statutes, (*k*) but a contrary doctrine was for some time entertained. (*l*) It has however been recently determined, that the first-mentioned statute, 31 Eliz. c. 5, s. 2, extends as well to subsequent as to prior penal statutes, and consequently in all penal actions the venue is now local. (*m*) This statute also extends to offences of omission as well as commission ; (*n*) and a penal action for non-residence must be brought in the county in which the living is situated. (*o*) But neither of the above statutes extends to actions brought by the party grieved. (*p*) Upon the common law principle, where there are two material facts to constitute the offence against a penal statute, and one happened in one county, and the other in another county, it has been supposed that the venue might be laid in either. (*q*) But where an usurious contract was made in one county, and the usurious interest is taken in another, in an action for the penalty, the venue must be laid in another county ; (*r*) and according to the terms of 21 Jac. 1, c. 4, s. 2, it seems safer to lay the venue in the county where the *offence was committed* or *perfected*.

Some actions against *particular persons*, which would otherwise be transitory, must, by different statutes, be laid in the county where the facts were committed, or the plaintiff will be nonsuited. Such are actions upon the *case* or *trespass* against *justices of the peace*, mayors, or bailiffs of cities or towns corporate, headboroughs, portreves, *constables*, tithing-men, churchwardens, &c. or *other persons* acting in their aid and assistance, or by their command, (*s*) for anything

(*k*) As to debt for penalties against usury, see *ante*, 281, note (*r*).

(*i*) *Butterfield v. Windle*, 4 East, 393.

(*l*) *Rex v. Gall*, 1 Ld. Raym. 373.

(*j*) *Attorney General v. Hines*, Parker’s Rep. 186 ; *French qui tam v. Coxon*, Andr. 25 ; 2 Str. 1081 ; *Rex v. Gaul*, 1 Salk. 372, 373 ; Com. Dig. Action, N. 10 ; Bac. Abr. Action *qui tam*, C. ; 1 Saund. 312 c, in the notes ; Bal. N. P. 195 ; Tidd, 9th ed. 430.

(*m*) *Barber v. Tilson*, 3 M. & Sel. 429 ; *Wynne v. Belman*, 5 Taunt. 754 ; 1 Marsh. 320, S. C. ; *Robinson v. Garthwaite*, 9 East, 296 ; Tidd, 9th ed. 430. See *Rex v. Window*, 3 Campb. 78.

(*n*) *Whitehead v. Wynn*, 5 M. & Sel.

427 ; 2 Chit. Rep. 420, S. C. There are several exceptions in the act. See Tidd, 9th ed. 430.

(*o*) *Ib.*

(*p*) *Calliford v. Blawford*, 1 Show. 354 ; Bul. N. P. 196 ; Tidd, 9th ed. 430.

(*q*) *Pope v. Davis*, 2 Taunt. 252 ; 2 Campb. 266, S. C. ; *Butterfield v. Windle*, 4 East, 385 ; Tidd, 9th ed. 430 ; *ante*, 281, *sed quare*.

(*r*) *Pearson v. M’Gowran*, 3 B. & C. 700 ; 5 D. & R. 616, S. C.

(*s*) 21 Jac. 1, c. 12, s. 5. Whether a person who *desires* a constable to act, and *who assists* him is within this provision, see *M’Cloughan v. Clayton*, Holt N. P. Rep.

done (*t*) in their official capacity; and actions against any person for anything done by him as an officer of the *excise*, (*u*) or customs, (*x*) or against any other person acting in his aid in execution or by reason of his office; or for anything done in pursuance of the act for consolidating the provisions of the acts relating to the duties under the management of the commissioners for the affairs of *taxes*, or any act for granting duties to be assessed under the regulations of that act, &c. (*y*) So, the venue is local in an action against an officer of the army, navy, or marines, for anything done in the execution of or by reason of his office; (*z*) or against any person for anything done in pursuance of the acts relative to larceny, &c. or malicious injuries to property. (*a*) And by the statute 42 Geo. 3, c. 85, s. 6, the provisions of the statute 21 Jac. 1, c. 12, with regard to the venue, &c. are extended to all persons in *any public employment*, or any office, station, or capacity, either civil or military, either in or out of the kingdom; and who, under any act of parliament, &c. have, by virtue of any such employment, &c. power to commit persons to safe custody; provided always, that when any action upon the case, trespass, battery, or false imprisonment, shall be brought against any such person in this kingdom, for or upon any act done out of the kingdom, the plaintiff may lay such act to have been done in Westminster, or any county where the defendant shall reside.

The venue in an action against a justice, constable, &c. for an act done in the execution of his office, seems to be local, if the party acted under color of his office, *intending* to act in his official character, *although it did not strictly justify him; for he would want no protection, if in reality he acted in the due course of his office. (*b*)

So actions against persons acting under the acts relating to *highways*; (*c*) or *turnpikes*; (*d*) or the *militia*; (*e*) and various other acts; are local by express provision. *Attorneys*, when plaintiffs, and suing in their own court, have the privilege of laying and retaining the venue in Middlesex in transitory actions, although the cause of action arose in another county. (*f*)

478; Nathan v. Cohen, 3 Campb. 257; Straight v. Gee, 2 Stark. R. 445.

(*t*) General construction of the words for anything done, see Tidd, 9th ed. 19, 29; Smith v. Shaw, 10 B. & C. 277. When it extends to assumpsit for money had and received, Waterhouse v. Keen, 4 B. & C. 200.

(*u*) 23 Geo. 3, c. 70, s. 34.

(*x*) 24 Geo. 3, sess. 2, c. 47, s. 35, 39; which statute is, however, repealed by the 6 Geo. 4, c. 105; and see 28 Geo. 3, c. 37, s. 23; 6 Geo. 4, c. 108, s. 97.

(*y*) 43 Geo. 3, c. 99, s. 70.

(*z*) 6 Geo. 4, c. 108, s. 97.

(*a*) 7 & 8 Geo. 4, c. 29, s. 75, and c. 30, s. 41.

(*b*) Straight v. Gee, 2 Stark. Rep. 445, 448; Wickes v. Clutterbuck, 10 Moore, 63;

Pike v. Carter, 10 Moore, 376; Evans v. Atkins, 4 T. R. 555; Daniel v. Wilson, 5 T. R. 1, 2. See Tidd, 9th ed. 19, 29, 31. But a constable has no protection in this respect if he commit an assault, &c. altogether and clearly not warranted by his office. Anonymous, 1 Stra. 446.

(*c*) 13 Geo. 3, c. 78, s. 81.

(*d*) 3 Geo. 4, c. 126, s. 147. Assumpsit against a toll collector for toll improperly taken is local. Waterhouse v. Keen, 4 B. & C. 200. That was a decision on a local act, but the clause on which the decision turned contained words similar to those used in the 147th sect. of the 3 Geo. 4.

(*e*) 42 Geo. 3, c. 90, s. 178.

(*f*) Seaman v. Ling, 2 Salk. 668; Pope

The Reg. Gen. Hil. T. 4 W. 4, reg. 8, orders that "The name of a county shall in all cases be stated in the *margin* of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the *body* of the declaration or in any subsequent pleading. Provided that in cases where local description is now required such local descriptions shall be given." (f¹)

No venue to be stated in body of declaration or subsequent pleading. Reg. Gen. Hil. T. 4 W. 4, reg 8, in trespass.

The same Reg. (5, in trespass) orders that "In actions of *trespass quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abutments or other description, in failure whereof the defendant may demur specially."

Name of abutments of locus in quo essential.

The first of these rules has put an end to the useless statement and incessant repetition of venue in all *personal* actions, where it is in law quite immaterial in what place or what part of a county the fact or facts occurred, and has thus even rendered more concise the forms of declarations on bills of exchange, promissory notes, and common debts recoverable in assumpsit or debt under the common indebitatus counts. (g) If venue or place be unnecessarily stated, a judge on summons may order the allegation to be struck out, (h) but it is not a ground even of special demurrer, (i) and if inadvertently place be incorrectly repeated only once or so, it would be more liberal practice to apply to the plaintiff's attorney to erase the useless words, instead of vexatiously putting him to the trouble, loss of time, and expense of a summons or motion, which proceeding, as observed by *the court, may be even more vexatious than the useless words objected to. (k) As to the extent of the application of the rule it would seem from its terms to apply to every declaration and pleading in which *local description* is not *clearly required*; so that even in actions where the venue is local, as in *case* for an injury to a house or land, or right of common or way, after stating the county in the margin, no subsequent statement of place is necessary; (l¹) and yet it is usual in these actions to insert a local description, and this notwithstanding the terms of the rule may perhaps be applicable. (l)

v. Redfearne, 4 Burr. 2027; Pye v. Leigh, 2 Bl. Rep. 1065; Yeardley v. Roe, 3 T. R. 573; Partington v. Woodcock, 2 Dowl. 550. The attorney's privilege is confined to Middlesex. Bradshaw v. Burton, 7 Dowl. 329. The privilege of an attorney is unaffected by the uniformity of process act. Lawless v. Tims, 3 Dowl. 707; Dyer v. Levy, 4 Dowl. 630; Wright v. Skinner, 4 Dowl. 745; Davidson v. Chilmann, 1 Bing. N. C. 297; Lewis v. Kerr, 2 M. & W. 226.

(f¹) [See Slate v. Post, 9 John. 81; Clapp v. Gilman, 2 Blackf. 45.]

(g) Reg. Gen. see the rule fully, Jervis's Rules.

(h) Harper v. Chamneys, 2 Dowl. 680; Farmer v. Champneys, 1 Cr., M. & R. 369; 4 Tyr. 859, S. C.; Fisher v. Snow, 3 Dowl. 27; Townsend v. Gurney, 3 Dowl. 168; 1 Cr., M. & R. 590, S. C.

(i) Ib. Ibid.

(k) Per Cur. in Brindley v. Dennett, 2 Bing. 184; 9 Moore, 388, S. C.

(l¹) [Richardson v. Locklin, 6 B. & S. 777.]

(l) See forms, vol. ii.

The venue is thus stated in the margin of the declaration, "Middlesex to wit," or "city of Bristol and county of the same city to wit."

In a declaration of trespass *quare clausum fregit* the rule is express that one of three descriptions must be adopted, as *first*, a name; *secondly*, a description by *abuttals*; or *thirdly*, some other description; or the defendant may demur *specially*, and abutting *towards*, the frequently adopted word, is incorrect, and the proper abuttal is "*on*," so as not to admit of any intermediate property. (*m*) The object of thus requiring particularity is to avoid the necessity for a new assignment, in case of a plea of *liberum tenementum*, (*m*¹) which leads to a useless course of pleading. The subject of abuttals will however be more fully stated when we consider declarations in trespass more particularly.

In *inferior* courts it continues necessary, in addition to the statement of the county as a venue, to aver that every material fact took place "within the jurisdiction of the court," as in *assumpsit* as well that the promise or contract was made, as that the goods were sold, or the money had and received, &c. *within the jurisdiction* of the court, (*m*²) and if the allegation be omitted, the declaration will be insufficient, even after verdict. (*n*) But as to such matters as are stated only in aggravation of damages, and might be omitted, it is not necessary to allege that the same arose within the jurisdiction, (*o*) and it suffices to allege that an account was stated within the jurisdiction, without averring that the items of the account accrued there. (*p*) It * has been decided that even in a declaration in debt on the judg-

(*m*) *Lempriere v. Humphrey*, 1 Harr. & Woll. 170. A description of a close by two abuttals is a sufficient compliance with the rule. *North v. Ingamells*, 9 M. & W. 249; 1 Dowl. N. S. 151, S. C.; and see further as to abuttals, *Webber v. Richards*, 1 G. & D. 114; and what is a variance, *Walford v. Anthony*, 8 Bing. 75; *Brownlow v. Tomlinson*, 1 M. & Gr. 484. [In Massachusetts, it is required in actions of tort for breaking and entering the plaintiff's close, that the place of the alleged trespass shall be designated in the plaintiff's declaration by name, abuttals, or other proper description. Genl. Sta. c. 129, § 6. See *Forbush v. Lombard*, 13 Met. 109; *Sawyer v. Ryan*, 13 Met. 144; *Hall v. Mayo*, 97 Mass. 419.]

(*m*¹) [*Hall v. Mayo*, 97 Mass. 419.]

(*m*²) [See *Thornton v. Smith*, 1 Wash. 81, and cases there cited; *Murray v. Fitzpatrick*, 3 Caines, 41; *Wetmore v. Baker*, 9 John. 307; *Shepherd v. Boyce*, 2 John. 447; *Briggs v. Nantucket Bank*, 5 Mass. 96; *Tuberville v. Long*, 3 Hen. & M. 309.]

(*n*) 1 Saund. 74, *α*, note (1); *Trevor v. Wall*, 1 T. R. 151; *Bentley v. Donnelly*, 8 T. R. 127; *Bourn v. Carrington*, Cro. Jac.

502; *Horton v. Beckman*, 6 T. R. 764; *Read v. Pope*, 1 Cr. M. & R. 302; 4 Tyr. 403, S. C.; *Salter v. Slade*, 1 Ad. & El. 608.

(*o*) 1 Saund. 74, note (1); Bac. Abr. Pleas, E. 1.

(*p*) *Emery v. Bartlett*, 2 Stra. 827. In *assumpsit* for work and labor in healing horses within the jurisdiction of a county court, and for potions, &c. administered on those occasions, it was held that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of the court. *Dunn v. Crump*, 3 B. & B. 309; 7 Moore, 137, S. C. In an action brought in an inferior court in *Wales* upon a *concessit solvere*, though the declaration stated merely a promise and not a consideration, it was held that the plaintiff was bound to prove a consideration arising within the jurisdiction, and that it was not sufficient to prove that the defendant promised to pay within the jurisdiction, unless it appeared that the promise was made upon an account stated, or other consideration arising there. *Williams v. Gibbs*, 5 Ad. & El. 208. See, also, *Dempster v. Purnell*, 4 Scott N. R. 30; 3 M. & Gr. 375, S. C.

ment of the inferior court, it is necessary to show that the original cause of action accrued within its jurisdiction. (*q*)

When a transitory matter has occurred *abroad*, it may in general be stated to have taken place in any English county, without noticing the place where it really happened, but if the real place abroad be stated, it should be shown under a *scilicet*, that it happened in an English county, as for instance, "in Minorca, to wit, at Westminster in the county of Middlesex." (*r*)

In *Mostyn v. Fabrigas*, (*s*) Lord Mansfield observed, that although actions of a transitory nature that arise abroad may be laid as happening in an English county, yet in the case of a deed made abroad, it should be averred that it was made in the foreign country, laying the *venue* under a *videlicet*. But unless a deed, bond, or bill of exchange made abroad, derive from that circumstance any peculiar character unknown to the English law, or be for the payment of foreign money; (*t*) so that the statement that it was a foreign instrument is substantially important; there seems to be no occasion to state that it was made abroad. (*u*) In stating a matter of record, no venue seems necessary, as the record must be presumed to be where the court is; (*x*) but in pleading an Irish judgment it may be otherwise. (*y*)

In penal actions when part of the penalty sought to be recovered is given to the poor of the parish, the name of the parish is matter of substance, and the offence must necessarily be laid and proved to have taken place therein. (*z*) So, in an action, though not local, if the situation of land or other real property be described, though unnecessarily, in a material averment, to be situate in a particular parish or place, the plaintiff would fail on the trial if there were a substantial mistake. (*a*) Where in debt *qui tam* the plaintiff sued as well for the poor of the "parish of St. James, in the county of Middlesex," as for himself, the description of the parish was held sufficient, although there were in the county the parishes of "St. James, Clerkenwell," and of "St. James, in the liberty of Westminster;" for the latter parish is sometimes called by the latter names, and sometimes St. *James. (*a*¹) So where, in ejectment, premises were

(*q*) *Read v. Pope*, 1 Cr., M. & R. 302; 4 Tyr. 403.

(*r*) *Cowp.* 177, 178; 10 Mod. 255; *ante*, 279, 280; 7 T. R. 243; Bayley on Bills, 5th ed. 172; Co. Litt. 261 b. See observations, 1 Stark. Crim. Law, 23, note (*h*); 1 Chitty Crim. Law, 178, 180. As to indictments, 7 Geo. 4, c. 64, s. 12, 13; 9 Geo. 4, c. 31.

(*s*) *Cowp.* 177, 178; *ante*, 279, 280; 2 Ld. Raym. 1043, S. C. in Balk, 622, and 6 Mod. 228.

(*t*) 2 B. & Ald. 301; 2 B. & C. 16; 2 D. & R. 15, S. C.

(*u*) See 3 Campb. 304; Bayley on Bills, VOL. L 24

Steph. 5th ed. 325; 1 Saund. 73, note (*h*), 5th ed.

(*x*) 1 Vent. 264.

(*y*) See 5 East, 473; 4 B. & C. 411.

(*z*) *Clark v. Taylor*, 3 Esp. Rep. 219; 2 Saund. 376, note (*g*); Peake Evid. 199; *Smith v. Bond*, 12 L. J. R. N. S. Ex. 296.

(*a*) *Wilson v. Clark*, 1 Esp./Rep. 273; *Wilson v. Gilbert*, 2 B. & P. 281; *The Queen v. Inhabitants of Barking*, 2 Salk. 452; *Bac. Abr. Trespass, K.*; *King v. Fraser*, 6 East, 352; *Jefferies v. Duncombe*, 11 East, 226; *Oates v. Macken*, 1 Stra. 595.

(*a*¹) *Taylor v. Williams*, 3 Bing. 449.

stated to be in the "parish of St. Luke, in Middlesex," the court held there was no variance, although there is the parish of "St. Luke, Chelsea," in Middlesex, and there is also the parish of "St. Luke, Old Street," in that county; for the latter parish, in which the premises were, is also commonly called "St. Luke, Middlesex;" and the court recognized the principle, that it suffices to describe the parish by the name by which it is commonly known. (δ) It has, however, been held to be a fatal variance to describe land situate in the parish of A. as situate "in the united parishes of A. and B.;" the parishes being united by statute merely for the support of the poor. (ε) But if a fact be stated to have occurred "at or near" a particular place, the mistake may not be so material, (d) and when it is doubtful whether the place where a navigation is alleged to lie is stated in the declaration as a venue or as a local description, it will be referred merely to the venue, and need not be proved to be at such place. (e) The mode of describing the place or venue in trespass and replevin, (f) and other particular actions, is stated in the notes to the several precedents in such actions.

At common law, if it appeared *upon the record* that the contract or cause of action arose in a county different from that in which the venue was laid, it was error. (g) But by 16 & 17 Car. 2, c. 8, "after verdict, judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid:" and this statute extends not only to those cases where there is a wrong venue in the proper county, but also to those where the cause has been improperly tried in a wrong county, and whether the objection appear on the record or not. (h) And the 4 & 5 Anne (i) extends this provision to a judgment by confession, *nil dicet*, or *non sum informatus*. (k) And the same provision appears to have been extended to penal actions by the 4 Geo. 2, c. 26, s. 4. (l) But as *inferior* courts, not of record, are not included in these acts, a declaration in the county court, omitting the necessary allegation as to the subject-matter of the action having arisen within the jurisdiction, will still be insufficient, even after verdict. (m) Hence it follows, that even in local and penal actions in the *superior* courts, the only modes of ob-

(b) *Doe v. Carter*, 1 Y. & J. 492. See, also, *Doe v. Salter*, 13 East, 9.

(c) *Goodtitle v. Lammiman*, 2 Campb. 274.

(d) *Peake's Evid.* 4th ed. 220; 4 T. R. 558, 561; 1 B. & P. 225; 5 Taunt. 789.

(e) 2 East, 497; 11 East, 226, 229; 2 Campb. 3, 5; 5 Taunt. 789.

(f) See 1 Saund. 347, note (1).

(g) *Com. Dig. Action*, N. 6; 1 Saund. 74, note (2).

(h) 1 Saund. 248, note (3); *The Mayor of*

London v. Cole, 7 T. R. 583; 2 Saund. 5 d, in notes.

(i) C. 16, s. 2.

(k) *Ib.*; 2 Com. Rep. 555.

(l) *Myddleton v. Wynn, Bart., Willes*, 599, 601. See *Tidd*, 9th ed. 928; but see *Butterfield v. Windle*, 4 East, 387, 388, where the verdict was set aside, though no objection with regard to the venue appears to have been taken at *nisi prius*.

(m) *Ante*, 287. When or not amendable, *Salter v. Slade*, 1 Ad. & El. 608.

jecting to the venue are by demurrer, (*n*) or at * the trial as a ground of nonsuit. (*k*) In the action of ejectment the objection could not be taken by a demurrer, but would be available on the trial; and at all events there could be no execution, because the sheriff of one county cannot deliver the possession of land in another. (*l*) It has been considered that the total omission of local description in the body of a declaration in ejectment was error, although the proper county was stated in the margin, but the court gave leave to amend pending a writ of error. (*m*) In other *local* actions, if the venue be laid in the wrong county, and the objection appear upon the record, it is clear that the defendant may *demur*; (*n*) and if it do not appear on record, may, sometimes, if the declaration be upon a specialty relating to the premises, avail himself of the objection at the trial as a *ground of nonsuit*; (*o*) or in trespass or ejectment, on the plea of not guilty; (*p*) or in replevin, on the plea of *non cepit*; (*q*) or may plead the matter in abatement. (*r*) And even in transitory actions an unnecessary precise description of local situation may, if erroneous, be fatal on the trial; (*s*) though where the description is rather by way of venue it will be otherwise. (*t*) If a *local description or venue, when necessary, be omitted*, it is not matter of nonsuit, (*u*) but now only a ground of *special demurrer*; (*x*) and by pleading over to the merits any formal defect in the venue is aided. (*y*) In *transitory* actions, the omission of a venue is aided at common law by a judgment *by default*, because the defendant thereby admits that there is nothing to try; (*z*) and an objection merely to the mode in which the venue is stated can be taken only by special demurrer. (*a*)

(*n*) *Thrall v. Cornwall*, 1 Wils. 165.

(*k*) *The Mayor of London v. Cole*, 7 T. R. 588; *Burckshaw v. Hopkins*, Cowp. 410; *Sautler v. Heard*, 2 Bl. Rep. 1033; *Tidd*, 9th ed. 427.

(*l*) *The Mayor of London v. Cole*, 7 T. R. 587, 588; *Mostyn v. Fabrigas*, Cowp. 170; *ante*, 279, 280.

(*m*) *Doe v. Bath*, 2 Nev. & Man. 440; but see *Duncan v. Passenger*, 8 Bing. 355; and *quære*, whether after verdict it is error, for the lessor of the plaintiff must always, at his peril, point out the premises to the sheriff, of which he is to deliver possession, and the local description in the declaration merely of a parish is rarely any precise guide.

(*s*) 1 Saund. 241 *d*, note; *The Mayor &c. of Berwick-upon-Tweed v. Shanks*, 3 Bing. 459; *Barker v. Darner*, Carth. 182; *The Mayor of London v. Cole*, 7 T. R. 588; *The Mayor &c. of Berwick v. Ewart*, 2 Bl. Rep. 1070; *Mellor v. Barber*, 3 T. R. 387; *Thrall v. Cornwall*, 1 Wils. 165; and see *Bowdell v. Parsons*, 10 East, 359. *Quære*, whether a demurrer can be sustained without first setting out the parcels, if the declaration be on a deed and does not set them out. In the

case of *The Mayor &c. of Berwick v. Shanks*, the declaration set out the situation of the premises, and therefore the objection was properly taken on demurrer.

(*o*) *Supra*, note (*k*); *Anon.* 1 Sid. 287; [*Haskell v. Woolwich*, 58 Maine, 535.]

(*p*) *Ib.*; *Oates v. Machen*, 1 Stra. 595.

(*q*) 1 Saund. 347, note (1), cites *Johnson v. Woolyer*, 1 Stra. 507; *Anon.* 2 Mod. 199, *acc.*; *Walton v. Kersop*, 2 Wils. 355, *semb. contra*.

(*r*) Com. Dig. Abatement, H. 17.

(*s*) *Ante*, 288, note (*z*).

(*t*) *Ante*, 289, note (*s*).

(*u*) *Mersey & Irwell Nav. Company v. Douglas*, 2 East, 499; *Walton v. Kersop*, 2 Wils. 354.

(*x*) Reg. Gen. Hil. Term, 4 W. 4, reg. 5.

(*y*) *Purslow v. Bailey*, 2 Ld. Raym. 1039; *Dyer*, 15 *a*; Com. Dig. Pleadar, 85; *Mellor v. Barber*, 3 T. R. 387.

(*z*) *Remington v. Taylor*, Lutw. 237; *The Lady Shandois v. Simpson*, Cro. Eliz. 880.

(*a*) *Mellor v. Barber*, 3 T. R. 387; [*Briggs v. Nantucket Bank*, 5 Mass. 94; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *ante*, 279, note (*b*¹).]

If no venue be laid in the margin the defendant may demur; (b) or, it seems, may plead that matter in abatement. (c)

* We have already noticed another improvement in the law of *venue* enabling either of the superior courts in which any *local* action is pending, or one of the judges thereof, on the application of either party, to order the issue to be tried or writ of inquiry to be executed in any other county or place than that in which the venue is laid; and for that purpose such court or judge may order a *suggestion* to be entered on the record that the trial may be more conveniently had or writ of inquiry executed in the county or place where the same is ordered to take place. But this regulation does not alter the form of the declaration.

Of changing the venue in local actions under 8 & 4 W. 4, c. 42, s. 22.

What is termed the *commencement* of the declaration follows the venue in the margin, and precedes the more *circumstantial statement* of the *cause of action*. The following is the form of the commencement of a declaration in a *personal* action prescribed by the Reg. Gen. Mich. T. 3 W. 4, reg. 15. The other forms there given are now inapplicable.

4thly. The commencement. (d)

In the ——— On the ——— day of ———, A. D. ———.
Venue. — A. B. by E. F. his attorney [or, "in his own proper person"], complains of C. D. who has been summoned to answer the said A. B. For that, &c.

The Reg. Gen. Hil. T. 4 W. 4, rule 20, prescribes the following form of commencement of a declaration when the plaintiff declares in a second action after a plea in abatement of non-joinder of another party liable to be sued.

Venue. — A. B. by E. F. his attorney [or, "in his own proper person"], complains of C. D. and G. H. who have been summoned to answer the said A. B., and which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H. &c.

In suits by infants, or by or against assignees, executors, attorneys, &c. the commencement always varied from the above forms. Infants are stated to sue by guardian or *prochein ami*. (e)
 The representative character of assignees and executors

By and against particular persons.

(b) *Remington v. Taylor*, 1 Lutw. 235.
 (c) *Com. Dig. Abatement*, H. 13.
 (d) See fully as to the points of practice respecting declarations, *Chitty's Archb. Pr.* 7th ed. and 3 *Chitty's Gen. Prac.* by Lush.
 (e) 2 *Saund.* 117 f, note (1); [*M'Giffin v. Stout*, *Coxe*, 91; *M'Daniel v. Nicholson*, 2 *Rep. Const. Ct.* 344; *Bouche v. Ryan*, 3 *Blackf.* 472; *Wilder v. Ember*, 12 *Wend.* 191; *Priest v. Hamilton*, 2 *Tyler*, 49; *Laws of Iowa* (Revis. of 1860), p. 491, § 2777; *Stewart v. Crabbin*, 6 *Munf.* 289. In *New York*, an action cannot now be commenced

by next friend. *Hoftailing v. Teal*, 11 *How. Pr.* 188. The guardian, provided for by the code, must be appointed before the action is commenced, as formerly was required in regard to a *prochein ami*. *Hill v. Thaxter*, 3 *How. Pr.* 407; *Wilder v. Ember*, 12 *Wend.* 191. If the infant plaintiff fails to have a guardian appointed before he commences his action, the defendant may move to have the proceedings set aside for irregularity. *Freyberg v. Pelerin*, 24 *How. Pr.* 202. But it is too late to move after an answer has been served. *Parks v. Parks*, 19 *Abb. Pr.* 161.

should be stated in the commencement, though it would suffice if it appeared in the other parts of the declaration. (f) In actions of *debt* by or against executors or administrators, in that character, it was considered that the words "*owes to*" must be omitted in the commencement; (g) but assignees of a bankrupt may sue in the *debet* and *detinet*. (h) An executor *de son tort* is stated to be "executor of the last will and testament" of the deceased, as if he were a rightful executor. (i) In actions by or against attorneys, peers, and members of parliament, their privilege as such is usually stated in the introduction. (k) In actions *by surviving partners* they should be described as such either in the commencement or body of the declaration; (l) but this is not necessary in actions *against surviving partners*. (m) A declaration stating that the defendant was indebted to the plaintiff and E. F. his *late* partner, without adding deceased, would be untech-

So the defect is cured if the plaintiff attains majority before any objection is made. *Rutter v. Puckhofer*, 9 Bosw. 638; S. C. 19 Abb. Pr. 161, note. In an action by an infant in Connecticut, an express admission of a *prochein ami* to prosecute is unnecessary; the admission of the *prochein ami* named in the writ is implied until disallowed. *Judson v. Blanchard*, 3 Conn. 579. In Massachusetts, the *prochein ami* will be admitted by the court without any other record than a recital in the count. *Putnam J. in Miles v. Boyden*, 3 Pick. 213, 219. So in Alabama. *Bothea v. M'Call*, 3 Ala. 449. It is otherwise in Indiana. *Keeran v. Clowzer*, 2 Blackf. 604. The power of the *prochein ami* commences with the suit, and he can therefore maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless the defendant has waived the necessity of a demand. *Miles v. Boyden*, 3 Pick. 213. See *Crosson v. Dryer*, 17 Mass. 222; *Trask v. White*, 7 Mass. 241; *Parsons v. Jones*, 9 Mass. 106. In Vermont an infant may sue by *prochein ami*, although he has a guardian, if the guardian does not dissent. *Thomas v. Dike*, 11 Vt. 273. But the person named as *prochein ami* is not regarded for any purpose as a party to the suit. *Brown v. Hull*, 16 Vt. 673. The infancy of the plaintiff must be pleaded in abatement; it cannot be shown as ground of nonsuit. *Treadwell v. Bruder*, 3 E. D. Smith, 596; *Blood v. Harrington*, 8 Pick. 552; *Gully v. Dunlap*, 24 Miss. 410; *Young v. Young*, 3 N. H. 345; *Schermerhorn v. Jenkins*, 7 John. 373; *Drago v. Moso*, 1 Spear (S. Car.), 212. As to infants defending by guardian *ad litem*, and the history of suits by *prochein ami*, see *Putnam J. in Miles v. Boyden*, 3 Pick. 219, and cases referred to. As to suits in name of *prochein ami* by persons other than infants, see *Wilson v. Oldham*, 12 B. Mon. 55.] The *prochein ami* is liable for the costs. *Tidd*, 9th ed. 100, 101. Where an infant plaintiff was taken in execution for the costs, the court would not dis-

charge him on motion. *Finley v. Jowle*, 13 East, 6; *Defries v. Davies*, 1 Hodge's Rep. 103. [In Massachusetts the infant plaintiff is liable to costs, and the *prochein ami*, as such, is not liable. *Crandall v. Slaid*, 11 Met. 288; *Smith v. Floyd*, 1 Pick. 275. See *Blood v. Harrington*, 8 Pick. 552. But in New York, in *People v. New York Com. Pleas*, 11 Wend. 164, *Savage J.* said that the object of the appointment of a *prochein ami* was that there might be a responsible person accountable for the costs before the court. The guardian appointed for the plaintiff, under the code, in place of a *prochein ami*, is liable for costs. *Cook v. Rawdon*, 6 How. Pr. 233; *Leopold v. Meyer*, 10 Abb. Pr. 40; S. C. 2 Hilton, 580; Code, § 316.]

(f) 1 Saund. 111, 112, note (2).

(g) Com. Dig. Pleader, 2 D. 1, 2, W. 8; 1 Saund. 1, 112, note (1); *Hope v. Bagne*, 3 East, 2. And this is still correctly so, but the unnecessary statement of the words "*owes to*" is now considered mere surplusage; those words are not now considered ground even of special demurrer. *Collett v. Collett*, 3 Dowl. 211. [See *Spotswood v. Price*, 3 Hen. & M. 123, 126.]

(h) *Winter v. Kretchman*, 2 T. R. 46.

(i) 1 Saund. 265; [*Campbell v. Tousey*, 7 Cowen, 64.]

(k) 2 Saund. 1, note (1); *Dodsworth v. Bowen*, 5 T. R. 325; *Hosier v. Lord Arundel*, 3 B. & P. 7.

(l) *Jell v. Douglas*, 4 B. & Ald. 374; *Fitzgerald v. Boettim*, 6 Moore, 332; *Israel v. Simmons*, 2 Stark. 356; *Bosanquet v. Wray*, 2 Marsh. 319; 6 Taunt. 597, S. C.; [*Collyer, Partn.* § 674. Where the declaration is in the name of one, as surviving partner, it necessarily implies the death of the other partner, although not averred. *Patterson v. Chalmers*, 7 B. Mon. 595.]

(m) *Richards v. Heather*, 1 B. & Ald. 29; [*Collyer Partn.* § 740; *Raborg v. Bank of Columbia*, 1 H. & Gill, 231; *Goelet v. M'Kinstry*, 1 John. Cas. 405; *Grant v. Shurter*, 1 Wend. 151.]

nical; because, notwithstanding that allegation, he may be still living and then ought to join, but where the omission only occurred in a second count, a demurrer on that ground was set aside as frivolous. (n) Where there is no necessity to describe parties as suing or being sued in any special character, it is advisable not to do so, and an inaccurate description of the party's interest will sometimes be fatal: as where A., B. and C. having been appointed assignees under three separate commissions of bankrupt, sued as joint assignees, not stating their several and respective interests in the declaration, it was held fatal. (o) In the second volume of Precedents, the several most usual forms of declaration by and against persons suing and being sued in *particular rights or characters* will be found. (p) The most salutary rule of Hil. Term, 4 W. 4, reg. 21, orders, "That in all actions by and against assignees of a bankrupt, or insolvent, or executors, or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied."

In the mixed action of *ejectment* and in *replevin*, and also where the suit has been removed into one of the superior courts from an *inferior* one, the form of commencement given by the Reg. Gen. Mich. T. 3 W. 4, is inapplicable. In these cases the forms of commencements used before the above rule are still to be adopted, and which forms will be found in the second volume of this work.

The Reg. Gen. Trin. T. 1 W. 4, seems to prescribe as the usual conclusion in all the courts the following: "To the plaintiff's damage of £—, and thereupon he brings suit, &c." But in penal actions, when no damages are recoverable, the *ad damnum* should be * omitted as heretofore; (r) and the conclusion in the action of *ejectment* is not affected by this rule.

In general the non-observance of either of the preceding express rules, although relating to and affecting the forms of *pleading*, cannot (except in the instance of the statement of *abutals*) be taken advantage of by *demurrer* as a defect in *pleading*; but must, if at all, be objected to by a *summons and order* of a judge, to set aside the *proceeding for irregularity*. (s) Thus, although the above rules expressly require

Consequences of deviations from such rules, viz. that they are only irregularities, and not grounds of demurrer.

(n) Undershell v. Fuller, 1 Cr., M. & R. 900.

(o) Ante, 28.

(p) Post, vol. ii. 10, &c.

(r) Neal v. Richardson, 2 Dowl. 89.

(s) Anderson v. Thomas, 9 Bing. 678;

Dod v. Grant, 4 Ad. & El. 485; 6 N. & M. 70; Hunt v. Pill, 1 Dowl. 659; Lyng v. Sutton, 4 M. & Scott, 417; Alderson v. Johnson, 2 M. & W. 70; 5 Dowl. 294; Tory v. Stevens, 6 Dowl. 75.

a declaration to be intituled of the day and month when it is delivered, yet it has been decided that the omission of such date is not a ground of demurrer; (t) and although the statute, 2 W. 4, c. 89, requires that the form of action shall be expressed in the writ, and it seems that the declaration should accord, yet if it vary, such variance is not a ground of *demurrer* (partly so because a *writ* cannot now appear on the *face of the pleadings or record*); and it can only be objected to by summons or motion for irregularity to set aside the declaration on account of such deviation. (u) So, if the commencement of a declaration at the suit of an executor be improperly in the debet and detinet, instead of more properly the latter only, the objection is not a ground of demurrer as part of the declaration, but may be rejected as surplusage. (x) So the improper insertion or repetition of venue in the body of a declaration, contrary to the above rule, Hil. T. 4 W. 4, r. 8, is not a ground of *demurrer*, but merely of a summons to strike out the objectionable repetition; (y) and although it would be absurd for any practitioner to neglect strict observance of the rules before referred to, yet it is obvious that it could never have been the intention of the judges that the unnecessary insertion in the *body* of a declaration of a venue should be constantly the subject of a summons to strike out those words, which would occasion much more expense, and be infinitely more vexatious than the introduction of those few words. (z) The *modes* of taking advantage of informalities in the title or commencement of a declaration is perhaps matter of *practice* rather than of *pleading*, and are fully considered as such in another work. (a)

* 5thly. After the *commencement* of the declaration, the *body* or statement of the *cause of action* follows in natural order, and which in every description of action consists of *three principal points*, viz. the *right*, whether founded upon contract or tort independent of contract; the *injury* to such right; and the consequent *damages*. In stating such of these, all the requisites of certainty and other points before noticed must be observed.

Keeping in view and subject to these *general requisites*, every pleader was, before the pleading rules of Hil. and Trin. T. 1 W. 4, at liberty

THE REGULATIONS AFFECTING THE BODY OR SUBSTANCE OF DECLARATIONS IN GENERAL.

(t) *Neal v. Richardson*, 2 Dowl. 89; *Hodson v. Parnel*, 7 Dowl. 208; 4 M. & W. 373.

(u) *Thompson v. Dica*, 2 Dowl. 93; *Scrivener v. Watling*, 1 Harrison, 8; *Ward v. Tennyson*, 1 Ad. & El. 619; *Edwards v. Dignam*, 2 Cr. & M. 346; 2 Dowl. 240, S. C.; and see *Marshall v. Thomas*, 3 Moore & S. 98; and *Anderson v. Thomas*, 9 Bing. 678; *Ward v. Tummon*, 1 Ad. & El. 619; *Tidd*, Sup. A. D. 1833, p. 122.

(x) *Collett v. Collett*, 3 Dowl. 211.

(y) *Farmer v. Champneys*, 1 Cr., M. & R. 69; 2 Dowl. 680, S. C.; *Fisher v. Snow*, 3 Dowl. 27; *Townsend v. Gurney*, 3 Dowl. 29.

(z) *Per cur.* in *Brindley v. Bennett*, 2 Bing. 184; see *post*, of striking out counts.

(a) 3 Chitty's Gen. Prac. by Lush, 377-404.

to frame the body or substance of every declaration in such order and language as he might consider preferable; he was not however allowed vexatiously to insert any superfluous, impertinent, or extraneous matter, as in an action on a mortgage deed a long description of the mortgaged premises, (y) or covenants of which no breach was assigned, and if he did so, or inserted numerous counts substantially alike, the courts, in virtue of their general jurisdiction, might, on summons or motion, order the unnecessary matter to be struck out. (z) But however superfluous or unnecessary the matter or count may be, that affords no ground of demurrer, and can only be objected to by application to strike out the same. (a) With a view to *compel greater conciseness*, some rules materially control and limit the length of declarations.

The Reg. Gen. Trin. T. 1 W. 4, prescribes forms and length of declarations in assumpsit or debts on *bills of exchange* and *promissory notes*, and for *common debts* recoverable in *indebitatus* assumpsit, thereby very considerably reducing the length of such declarations; (b) and the judges certainly intended that the particular forms there given should be considered not as mere limited examples, but as models of conciseness *to be observed and extended to all other cases*. The Reg. Gen. Hil. Term, 2 W. 4, reg. 71, depriving every party of the costs of issues and pleadings upon which he does not succeed, had a strong tendency to prevent the introduction of useless counts, pleas, and issues, or even of any useless allegations.

The Reg. Gen. Hil. T. 4 W. 4, reg. 5, 6, and 7, imperatively prohibit the use of *several counts* or *pleas*, unless a distinct subject-matter of *complaint* or *defence* is intended to be established in respect of each. The student and every practitioner must constantly consult those rules, as any deviation might be fatal. (c)

Independently of the particular and precise operation of each of these rules, it has become the practice in declaring for the breach of a contract to pay money, or deliver goods, or perform works, * in cases where there has been a *part performance*, expressly to admit the same on the face of the declaration, by which means the plaintiff having himself justly limited his claim to his real demand, the defendant is thus deprived of all pretence for pleading the part payment or partial performance, and the costs of the useless pleading and evidence relating to such part performance is thus saved, and this mode of

(y) *Dundas v. Lord Weymouth*, Cowp. 665; *Price v. Fletcher*, Cowp. 727; 1 Saund. 233, note (2); 2 Saund. 366.

(z) *Ib. Ibid.*; 3 Chitty's Gen. Prac. 638-643.

(a) *Gardner v. Bowman*, 4 Tyr. 412.

(b) See the rule and forms, *post*, vol. ii. 27 *et seq.*

(c) See these rules, Jervis's Rules, and the cases thereon, 3 Chitty's Gen. Prac. by Lush, 398.

The rules Hil. T. 4 W. 4, reg. 4, 5, 6, prohibiting *several counts*, &c.

Other incidental improvements, as admissions on face of declarations of part payments or part performances.

declaring is particularly desirable when the part performance would take the case out of the statute against frauds, or statute of limitations. (d)

Having thus considered the pleading rules as they affect the body or substance of declarations in general, and the prohibitions against *second counts*, we will proceed to consider in detail the requisites of declarations in each form of action in particular, as, 1st, In *assumpsit*; 2dly, *debt*; 3dly, *covenant*; 4thly *detinue*; 5thly, *case*; 6thly, *trover*; 7thly, *replevin*; 8thly, *trespass*.

In *assumpsit*, the statement of the cause of action is either *special* or *general*. Such of the forms of *special counts* in *assumpsit* as most frequently occur in practice are given in the second volume. IN ASSUMPSIT.

In general, where the claim is merely of a *pecuniary* nature, and is founded on a past or completed or *executed* consideration, it is sufficient to declare upon the common *indebitatus* counts. (e) There are, however, many occasions in which, although it may not be strictly necessary, yet it is judicious to insert a *special count* in the declaration; for instance, upon a written contract to build a house, if the work has been performed, and the reward was to be paid in money, the common counts for work and materials would suffice; but if the plaintiff declare specially, and set out the written contract, and the defendant suffer judgment by default, or pay money into court generally, the contract, and all material allegations as stated in the declaration, would be thereby admitted, and no objection could be raised on account of the want of a stamp. In many instances, as in actions against agents for not accounting for goods or the proceeds of goods intrusted to them, or for not using due care in selling, &c. (f) the declaring specially for unliquidated *damages* will exclude a tender or a *set-off*, (f) or even

When or not a special count is requisite or proper.

(d) Since the rule of court rendering a plea of payment unnecessary where credit is given in the particulars of demand, it has become less usual to admit part payment on the face of the declaration. When so admitted it was wholly ineffectual to take the case out of the statute of limitations, as the defendant was in no way bound by such statement. See *Hollis v. Palmer*, 2 Bing. N. C. 713.

(e) See *post* as to the common counts. [*Carlisle v. Dunn*, 5 Blackf. 605. The common counts will not suffice, where the action is based on an express contract, which is still open, or to be performed in future; in such case, the count must be framed on the contract. *Speake v. Sheppard*, 6 Harr. & J. 81; *Watkins v. Hodges*, 6 Harr. & J. 38; *Shepard v. Palmer*, 6 Conn. 100; *Snow v. Chapman*, 2 Root, 99; *Kelly v. Foster*, 2 Binn. 4; *Felton v. Dickinson*, 10 Mass. 287;

Arnold v. Paxton, 6 J. J. Marsh. 505; *Halloway v. Davis*, Wright, 129; *Harris v. Liggett*, 1 Watts & S. 301. In an action to recover, under a statute, double the price of building the defendant's part of a divisional fence, the count should be special, setting forth all the facts necessary to fix the defendant's liability. *Sanford v. Haskell*, 50 Maine, 86. So in a suit, under a statute, by one town against another for the support, &c. of a pauper, the declaration must aver all the facts necessary to create the liability. *Salem v. Andover*, 3 Mass. 438; *Bath v. Freeport*, 5 Mass. 326; *Wrentham v. Attleborough*, 5 Mass. 434; *Rogers v. Newbury*, 105 Mass. 533.]

(f) See *Colson v. Welsh*, 1 Esp. Rep. 380; *Hardcastle v. Netherwood*, 5 B. & Ald. 93; *Hutchinson v. Reid*, 3 Campb. 329. But it seems that if on the special count the plaintiff prove a cause of action, the whole of

the defence of bankruptcy. (g) In these cases a special count is advisable, although the chief part of the plaintiff's demand may be recoverable upon the common counts. * But where neither these, nor any other satisfactory reason for introducing a special count can be adduced, and the cause of action may be proved upon a common count, the latter alone should be used; as where goods have been sold and delivered, and the credit or time for payment has elapsed, then a special count would be improper. Where a declaration consisted of one special and several general counts, and to the special counts there were several special pleas, and to the general counts the general issue was pleaded, and the plaintiff entered a *nolle prosequi* as to the special count, and joined issue on the others, it was held that he was entitled to recover on the general counts, although the matters proved might have been given in evidence and investigated on the special count and the pleas thereto. (h)

Usual parts
of a special
count in as-
sumpsit. (i)

In considering the rules to be observed in the structure of *special counts in assumpsit*, six points are principally to be attended to, viz.:—

- 1st, The *inducement* ;
- 2dly, The *consideration* of the contract ;
- 3dly, The *contract itself* ; (j)
- 4thly, The *necessary averments* ;
- 5thly, The *breach* ; and
- 6thly, The *damages*.

An *inducement*, in an action of *assumpsit*, is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference. A formal inducement does not appear to be in any case necessary in pleading; it would be sufficient if the subject-matter of the inducement were alleged in any other part of the declaration; but it is useful in composition, for the purposes of perspicuity. The matter of inducement may be stated *by way of parenthesis*, as thus:

1st. Of the
inducement
in assump-
sit.

which is also provable upon the common counts as a debt, the set-off is not excluded. *Birch v. Desseyster*, 4 Campb. 385.

(g) *Ante*, 231.

(h) *Hayward v. Kain*, 1 M. & M. 311. [Where there is a count on a special contract and the common counts are used, the plaintiff may recover on a *quantum meruit*, if he fails to prove the special contract, but not if he proves a different contract. *Ames v. Le Rue*, 2 McLean, 216; *Porter v. Beltzhoover*, 2 Harr. (Del.) 484; *Fowler v. Austin*, 1 How. (Miss.) 156; *Londregon v. Crowles*, 12 Conn. 558; *Formholz v. Taylor*, 13 Iowa, 500; *Tuttle v. Mayo*, 7 John. 132; *Robertson v. Lynch*, 18 John. 451; *Dubois v. Dela-*

ware &c. Co. 4 Wend. 285; *Perrine v. Hankinson*, 6 Halst. 181. See *Speake v. Sheppard*, 6 Har. & J. 81; *Hatch v. Adams*, 8 Cowen, 35. In *Keyes v. Stone*, 5 Mass. 391, it was held that where the plaintiff declares on a special contract, and a general *indebitatus assumpsit*, and on trial proves a special agreement, but different from the one declared on, he may still recover on the general count, if his evidence will support it. *M'Williams v. Smith*, 1 Call, 123.]

(i) See the form and parts, *ante*, 277.

(j) Properly speaking, the term contract includes the consideration as well as the promise. But it is here used as signifying the defendant's promise only.

"For that whereas heretofore, to wit, on, &c. in consideration that the plaintiff, at the request of the defendant, [*he then being an attorney of the court of our lady the queen, before the queen herself, or he then being a carrier of goods for hire from, &c. to, &c.*] had then retained and employed him as such attorney, to, &c.;" or the declaration may begin by a *formal inducement*, as in the precedent referred to in the notes. (*k*) Where a variety of facts preceded the contract, and are so connected with it that the statement of them is necessary to render the count intelligible, it is obviously better to adopt a formal inducement, (*l*) than in the description of the consideration or of the contract to show those facts in one continued sentence of great length. Thus, in an action on a wager on a horse-race, it is usual to begin the declaration *with an *inducement* of the expected race. (*m*) So, in assumpsit upon an award, the existing differences between the parties are concisely stated, as that "certain differences had existed and were depending;" (*n*) and on a contract to pay money upon a consideration of forbearance, the declaration begins by stating with brevity the existence of the debt forborne, and from whom it is due. (*o*) The inducement, or averment by way of introductory allegation, is peculiarly proper where a party is charged upon or in respect of the breach of a contract or implied duty, resulting from any particular character or capacity of the defendant. Thus, in a declaration against an attorney for negligence, or a carrier, a coach proprietor, a wharfinger, or captain of a ship, or an innkeeper, for the loss of goods, &c. it is usual and proper to show, by way of inducement, or at least by other averment in the declaration, that the defendant followed the occupation in respect of which the plaintiff employed him. If no such allegation be contained in the declaration, the defendant cannot be charged thereon for the breach of a duty which results only from the particular character which he held, and in reference to which he was retained. (*p*) But where the mere statement of the consideration and promise will be sufficiently intelligible, without any prefatory allegation, they may be set forth without any inducement; as in declarations upon bills of exchange, &c. which should proceed at once to state the instrument or contract without any preamble of the custom of merchants, which ought not to be set forth. (*q*)

It is said that as the office of an inducement is explanatory, it does not in general require exact certainty. (*r*) Thus, where an agreement

(*k*) See *ante*, 277, and *post*, vol. ii. 138, D. & R. 438, S. C.; 2 New Rep. 454. See 276, 277. *Max v. Roberts*, 12 East, 94.

(*l*) *Dartnall v. Howard*, 4 B. & C. 345; 6 D. & R. 438, S. C.

(*m*) *Post*, vol. ii. 395.

(*n*) *Ib.* 63, 65.

(*o*) *Ib.* 131.

(*p*) *Dartnall v. Howard*, 4 B. & C. 345; 6

(*q*) *Ante*, 239.

(*r*) Tidd, 9th ed. 436, cites Com. Dig. Pleading, C. 31. See *Andrews v. Whitehead*, 13 East, 116; *Gwinnet v. Phillips*, 3 T. R. 646, per Buller J.; *Stephen*, 5th ed. 328, 409; *Biggs v. Bullingham*, Cro. Eliz. 715.

with a third person is stated only as inducement to the defendant's promise, which is the principal cause of the action, it was considered in general sufficient to state such agreement without certainty of name, place, or person. (s) This rule prevailed in the statement of matter which merely constituted an *executed or past consideration*; (t) as where the declaration charged, that in consideration that the plaintiff "had, at the defendant's request, granted to him by deed the next avoidance of a certain church," the defendant promised to pay the plaintiff £100, the court held the declaration good, although it was objected, in arrest of judgment, that the time or place at which the grant was made was not stated. (u) So, in declaring upon a promise to pay money in consideration of the forbearance of a preceding debt, though some cause of action must be alleged, it was not * necessary to state the particular cause or subject-matter of the debt, or the time when or place where it was contracted; (x) and in an action for negligence against an attorney who had been employed to sue another, it was not necessary or advisable to state in an inducement that such other person was indebted; and if it be stated, though unnecessarily, it must be proved. (y) But where the inducement disclosing a past consideration also professes to state some matter material to be ascertained with certainty, it must be stated with precision and particularity. (z) Therefore, where in a declaration in *assumpsit* for not accepting a lease; the inducement charged that the plaintiff was possessed of the premises for a certain term, ending on a day named, and the proof showed that he had only a shorter term, the court held the variance fatal. (a) It suffices if the *introductory* matter or inducement be stated according to its legal effect; (b) and the first part of the rule, that allegations of matter of substance may be substantially proved, but allegations of matter of description must be literally proved, (c) applies peculiarly to averments in an inducement; and therefore if the inducement be not a mere matter of description, and it be substantially proved as alleged, a slight variance will be immaterial. Even material matter laid in an inducement need not be proved precisely as alleged when stated under a *videlicet*, if it be correct in substance. Thus, where in a declaration to recover from the defendant a debt due from a third person, which the defendant had promised to pay in consideration of forbearance, the sum due

(s) *Coxe v. Jennings*, 1 Yelv. 17.

(t) *Ib.*; 10 Co. 59 b; Com. Dig. Pleader, C. 31, 43; E. 10, 18; *Andrews v. Whitehead*, 13 East, 105, 116; and see *Bourne v. Diggle*, 2 Chit. Rep. 311; *Elsee v. Gatward*, 5 T. R. 143.

(u) *Biggs v. Bullingham*, Cro. Eliz. 715.

(x) *Woolaston v. Webb*, Hob. 18; *post*, vol. ii. 131, 132.

(y) *Lee v. Ayrton*, Peake's Rep. 119; *post*, vol. ii. 60, form 2, note (z).

(z) *Andrews v. Whitehead*, 13 East, 102.

(a) *Routledge v. Grant*, 1 M. & P. 717; 4 Bing. 653, S. C. See *Carvick v. Blagrave*, 1 B. & B. 536.

(b) *Winter v. White*, 3 Moore, 674, 695, 696.

(c) *Ante*, 252, 253; *Stoddart v. Palmer*, 3 B. & C. 4; 6 D. & R. 626, S. C. See further as to this, *post*.

was stated in the inducement under a *videlicet* to be £26 13s. 6d., and was described as the balance of a larger sum, and the statement of the contract referred to the sum so alleged in the inducement to be due, but only £26 were due as the balance; the court held that the variance was not material. (d) In general, however, every allegation in an inducement, which is material and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal; and consequently great attention to the facts is necessary in framing the inducement, and care must be taken not to insert any unnecessary allegation. (e) Thus, in the case just mentioned against an attorney, where the declaration stated that E. F. was *indebted* to the plaintiff, and that the plaintiff employed the defendant to sue her, it being proved that E. F. was a *feme covert* at the time the supposed debt *accrued, and consequently not in point of law indebted, the plaintiff was nonsuited; though the declaration might have been sufficient without stating that the third person was indebted. (f) Where, however, the matter unnecessarily stated in the inducement is wholly impertinent, and might be struck out as surplusage, there are some cases in which a failure in proof of such statement would not be material. (g)

The pleading rules of Hilary Term, 4 W. 4, as they apply to most actions, and especially *assumpsit* and *case*, now relieve a plaintiff from the necessity for proving matter of *inducement*, or from any risk of variance in the statement thereof, unless the defendant's plea *expressly* traverse or deny the inducement; thus, in an action on the case, if the declaration state that the plaintiff *was possessed of a close and a pond full of water therein*, and then stated an injury to the water in the pond, it was held that the plea of *not guilty* did not put in issue the inducement even though connected with the description of the injury, and that therefore the defendant could not on the trial dispute the correctness of the inducement. (h)

Inducement if not traversed, need not be proved.

In treating of the rules relative to the statement of the *consideration* for the contract, we will consider, 1st, *What consideration must appear on the face of the declaration, and how it*

2dly. The consideration.

(d) *Bray v. Freeman*, 2 Moore, 114. See *Carrick v. Blagrove*, 1 B. & B. 536. See *post*, as to the *scilicet*.

(e) *Ante*, 252, 253; *Bromfield v. Jones*, 4 B. & C. 380; 6 D. & B. 500, S. C.; *Bristow v. Wright*, Douglas, 667; *Peppin v. Solomons*, 5 T. R. 498; *Turner v. Eyles*, 3 B. & P. 463; *Bourne v. Diggles*, 2 Chit. Rep. 311; *Steph*. 5th ed. 277.

(f) *Lee v. Ayrton*, Peake's Rep. 119.

(g) *Ante*, 252; *Winn v. White*, 2 Bl. Rep. 840; *Bristow v. Wright*, Dougl. 667; *Peppin v. Solomons*, 5 T. R. 498; *Gwinnett v. Phillips*, 3 T. R. 646.

(h) *Dukes v. Gostling*, 3 Dowl. 619; *Frankum v. Earl Falmouth*, 4 Nev. & Man. 330; 1 Harr. & Wol. 1; 6 Car. & P. 529, S. C.

should be stated; and 2dly, the doctrine of *variances* between the statement of the *consideration* and the *evidence* in support of it.

In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and *implies* consideration, as a bill of exchange or promissory note, (i) or *expressly* to state the particular *consideration* upon which it was founded; (k) and it is essential that the consideration stated should appear to be *legally sufficient* to support the promise, for the breach of which the action is brought. (k¹) An examination of the various points of law relating to the sufficiency of consideration, (l) would be foreign to the object of this treatise; but it may be important to make some few observations as to the *mode of stating* the consideration upon the record in such a manner that it may appear legally sufficient. Although no mode of *pleading can enable a plaintiff to recover when the consideration is insufficient or illegal, if the defendant by his plea properly raise the question, yet it may not unfrequently occur that a sufficient consideration may exist, but that the action may be defeated in consequence of the statement upon the pleading being imperfect.

In declaring upon *bills of exchange* and *promissory notes* and some other legal liabilities, the mere statement of the liability which con-

(i) These instruments always imply a consideration; *Graham v. Pitman*, 5 Nev. & Man. 137; so that, although the statute against frauds, 29 Car. 2, c. 3, s. 4, requires an undertaking by a third person to pay the debt of another to state the consideration, yet by means of a bill or note the statute is avoided. *Ridout v. Bristow*, 1 Tyrw. Rep. 84; *Poplewell v. Wilson*, 1 Stra. 264; [*Tibbetts v. Blood*, 21 Barb. 650.]

(k) Com. Dig. Action, Assumpsit, 3; Bul. N. P. 146, 147; 1 Saund. 211, note (2); [*Beauchamp v. Bosworth*, 3 Bibb, 115; *Potter v. Earnest*, 45 Ind. 416, 418; *Murdock v. Caldwell*, 8 Allen, 310. The want of a statement of the consideration of a promise is a capital defect in a declaration, not to be supplied by intentment, but by an amendment. *Bell J. in New Market Iron Foundry v. Harvey*, 23 N. H. 406. The consideration must be truly stated, and with substantial certainty, and proved as laid. *Moore v. Ross*, 7 N. H. 528; *Shelton v. Bruce*, 9 Yerger, 24; *Murdock v. Caldwell*, 8 Allen, 309, 310; *Colburn v. Pomeroy*, 44 N. H. 19, 22; *Favor v. Philbrick*, 7 N. H. 326; *Smith v. Wheeler*, 29 N. H. 342; *Streeter v. Sumner*, 19 N. H. 518; *Bruner v. Stout*, Hard. (Ky.) 225; *Hemmenway v. Hickey*, 4 Pick. 497; *Wheeler v. Moore*, 1 Hall (N. Y.), 201; *Gaines v. Kendrick*, 2 Treadw. (S. Car.) Const. 339; *Moseley v. Jones*, 5 Munf. 23; *Beverleys v. Holmes*, 4 Munf. 95; *Bailey v. Freeman*, 4 John. 280; *Russell v. Slade*, 12 Conn. 455; *Bailey v. Bussing*, 29 Conn. 1; *Poundstone v. Lewark*, 4 Blackf. 173; *Nelson v.*

Swan, 13 John. 483; *Lyon v. Alcord*, 18 Conn. 66; *Douglass v. Davie*, 2 McCord, 218; *Burnet v. Bisco*, 4 John. 235; *Powell v. Brown*, 3 John. 100; *Lansing v. McKillip*, 3 Caines, 286; *Hendrick v. Seeley*, 6 Conn. 176; *De Forest v. Frazy*, 6 Cowen, 151; *Carrell v. Collins*, 2 Bibb, 429; *Decker v. Birharp*, 1 Morris, 62; *Bender v. Manning*, 2 N. H. 289; *Connolly v. Cottle*, 1 Breese, 286; *Harris v. Reynier*, 8 Pick. 541. When the instrument declared on purports to be for value received, and is set out in the declaration or complaint, that is a sufficient averment of consideration. *Prindle v. Caruthers*, 15 N. Y. 425; *Appleby v. Elkins*, 2 Sandf. 678. It has been held not sufficient, either in special or general assumpsit, to allege that the defendant "being indebted" in a certain sum in consideration thereof promised to pay, &c. without alleging the cause or consideration on which the debt is founded. See *Beauchamp v. Bosworth*, 3 Bibb, 115; *S. P. Chandler v. State*, 5 Harr. & J. 284; *Manry v. Olive*, 2 Stewart, 472.]

(k¹) [*Harding v. Cragie*, 8 Vt. 501.]

(l) See in general 1 Saund. 211, note (2); 3 Chit. Com. Law, 63-99; Chit. jr. on Contr. 6, &c.; Selw. Nisi Prius, 10th ed. 40-64; *Monkman v. Shepherdson*, 11 Ad. & El. 411; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Herring v. Dorell*, 8 Dowl. 604; *Mortimer v. Wright*, 6 M. & W. 482; *Jennings v. Brown*, 9 M. & W. 496; *Bainbridge v. Firmstone*, 8 Ad. & El. 743; *Haigh v. Brooks*, 10 Ad. & El. 309.

stitutes the consideration is sufficient; (*l*¹) but in other cases of simple contracts, it is necessary that the declaration should disclose a consideration, which may consist of either benefit to the defendant, or detriment to the plaintiff; (*l*²) or the promise will appear to be *nudum pactum*, and the declaration will consequently be insufficient. (*m*) Thus, where the plaintiff declared that a person, since deceased, was indebted to him, and that after the death, in consideration of the premises, and that the plaintiff, at the defendant's request, "would give time for the payment of the debt," the defendant promised, &c.; but did not state that there was any person in existence who was liable in respect of assets or otherwise to be sued by the plaintiff for the debt, and to whom he gave time; the declaration was held insufficient on demurrer; for no benefit was shown to move to the defendant, nor did it appear that any detriment had been sustained by the plaintiff, as it was not stated that any one was liable to be sued by him, or that he had suspended the enforcement of any right. (*n*) So, where the declaration in assumpsit alleged, that in consideration that the plaintiff would retain and employ the defendant to lay out a sum of money in the purchase of an annuity, the latter undertook to *do his duty in the premises*, and that the plaintiff accordingly did retain the defendant, but that the defendant neglected to do his duty, and took an insufficient security; it was held, on motion in arrest of judgment, that the count was bad, since it did not show that any *reward* was to be paid to the defendant, nor aver that the defendant was employed as an attorney, or in any particular character, by reason of which it became his absolute duty not to take a security of an insufficient nature. (*o*)

Upon this subject it has been laid down as a rule, that the consideration should be coextensive with the promise, in order to support it. Thus where the plaintiff stated that the defendant was liable in the character of *executor* to pay a certain debt, and then averred, that in consideration thereof, he personally promised to pay the debt, the declaration was held bad in arrest of judgment, no *additional* * consideration being shown for the enlarged responsibility arising from

(*l*¹) [Peaseley v. Boatwright, 2 Leigh, 198; Chappell v. Proctor, Harper, 49; Gains v. Kendrick, 2 Rep. Const. Ct. 339; M'Curdy v. Dudley, 1 A. K. Marsh. 288; Richmond v. Patterson, 3 Ham. 368. As to notes not negotiable, see Jerome v. Whitney, 7 John. 321; Odiorne v. Odiorne, 5 N. H. 316; bank-notes, Gilbert v. Nantucket Bank, 5 Mass. 97.]

(*l*²) [1 Chitty Contr. (11th Am. ed.) 28 et seq.]

(*m*) See ante, note (*l*); Jones v. Ashburnham, 4 East, 455; Williamson v. Clements, 1 Taunt. 523; [Curley v. Dean, 4 Conn.

265; Douglass v. Davis, 2 McCord, 218; Greene v. Dodge, 2 Ham. 430.]

(*n*) Jones v. Ashburnham, 4 East, 455.

(*o*) Dartnall v. Howard, 4 B. & C. 345; but see Whitehead v. Greetham, 2 Bing. 464; M'Clel. & Y. 205, S. C., in which it was held that a count in assumpsit that the plaintiff had retained the defendant, at his request, to lay out £700 in the purchase of an annuity; that defendant promised to lay it out securely; that plaintiff delivered the money to him for that purpose, and that defendant laid it out insecurely; contained a sufficient consideration for the defendant's promise, after verdict.

the promise. (*p*) And upon the same principle, a declaration against a husband alone, on his mere promise to pay the debt of his wife contracted before marriage, without showing any *new* consideration, was also considered insufficient, and the judgment was arrested. (*q*)

When the consideration for the defendant's contract consists of any *agreement* on the part of the plaintiff, it must appear from the declaration that such agreement was binding on the plaintiff at the time the defendant's promise was made; for if it should appear from the declaration that the obligation was all on one side, the defendant's engagement would be *nudum pactum*, and the declaration consequently bad. (*r*) We have already seen, that, at least in some instances, it may be sufficient to show that the consideration moved from a third person, if the promise be made for the benefit of the plaintiff. (*s*)

When part of an entire consideration, or one of several considerations, stated in a declaration, is merely *frivolous* and void, without being illegal, and *the residue is good*, and extends to the whole of the promise, the void part will not vitiate the declaration, (*s*¹) but may be rejected as surplusage; and the promise will be referred to and supported by that part of the consideration which is legally sufficient. (*t*) But if part of an entire consideration, or one of

(*p*) Rann v. Hughes, 7 T. R. 350, note (*a*); [Berry v. Harper, 4 Gill & J. 470.]

(*q*) Mitchinson v. Hewson, 7 T. R. 348. In Jones v. Waite, 5 Bing. N. C. 341, a deed of separation between the plaintiff and his wife having been drawn up, but not executed by the plaintiff, it was held that his executing such deed was a legal consideration for a promise by the defendant to pay certain debts and expenses for which the plaintiff was solely liable. And where a declaration stated that in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh two boilers of the plaintiff, the defendant promised to give them up after weighing in as perfect condition as they were in at the time of the consent, it was holden to disclose a sufficient consideration. Bainbridge v. Firmstone, 8 Ad. & El. 743.

(*r*) Cooke v. Oxley, 3 T. R. 653. See Payne v. Cave, 3 T. R. 149; M'Iver v. Richardson, 1 M. & Sel. 557; Adams v. Lindsell, 1 B. & Ald. 681; Humphries v. Carvalho, 16 East, 45; Draut v. Brown, 3 B. & C. 668; Hawkins v. Wane, 3 B. & C. 690; 5 D. & R. 512, S. C.; [1 Chitty Contr. (11th Am. ed.) 14; Benjamin Sales (1st Am. ed.), § 41 *et seq.*; § 64 *et seq.*; Van Alstyne v. Wimple, 5 Cowen, 162; Loomis v. Newhall, 15 Pick. 159; Donallen v. Lennox, 6 Dana, 91; Woodruff v. Hinman, 11 Vt. 592; Hinesburgh v. Sumner, 9 Vt. 23; Armstrong v. Toler, 11 Wheat. 258; Carleton v. Whitcher,

5 N. H. 196; Hinds v. Chamberlin, 6 N. H. 225.]

(*s*) *Ante*, 2, 3. But see Price v. Easton, 4 B. & Ad. 433; 1 Nev. & Man. 303, S. C.; Thomas v. Thomas, 2 G. & D. 232; Selw. N. P. 10th ed. 46.

(*s*¹) [Beach v. Lee, 2 Dall. 256; Buckner v. Smyth, 4 Desaus. Ch. 371; Lowry v. Brook, 2 McCord, 421.]

(*t*) Ring v. Roxbrough, 2 Cr. & Jerv. 418; 2 Tyr. 468, S. C.; King v. Sears, 2 Cr., M. & R. 48; Bradburne v. Bradburne, Cro. Eliz. 149; Coulston v. Carr, Cro. Eliz. 848; Crisp v. Gamel, Cro. Jac. 127; Best v. Jolly, 1 Sid. 38; Bul. N. P. 147. But in an action of assumpsit the defendant can only be made chargeable with the breach of the promise as laid in the declaration. Head v. Baldrey, 2 N. & P. 217. [An entire promise founded partly on a past and executed consideration and partly on an executory consideration, is supported by the executory consideration. Loomis v. Newhall, 15 Pick. 159; Andrews v. Ives, 3 Conn. 368; 1 Chitty Contr. (11th Am. ed.) 67, 68; Parish v. Stone, 14 Pick. 198; Haynes v. Nice, 100 Mass. 327; Rand v. Mather, 11 Cush. 1; Allen v. Leonard, 16 Gray, 202; Merrill v. Aden, 19 Vt. 505. The insufficient consideration, inasmuch as it forms, in fact, no part of the legal consideration for the agreement, need not be stated. Thomas v. Thomas, 2 Q. B. 851; Vin. Abr. Actions of Assumpsit (*y*); Com. Dig. Action, Assumpsit, B. 13.]

several considerations stated, *be illegal*, though the residue may be good, the whole declaration will, it appears, be vitiated by the illegal part. (u)

Another material circumstance to be attended to in the statement of the consideration is, that it should be shown with a proper degree of *certainty* and particularity. A declaration may contain enough to disclose a consideration, which is legally sufficient to support the *promise, but may be liable to objection on special demurrer, on account of omitting to set out that consideration with a sufficient degree of certainty. (x) The degree of certainty required in stating the consideration will depend, in some degree, on the particular species of

(u) *Fetherston v. Hutchinson*, Cro. Eliz. 199; *Rawson & Brown's case*, 4 Leon. 3; *Morris v. Chapman*, Sir T. Jones, 24; Com. Dig. Action, Assumpsit, B. 13. As to the distinction of a consideration being illegal in part at common law, or by statute, see *Norton v. Simmes*, Hob. 14; 1 Saund. 66, note (1); *Morgan v. Horseman*, 3 Taunt. 244; *Greenwood v. The Bishop of London*, 5 Taunt. 746; *Doe v. Pitcher*, 6 Taunt. 359; *Newman v. Newman*, 4 M. & Sel. 66. [It has been held that if there be an entire consideration for the defendant's promise, made up of several particulars, and one of these consists of an agreement by the defendant, which the statute of frauds requires to be in writing, and which, for want of such writing, is void, the whole consideration is void, and the promise cannot be supported. *Mechelen v. Wallace*, 7 Ad. & El. 49; *Head v. Baldrey*, 6 Ad. & El. 459; *Littledale J. in Mayfield v. Wadsley*, 3 B. & C. 357, 365; 1 Chitty Contr. (11th Am. ed.) 68, and note (g); *Loomis v. Newhall*, 15 Pick. 159. In *Rand v. Mather*, 11 Cush. 1, it was decided that an agreement, which is void in part under the statute of frauds, is not necessarily void *in toto*. The case was: A. contracted to do certain work for B., but suspended labor because of B.'s failure to pay according to contract; C. told A. to finish the contract, and he would pay him in full. A. did so, relying upon C.'s promise. It was held that A. could recover of C. for the work performed after such promise, but not for that before. Metcalf J. in giving the opinion of the court said: "On principle, and according to numerous modern adjudications, the true doctrine is this: if any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant." A contrary determination in *Loomis v. Newhall*, 15 Pick. 159, was overruled. Later cases have followed *Rand v. Mather*, *supra*. In *Haynes v. Nice*, 100 Mass. 327, it was decided that an oral promise to pay for both the past and

future board of the child of another at a certain rate per week is severable, and in an action on that promise, the plaintiff under a general count may recover for so much as is not within the statute of frauds. See *Allen v. Leonard*, 16 Gray, 202; *Irvine v. Stone*, 6 Cush. 508; *Hite v. Wells*, 17 Ill. 88; *Andrews v. Ives*, 3 Conn. 368; *Roby v. West*, 4 N. H. 285; *Robinson v. Green*, 3 Met. 159; *Page v. Monks*, 5 Gray, 492-496. If any part of the *entire* consideration for a promise, or any part of an *entire* promise, not in its nature divisible, be illegal, either at common law or by statute, the *whole* agreement is void. *Waite v. Jones*, 1 Scott, 730; *Shackell v. Roasier*, 3 Scott, 59; *Deering v. Chapman*, 22 Maine, 488; *Ladd v. Dillingham*, 34 Maine, 316; *Coburn v. Odell*, 30 N. H. 540; *Carleton v. Woods*, 28 N. H. 290; *Carleton v. Whitcher*, 5 N. H. 196; *Hinds v. Chamberlin*, 6 N. H. 225; *Crawford v. Morrell*, 8 John. 253; *Barton v. Port Jackson & Union Falls Plank Road Co.* 17 Barb. 397; *Rose v. Truax*, 21 Barb. 361; *Donallen v. Lennox*, 6 Dana, 91; *Woodruff v. Hinman*, 11 Vt. 592; *Hinesburgh v. Sumner*, 9 Vt. 23; *Toler v. Armstrong*, 4 Wash. C. C. 297; 8 C. 11 Wheat. 258; *Irvine v. Stone*, 6 Cush. 508; *Gunter v. Leckey*, 30 Ala. 591; *Peck v. Burr*, 10 N. Y. 294; *Lord v. Chadbourne*, 42 Maine, 429; *Hathaway v. Moran*, 44 Maine, 67; *Deans v. McLendon*, 30 Miss. 343. But where the *consideration* is tainted by no illegality, and some of the *promises* only are illegal, the illegality of these does not communicate itself to, or taint the others, except when, owing to some peculiarity in the contract, its parts are inseparable. Per Tindal C. J. in *Shackell v. Roasier*, 3 Scott, 59; *M'Allen v. Churchill*, 11 Moore, 483; *Leavitt v. Blatchford*, 5 Barb. 9; *Leavitt v. Palmer*, 3 Comst. 19; *Hook v. Gray*, 6 Barb. 398; *Carleton v. Woods*, 28 N. H. 290; *Tracy v. Talmage*, 4 Kernan, 162; *Curtis v. Leavitt*, 1 Smith (N. Y.), 9; *Rand v. Mather*, 11 Cush. 1; *Robinson v. Green*, 3 Met. 159; *Mackie v. Cairns*, 5 Cowen, 547; *Raguett v. Roll*, 7 Ohio, 76; *Haynes v. Nice*, 100 Mass. 327; 2 Kent, 467.]

(x) See the general rule as to certainty in pleading, *ante*, 256.

consideration to be stated, and it will therefore be necessary to notice the various kinds of considerations. They are, 1st, *executed*, or 2dly, *executory*; to which may be added, 3dly, *concurrent*, and 4thly, *continuing considerations*.

1st. An *executed* consideration consists of something *past* or *done* before the making of the promise. (*x*¹) It is said not to be necessary, in stating *executed* considerations, to allege them with the certainty of time and place required in stating *executory* considerations, nor with the same particularity in other respects as to quantity, quality, value, &c.; (*y*) because the allegation of a past consideration is considered to be matter of inducement, and as such, not in itself traversable. (*z*) It must, however, be shown, that the executed consideration arose *at the defendant's request*, (*a*) though such request may, in some cases, be *implied in evidence*, as when the defendant has derived benefit from the consideration, (*a*¹) and has afterwards made an express promise to the plaintiff, (*a*²) or has recognized the plaintiff's act; and it is only necessary in cases of *executed consideration* to state that the consideration for the defendant's promise moved at *his request*; (*b*) the executed consideration must, in legal estimation, be of some value, but the performance by the plaintiff of any act he was not legally *bound* to perform would suffice, as the producing or giving to the defendant a certain letter. (*c*) There are some cases in which the plaintiff has the option of stating the consideration either as an executed or as an *executory* consideration, and which will be hereafter noticed. (*d*)

2dly. In the statement of an *executory* consideration a greater degree

(*x*¹) [1 Chitty Contr. (11 Am. ed.) 52 *et seq.* and notes, 69 *et seq.* and cases in notes; Loomis v. Newhall, 15 Pick. 159.]

(*y*) See Andrews v. Whitehead 13 East, 105, 116, 117; Steph. 5th. ed. 328, 409. See as to matter of inducement, *ante*, 296.

(*z*) *Ib.*; Bul. N. P. 146; Sexton v. Miles, Salk. 22; Lampleigh v. Brathwait, Hob. 106. *Sed quære*, it is certainly *traversable*, and though it need not be averred on what *precise day* the executed consideration took place, yet it must be shown that it had *previously* occurred as *before then*, &c.

(*a*) 1 Saund. 264, note (1); Hayes v. Warren, 2 Strange, 933; Dyer, 272; and per Parke B. in King v. Sears, 2 Cr., M. & R. 53; [Parker v. Crane, 6 Wend. 647; Leland v. Douglass, 1 Wend. 492; Balcom v. Craggin, 5 Pick. 295; Train v. Gold, 5 Pick. 380; Jewett v. Somerset, 1 Greenl. 125; Goldsby v. Robertson, 1 Blackf. 247; Stoever v. Stoever, 9 Serg. & R. 434; Harding v. Craigie, 8 Vt. 501; 1 Chitty Contr. (11th Am. ed.) 69 *et seq.*; Bulkley v. Landon, 2 Conn. 204; Chaffee v. Thomas, 7 Cowen, 858; Lonsdale v. Brown, 4 Wash. C. C. 148; Hitchcock v. Litchfield, 1 Root, 206.

See, further, on the subject of executed consideration, Kent J. in Livingston v. Rogers, 1 Caines, 585; Comstock v. Smith, 7 John. 87; Hicks v. Burhans, 10 John. 243; Everts v. Adams, 12 John. 352; Frear v. Hardenburgh, 5 John. 272; Robertson v. Bethune, 3 John. 250; Mitchell v. Bell, 1 Taylor, 61.]

(*a*¹) [As, from the beneficial nature of the act performed by the defendant. Hicks v. Burhans, 10 John. 243; Livingston v. Rogers, 1 Caines, 585, 586; Comstock v. Smith, 7 John. 87; Oatfield v. Waring, 14 John. 188.]

(*a*²) [Greeves v. M'Allister, 2 Binney, 591; Goldsby v. Robertson, 1 Blackf. 247.]

(*b*) King v. Sears, 2 Cr., M. & R. 48; 1 Saund. 264, note (1), a good instance; it was there stated, that in consideration that the plaintiff would forbear to distrain on a third person (without saying at defendant's request), defendant undertook to pay, &c. and held sufficient on special demurrer.

(*c*) Wilkinson v. Olivera, 1 Bing. N. C. 490.

(*d*) *Post*, 305, note (*t*); Payne v. Wilson, 7 B. & C. 423.

of certainty is required. (e) The consideration and the promise of the defendant are two distinct things, and in order to show that the plaintiff possesses a right of action, it is in general necessary to aver performance of the consideration on his part, which allegation being material and traversable must be made with proper *certainty of time, &c. (f) This obligation of averring performance imposes upon the plaintiff the necessity of stating the consideration with a greater degree of certainty and minuteness than in the case of executed considerations; for the court would otherwise be unable to judge whether the performance averred in the declaration were sufficient. (g) Thus, in an action for wages, agreed to be paid to the plaintiff in consideration that he *would* proceed on a certain voyage, it has been held necessary to state the particular voyage. (h) But the same degree of certainty is not required in stating any particular part of the consideration, with respect to which the circumstances of the case render it unnecessary to aver performance. Thus, in actions for negligence, &c. against attorneys, carriers, and other bailees, who have been employed by the plaintiff for reward, it is not necessary to specify the amount of the remuneration stipulated to be given, but the plaintiff may state that the retainer was "for certain reasonable reward." (i) It will be observed, that in these cases the payment of the reward does not constitute a condition precedent, and that in point of fact it is the retainer that constitutes the consideration: the reward may or may not become payable according to circumstances. But it is obviously essential in general to aver that the retainer was for reward, otherwise the promise would appear to be *nudum pactum*. (k)

Statement of
executory
considerations.

3dly. A *concurrent* consideration occurs in the case of mutual promises, which are a third species of consideration, partaking of the nature of the preceding two. The plaintiff's *promise* is *executed*, but the *thing* which he has engaged to perform is *executory*, as in promises to marry, to submit to an award on wages, &c. The promises of each party must in general be concurrent or obligatory on *both* at the same time, (k¹) to render the promise of

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(e) 1 Saund. 264, note (1); [Read v. Smith, 1 Allen, 520; 1 Chitty Contr. (11th Am. ed.) 72.]

(f) Bul. N. P. 146 a; Salk. 22; Ring v. Roxbrough, 2 Tyr. 468; 2 Cr. & J. 418; [Glover v. Tuck, 24 Wend. 153; Russell v. Stade, 12 Conn. 455.]

(g) See Com. Dig. Action, Assumpsit, H. 4; Flander, C. See, also, Head v. Baldrey, 2 N. & P. 217.

(h) White v. Wilson, 2 B. & P. 116, 120; Ward v. Harris, 2 B. & P. 265; [Lent v. Padelford, 10 Mass. 230.]

(i) See the precedents of declarations in

assumpsit against attorneys, carriers, &c. for negligence, in the second volume; and see Andrews v. Whitehead, 13 East, 114, note; Bayley v. Tucker, 2 New Rep. 458; and see Whitehead v. Greetham, 2 Bing. 464; M'Clel. & Y. 205, S. C.

(k) See ante, 301; Dartnall v. Howard, 4 B. & C. 345; 6 D. & R. 438, S. C.

(k¹) [Porter v. Rose, 12 John. 209; Steam Navigation Co. v. Dandridge, 8 Gill & J. 248; Livingston v. Rogers, 1 Caines, 583; Whitall v. Morse, 5 Serg. & R. 358; Tucker v. Woods, 12 John. 190; Briggs v. Tillotson,

either binding, and must be so stated in pleading. (*l*) And in these cases it is not always necessary to aver performance of the thing stipulated to be done, (*l'*) the plaintiff's *agreement* to perform being a sufficient consideration; (*m*) unless the *performance* of one act be the consideration of the performance of the other, in which case an averment of *performance*, or *readiness* to *perform, is in general necessary, even in the case of mutual promises; (*n*) as upon mutual promises to marry and bargains to sell and accept goods. (*o*)

4thly. In the case of a *continuing* consideration, the declaration generally states, that in consideration that the defendant *had become and was* tenant to the plaintiff of certain land, &c. he undertook, during the continuance of the tenancy, *to use the premises in a tenant-like manner, &c.*; and the declaration then avers the continuance of the tenancy and the breach; (*p*) or the declaration states the defendant's character and relative duty, and his promise in consideration thereof to perform his duty. But in either of *these cases* of mere *continuing* consideration, the promise must not be stated to have been more extensive than the law would presume, or, at least, support; and, therefore, a promise that, in consideration that the defendant then was tenant to the plaintiff, he promised *to repair*, &c. the declaration will be demurrable. (*q*)

Statement of
continuing
considerations.

In the preceding observations we have considered the necessity of showing that the consideration was legally sufficient, and the degree of certainty and particularity required in stating it. Another important point to be observed is, that the consideration, if expressly traversed or denied by the plea (but not

2. Of variations in stating the consideration.

8 John. 285; Woods v. Rice, 4 Met. 481; Morrison v. Ives, 4 Sm. & M. 652.]

(*l*) Payne v. Cave, 3 T. R. 148; Cooke v. Oxley, 3 T. R. 653; Clayton v. Jennings, 2 Bl. Rep. 706; Kingston v. Phelps, Peake N. P. R. 228; Callonell v. Briggs, 1 Salk. 112; Wain v. Warlters, 5 East, 16; [Livingston v. Rogers, 1 Caines, 583; 1 Chitty Contr. (11th Am. ed.) 73.] In the case of Sykes v. Dixon, 9 Ad. & El. 693; 1 P. & D. 463, S. C. where an agreement professed to be made between a master and servant was signed by the latter only, in an action for harboring the servant, it was held that as the agreement contained nothing binding on the master, it was *nudum pactum*, and altogether void. See, also, Latch v. Wedlake, 3 P. & D. 499.

(*l'*) [Lent v. Padelford, 10 Mass. 230; Russell v. Slade, 12 Conn. 463; Whittall v. Morse, 5 Serg. & R. 358; Close v. Miller, 10 John. 90; Dey v. Dox, 9 Wend. 129.]

(*m*) Martindale v. Fisher, 1 Wils. 88; Bach v. Owen, 5 T. R. 409; Thorpe v. Thorpe, 1 Ld. Raym. 664; 1 Salk. 171, S. C.

(*n*) Callonell v. Briggs, 1 Salk. 112; Thorpe v. Thorpe, 1 Salk. 171; 1 Ld. Raym. 665, S. C.; Campbell v. Jones, 6 T. R. 570; Norton v. Lamb, 7 T. R. 125; Levy v. Herbert, 1 Moore, 56.

(*o*) Rowson v. Johnson, 1 East, 203; Waterhouse v. Skinner, 2 B. & P. 447; 1 Saund. 320 e, note (5); [Livingston v. Rogers, 1 Caines, 583; Tucker v. Woods, 12 John. 190; Keep v. Goodrich, 12 John. 397; Gould v. Banks, 8 Wend. 562.]

(*p*) Pawley v. Walker, 5 T. R. 373; Musson v. Price, 4 East, 150; Pearle & Edward's case, 1 Leon. 102; Pearle v. Unger, Cro. Eliz. 94; Riggs v. Bullingham, Cro. Eliz. 715; Sidenhams & Worlington's case, 2 Leon. 224; Winn v. White, 2 Bl. Rep. 842; Brown v. Crump, 1 Marsh. 567; *post*, vol. ii. 187; [1 Chitty Contr. (11th Am. ed.) 73, 74.]

(*q*) Brown v. Crump, 1 Marsh. 567; 6 Taunt. 300, S. C.; Granger v. Collins, 6 M. & W. 460; *post*, vol. ii. 187, and note (*y*).

otherwise, since the pleading rules of H. T. 4 W. 4), must be *proved* as stated; or the plaintiff will fail at the trial on the ground of a *variance*, (q¹) unless permitted to amend under 3 & 4 W. 4, c. 42, s. 23. Instances of variance in stating matter of *inducement* have already been given. (r) It is proposed now to notice the rules relative to *variances* in the statement of the *consideration*; and the doctrine of *variances* in stating the *promise* or *contract* will be explained in a subsequent part of the work.

Great accuracy is required in the statement of the *consideration*, which in an action of *assumpsit* forms the basis of the contract, and if any error appear to have been made in describing it, the consequence will be, that the whole contract is misdescribed. (r¹) Thus, in the instance before noticed, of an action brought for wages, to be paid to the plaintiff, in consideration that he would proceed on a particular voyage, it was held that a variance in the description of the voyage was fatal, though laid under a *videlicet*. (s) So, it would appear to *be a general rule, that if the consideration alleged be executory, and that which is proved be executed, the misdescription is fatal: executory and executed considerations being in their nature materially distinct. (s¹) But when in a declaration in *assumpsit* the plaintiff alleged, that in consideration that he, at the request of the defendant, *would consent* to suspend proceedings against A., the defendant promised, &c.; and the evidence was an agreement in these terms, viz. "the plaintiff *having, at my request, consented to suspend proceedings* against A., I do hereby, in consideration thereof, promise to pay 30*l.* on the first day of April," it was held, on motion in arrest of judgment, that the consideration was sufficiently described: the fair construction of the agreement being, that the consideration was that the plaintiff would suspend proceedings against A. until the 1st of April. (t) So where a count of a declaration in *assumpsit* against a carrier by water alleged that in consideration that the plaintiff, at the request of the defendant, *had caused* to be shipped on board the defendant's vessel a quantity of wheat, to be carried to a certain place

(q¹) [N. H. Mutual Fire Ins. Co. v. Hunt, 30 N. H. 219; Smith v. Barker, 3 Day, 312; Robertson v. Lynch, 18 John. 451. If the consideration for a covenant is set forth in the declaration in the words of the agreement containing the covenant, there can be no variance. Smith v. Edmunds, 16 Vt. 687.]

(r) *Ante*, 297.

(r¹) [Hendrick v. Seeley, 6 Conn. 176; Russell v. South Britain Society, 9 Conn. 506; Carley v. Dean, 4 Conn. 259; Brooks v. Lowrie, 1 Nott & McC. 342; Bender v. Manning, 2 N. H. 289; De Forest v. Frazz, 6 Cowen, 151; Lansing v. M'Killip, 3 Caines, 286; Carrell v. Collins, 2 Bibb, 429; Stone v. Knowlton, 3 Wend. 374.]

(s) White v. Wilson, 2 B. & P. 116; *ante*, 303.

(s¹) [Robertson v. Lynch, 18 John. 451; Bulkley v. Landon, 3 Conn. 404.]

(t) Payne v. Wilson, 7 B. & C. 423. Littledale J. observed in this case that there was a continuing consideration; for the plaintiff not only had consented to suspend the proceedings, but also that they should be suspended until the first of April, and that therefore this might be alleged in pleading, either as an executed executory consideration. See Com. Dig. Action, Assumpsit, B. 12; Pearle v. Unger, Cro. Elia 94.

for freight to be therefore paid to the defendant, he undertook to carry the wheat safely, and deliver it for the plaintiff on a given day; but it appeared that the defendant's undertaking to carry was made *before* the whole of the wheat had been shipped on board his vessel; it was held, that the count might be supported, although it was objected that the consideration for the promise was executory; on the ground, that where an order is given to a carrier antecedently to the delivery of goods, who assents to deal with them, when delivered, in a particular manner, a duty is imposed on him, on the receipt of the goods, to deal with them according to the order previously given; and the law implies a promise by him to perform such duty. (u)

In accordance with the rule requiring the consideration to be stated accurately, it is necessary that the *whole* of the consideration should in general be stated; and if any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail at the trial on the ground of variance. (x) Thus, where in assumpsit on the warranty of a horse, the declaration stated the transaction as upon a sale of a *single* horse, and upon the evidence it appeared that *two* horses had been sold at an entire price and with a joint warranty, the variance was considered fatal, the purchase of the two horses constituting the consideration for the warranty. (y) The * same rule renders it also imperative that the consideration stated in the declaration should be proved to the extent alleged; and in general when the consideration proved falls short of that which is stated in the declaration, as the foundation for the promise, the variance will be equally fatal as when the proof exceeds the statement. In an action brought by *husband and wife and another party*, the declaration stated, that by an agreement between the *plaintiffs* and the defendant, the *plaintiffs* agreed to let to the defendant certain lands; that the defendant became tenant to the plaintiffs, and stated mutual promises by the plaintiffs and defendant to perform all things contained in the agreement; the agreement given in evidence purported to be made by an agent on behalf of the *wife* and the *third plaintiff only*, without any mention of the husband, but it appeared that the husband had *subsequently* received rent from the tenant: the court held, that in order to support the consideration alleged, it was necessary to prove that the husband was a joint contractor *ab initio*; that the evidence fell short of this proof, since, before the receipt of rent by the husband, he was clearly not bound by the agreement; and that the variance was therefore fatal. (z) So also, where in an action

(u) *Sheeter v. Horlock*, 7 Moore, 283; 1 Bing. 34, S. C.

(z) *Clarke v. Gray*, 6 East, 568; *Miles v. Sheward*, 8 East, 7; *King v. Robinson*, Cro. Eliz. 79; *Bul. N. P.* 147; *Leeds v. Burrows*, 12 East, 1; *Andrews v. Whitehead*, 13 East, 102; [*Smith v. Webster*, 48 N. H. 142;

Brooks v. Lowrie, 1 Nott & McC. 342; *Badger v. Burleigh*, 13 N. H. 507; *ante*, 303, note (k).]

(y) *Symonds v. Carr*, 1 Campb. 361.

(z) *Saunders v. Griffiths*, 5 B. & C. 909; 8 D. & R. 643, S. C.

for the breach of warranty of a horse, the declaration stated the consideration of the warranty to be the sale to the plaintiff of the horse for the sum of 55*l.*, and it was proved that the plaintiff was to have the horse for that sum, but the defendant had agreed to give 1*l.* back, if the horse did not bring the plaintiff 4*l.* or 5*l.*; the variance was held fatal, the declaration importing that the price was 55*l.* absolutely, and the evidence showing that the price agreed for was subject to a contingent reduction. (a)

An exception, however, prevails in regard to considerations which are in part good, and in part frivolous and insufficient. We have before noticed cases of this description, and have shown that when a consideration of this nature is stated, the declaration will not be vitiated by the insufficient part, but that the promise will be referred to that part of the consideration which is in law sufficient to support it. (a¹) The insufficient part is regarded as mere surplusage; in a legal point of view it forms no part whatever of the real consideration for the contract, and consequently it becomes wholly unnecessary either to notice it in the declaration or to prove it if stated. (b) A variance, therefore, between the evidence and the declaration as to such part of the consideration stated as is frivolous and insufficient will be of no consequence. Thus, where in an action for rent the declaration stated a demise of "a messuage, land, and premises, with the appurtenances;" * and the evidence was of a demise of furniture and utensils, as well as of real property, the variance was held to be immaterial, since in point of law the rent issued out of the real property only, and not out of the furniture. (c)

When there is no direct contradiction between the allegation and the evidence, it is in general sufficient that they agree in substance. Thus, when the consideration of the retainer and employment of the defendant by the plaintiff is stated to be "certain *reasonable* reward," it seems that it will not amount to a variance if it appear by the evidence that a *specific sum* was agreed upon. (d) And where it was stated that the defendant agreed to furnish certain goods "at fair and reasonable prices," the averment was held sufficiently proved by showing a contract to furnish such goods, with a certain latitude as to price, viz. between two specified sums. (e) In these cases it was considered that the evidence *substantially* supported the allegations in the declarations, and was not inconsistent with it.

(a) Blyth v. Bampton, 3 Bing. 472. See, also, Charchill v. Wilkins, 1 T. R. 447.

(a¹) [See Loomis v. Newhall, 15 Pick. 159; Andrews v. Ives, 3 Conn. 368.]

(b) Ring v. Roxbrough, 2 Cr. & Jer. 418; 2 Tyr. 468; King v. Sears, 2 Cr. M. & R. 48; Crisp v. Gamel, Cro. Jac. 127; Bradburne v. Bradburne, Cro. Eliz. 149; Com.

Dig. Action, Assumpsit, B. 13; ante, 301, note (i).

(c) Farewell v. Dickenson, 6 B. & C. 251; 9 D. & R. 245, 8 C. The action was debt, but it is noticed as illustrative of the principle stated in the text.

(d) Bayley v. Tucker, 2 New Rep. 458; [Leland v. Douglass, 1 Wend. 490.]

(e) Laing v. Fidgeon, 6 Taunt. 108.

When *no consideration* is stated in the declaration, or when that which is stated is *clearly insufficient or illegal*, the defendant may either demur or move in arrest of judgment, or support a writ of error. (*f*) When the mode in which the consideration is stated is defective, informal, or uncertain, the declaration will be bad upon *special demurrer*; (*g*) but after verdict a defective statement of the consideration will be aided, (*g*¹) provided, by a reasonable construction of the whole declaration, it sufficiently appears that there was a consideration capable of supporting the promise. (*h*)

Where the consideration is *untruly stated*, or a part thereof is omitted, or the whole cannot be proved, the objection can only be taken at the trial as a ground of nonsuit, (*i*) and since the pleading rules Reg. Gen. Hil. Term, 4 W. 4, the defendant must *by plea expressly deny* the consideration, or plead specially the want of adequate consideration; and in actions on bills or notes the plea must be very particular. (*k*)

After showing the consideration, the declaration proceeds to state the defendant's *promise* or *contract*. In treating of the manner in * which the contract should be stated, we may consider, 1st, the general rules of *pleading* with respect to the statement of the defendant's promise or contract, so that it may appear to be valid *on the face of the record*; and, 2dly, the doctrine of *variances* between the *statement* and the *evidence*.

1st. A declaration in assumpsit should in all cases show that a *promise* has been made, either by expressly averring that the defendant "*promised*," (*l*) or by other equivalent words. (*l*¹) The adoption of the terms *assumpsit super se*, &c. has been in some cases considered absolutely necessary, and a declaration which omitted them has been held bad

(*f*) *Mitchinson v. Hewson*, 7 T. R. 348; *Darmall v. Howard*, 4 B. & C. 345; 6 D. & R. 438, S. C.; [*Bender v. Manning*, 2 N. H. 289; *Muldrows v. Tappan*, 6 Missou. 276; *McNulty v. Collins*, 7 Missou. 69; *Bruner v. Stout*, Hard. (Ky.) 225; *Winston v. Francisco*, 2 Wash. (Va.) 187.]

(*g*) *Jones v. Ashburnham*, 4 East, 455; *Andrews v. Whitehead*, 13 East, 102.

(*g*¹) [*Shaw v. Redmond*, 11 Serg. & R. 27.]

(*h*) *Ward v. Harris*, 2 B. & P. 265; *Marshall v. Birkenshaw*, 1 New Rep. 172; *Jones v. Ashburnham*, 4 East, 464; 2 Bing. 464; *Whitehead v. Greetham*, M'Clel. & Y. 205.

(*i*) *Carter v. Goddard*, Cro. Eliz. 79; [*N. H. Mut. Fire Ins. Co. v. Hunt*, 30 N. H. 219.] As to amendment of a declaration on

a written instrument at the trial, see *post*, 328.

(*k*) See the rules and requisites of *pleas*, *post*, ch. vii.; *Graham v. Pitman*, 5 Nev. & Man. 37; *Kinder v. Smedley*, 5 Nev. & Man. 138; so, also, illegality of consideration must be specially pleaded. *Barnett v. Glossop*, 3 Dowl. 625; 1 Bing. N. C. 633; 1 Hodges, 35.

(*l*) See forms prescribed by Reg. Gen. Trin. T. 1, W. 4, as models, *post*, vol. ii. 60, 61; [*Chapman C. J.* in *Cooper v. Landos*, 103 Mass. 58, 60.]

(*l*¹) [*Avery v. Tyringham*, 3 Mass. 160; *McGinnity v. Laguerenne*, 10 Ill. 101; *Wingo v. Brown*, 12 Rich. (S. Car.) 279; *Muldrows v. Tappan*, 6 Missou. 276; *McNulty v. Collins*, 7 Missou. 69. And the presence or absence of

even after judgment (*m*) and is certainly bad on *special* demurrer. (*n*) But from other authorities it appears that a declaration in assumpsit, which does not contain the word "*promised*," may nevertheless be good, provided it sufficiently appear from the whole declaration that what is equivalent to a promise has taken place. (*n*¹) Thus, in assumpsit on a bill of exchange, where the declaration showed the defendant's liability on the bill as the drawer, but omitted to add that he promised to pay, the court refused to arrest the judgment for this omission, and held that the count was, notwithstanding such omission, a count in assumpsit, because the drawing of the bill was a promise; (*o*) and the same doctrine has been extended to a promissory note. (*p*) So it has been held on motion in arrest of judgment, that a declaration in assumpsit, which stated an agreement between the plaintiff and defendant, but omitted the mutual promises, was sufficient, and the court said an agreement was a promise. (*q*) And in a case where one count in a declaration stated that the plaintiff had delivered certain property to the defendant to be taken care of by the defendant for reward to him, and that in consideration thereof the defendant "*undertook and agreed*" to take care of the property and to redeliver it on request; it was held, on motion in arrest of judgment, that this

these words is a test of distinction in declaring between assumpsit and case. In assumpsit or contract the pleader is bound to allege that the defendant undertook and promised to do, or not to do, the particular act, which was the cause of the injury sustained by the plaintiff, or that he undertook to do it in a skillful and proper manner. The count in case is substantially the same as that in assumpsit, except the allegations that the defendant promised and undertook to do, or not to do, the particular act complained of, is omitted. *Mullin v. J. in Booth v. The Farmers' & Mechanics' National Bank of Rochester*, 1 N. Y. Sup. Ct. Rep. 49. The learned judge, in this case, referring to the New York Code of Procedure, said: "The codifiers, while proposing to abolish the distinction between forms of actions, found it impossible or impracticable, in many cases, to effect their object, and this case illustrates the failure in at least one class of cases. When case and assumpsit were, at common law, concurrent remedies, the form of action that the pleader selected was determined by the insertion in or omission from the declaration of the allegation that the defendant undertook and promised. This right of selection remains, and whether the action is in *tort* or *assumpsit* must be determined by the same criterion. If this is not so the right of selection is taken away. If taken away, which of the two is left? An action on contract cannot be joined with one in *tort*. How are we to determine whether the action is one in contract or in *tort*, unless the pleader, by averment, alleges

the making of the contract, and demands damages for a breach in the one case, or, by the omission of such an averment, makes it an action in *tort*? I know of no more certain or convenient criterion by which to determine the class to which a cause of action belongs than the one suggested. If some such rule is not established the question of misjoinder will arise in every case in which, at common law, assumpsit and case were concurrent remedies."

(*m*) *Lee v. Welsh*, 2 Stra. 793; 2 Ld. Raym. 1516, S. C.; *Buckler v. Angel*, 1 Sid. 246; *Com. Dig. Action, Assumpsit*, H. 3. The want of an allegation of a promise to pay in an indebitatus count is not cured even after verdict. *Hayter v. Moat*, 2 M. & W. 56. But in a count on a bill of exchange or note, no promise need be alleged. *Griffith v. Roxborough*, 2 M. & W. 734.

(*n*) *Harding v. Hibel*, 4 Tyr. 314; [*Winston v. Francisco*, 2 Wash. 187; *Bruner v. Stout*, 225; *Bender v. Manning*, 2 N. H. 289; *Candler v. Rossiter*, 10 Wend. 487.]

(*n*¹) [*Avery v. Tyringham*, 3 Mass. 160; *Bell v. Hobbs*, Geo. Decis. 144; *Sexton v. Holmes*, 3 Munf. 366; *Cook v. Sims*, 2 Call. 39.]

(*o*) *Starke v. Cheseeman*, 1 Ld. Raym. 538; 1 Salk. 128; *Carth. 509*.

(*p*) *Wegenloft v. Keene*, 1 Stra. 224. See *Morris v. Norfolk*, 1 Taunt. 217, 218. [So, in assumpsit by the bearer of a note payable to bearer. *Dole v. Weeks*, 4 Mass. 451.]

(*q*) *Mountford v. Horton*, 2 New Rep. 62.

was a count in assumpsit, (*q*¹) and was therefore improperly joined with one in tort. (*r*) It should however be observed that in all these cases it was considered that the declaration contained averments which were fully tantamount to the allegation of an express promise, a circumstance which is absolutely necessary in a declaration in assumpsit. No distinction exists in *pleading between an implied promise and an express one; it is true that in *evidence* the law in many cases implies from certain facts, that a promise has been made; but in *pleading*, the supposed promise itself should be alleged, (*r*¹) and it is at least untechnical merely to state that which is only *evidence* of a promise. (*s*)

It is essential that the contract should be stated with certainty; (*t*) but we have formerly seen that in a declaration a less degree of certainty is required than in a plea; and that what in the ordinary technical phrase is called "certainty to a certain intent in general," will be sufficient; (*u*) and therefore a statement in a declaration, "for that *whereas* the defendant on, &c." promised, &c. is good on general demurrer, and perhaps even on special demurrer. (*v*)

The declaration should specify the *names of the parties* by and to whom the promise was made, but an omission in this respect will frequently be aided, especially after verdict; and it is even said that when the name of the party making the promise has been omitted, it may be intended after verdict that the defendant made the promise. (*w*) And where the declaration omits to state to whom the promise was made, it will be intended that the promise was made to the party from whom the consideration proceeded. (*x*) But after verdict for the plaintiff, the judgment was arrested, because the declaration showed only a consideration from a *third person*, and not from the plaintiff, and only stated a promise to *pay* him, without showing a promise *to* him. (*y*) It was also necessary that the promise should be averred with certainty of *time* and *place*, and is still so as to *time*. (*z*) It seldom occurs that the precise time laid in the declaration is material to be proved, but the promise being a material and traversable allegation, the rules of pleading require, as we have previously seen, that a *time* of making it should be specified. (*a*) The

(*q*¹) [Avery v. Tyringham, 3 Mass. 160.]
(*r*) Corbett v. Packington, 6 B. & C. 268;
9 D. & R. 258, S. C.

(*r*¹) [See Kinsley v. Bill, 9 Mass. 199;
Candler v. Rossiter, 10 Wend. 487.]

(*s*) See Starke v. Cheeseman, 1 Ld. Raym.
538, 539; Anonymous, 6 Mod. 131; Kinder
v. Paris, 2 H. Bl. 563, note (*a*); *ante*, 248.

(*t*) Com. Dig. Action, Assumpsit, H. 3.
(*u*) *Ante*, 257, 270; Com. Dig. Action,
Assumpsit, A. 4.

(*v*) *Ib.* *Ibid.*; Ring v. Roxbrough, 2 Tyr.
468; 2 Cr. & J. 418, S. C. ✓

(*w*) Com. Dig. Action, Assumpsit, H. 3;

Lut. 283; but see *contra*, Law v. Sanders,
Cro. Eliz. 918; Noy, 50, S. C.; [Blackwell
v. Irvin, 4 Dana, 187.]

(*x*) Rolfe v. Sharpe, Cro. Car. 77; Noy,
83, S. C.; Com. Dig. Action, Assumpsit, A.
5; Jones v. Owen, 5 Ad. & El. 222.

(*y*) Price v. Easton, 4 B. & Ad. 433; 1 Nev.
& Man. 303, S. C.

(*z*) See Ring v. Roxbrough, *supra*, note
(*x*). ✓

(*a*) See *ante*, 272, 275; *supra*, note (*z*).
[See Stephens v. Graham, 8 Serg. & R. 405;
Church v. Feterow, 2 Penn. 301.]

statement of the contract should in strictness be positive, and not by way of a recital; but it will be considered sufficient if the averment of the defendant's promise be preceded by "whereas." (b) And in setting out an agreement the plaintiff may do so by a "*testatum existit.*" (c)

All those parts of the contracts, which are material for the purpose of enabling the court to form a just idea of what the contract actually was, or which are necessary for the purpose of furnishing the jury with a criterion in the assessment of damages, should be stated with certainty and precision. (d) In a case where the declaration stated that in consideration that the plaintiff had sold to the defendant a certain horse of the plaintiff, at and for a *certain quantity of oil*, to be delivered *within a certain time, which had elapsed* before the commencement of the action, the defendant promised to deliver the *said oil to the plaintiff accordingly*, the court at first entertained some doubt whether so uncertain a statement of the contract was not bad in arrest of judgment, but finally held that it was sufficient after verdict. (e) In a subsequent case, where (after stating a former agreement for the sale of goods by the defendant to the plaintiff, "at a certain rate or price per pound, to be paid in a manner then stipulated between them, the goods to be delivered by the defendants to the plaintiffs at a time which had elapsed before making the promise therein after mentioned, but which goods had not been delivered") the declaration proceeded to state a new contract, that in consideration that the plaintiff would still receive and pay for the goods "*at the rate or price and in manner aforesaid,*" the defendant promised to deliver the same "*within such reasonable time as aforesaid;*" this mode of statement was held too general, and bad upon special demurrer. (f) If, however, the uncertainty of the words of the promise be afterwards supplied and rendered certain by an averment, it will be sufficient; as in the ordinary instance of a promise to pay the plaintiff as much as he should deserve, with a subsequent averment that he deserved so much. (g)

When the contract is in *writing*, it is not necessary to state that circumstance in a declaration. (g¹) And even in cases where, by the statute of frauds, the promise is rendered ineffectual, unless there be a memorandum of its terms in writing, it is not *necessary* in a declara-

(b) *Eraly v. Ld. Falkland*, Hardr. 1; Com. Dig. Assumpsit, H. 3; *supra*, note (z).

(c) This form of setting out an agreement or deed is considered sufficient in a declaration, although in a plea it might be otherwise; *ante*, 257; 1 Saund. 274, note (i).

(d) See *Ward v. Harris*, 2 B. & P. 267; *Andrews v. Whitehead*, 13 East, 115, 116. [See *Favor v. Philbrick*, 7 N. H. 326; *Wilde J. in Stearns v. Barrett*, 1 Pick. 443; *Couch v. Legemoll*, 2 Pick. 292.]

(e) *Ward v. Harris*, 2 B. & P. 265.

(f) *Andrews v. Whitehead*, 13 East, 102; and see *Mayor of Reading v. Clarke*, 4 B. & Ald. 268.

(g) *Royle v. Bagshaw*, Cro. Eliz. 149; Com. Dig. Assumpsit, H. 3.

(g¹) [*Wallis v. Frazier*, 2 Nott & McC. 280; *Nelson v. Dubois*, 13 John. 175; *Baker v. Jameson*, 2 J. J. Marsh. 547.]

tion at law, (h) or a bill in equity, (i) to show that the requisitions of the statute have been complied with in this respect. (j) The nature of the promise still remains the same in the eye of the law, which does not admit of any distinction between verbal and written agreements, except where the latter are under seal; and it should * seem that the provisions of the statute only affect the rules of evidence and not those of pleading. (k)

We shall examine hereafter, in treating of the degree of accuracy required in stating contracts, how much of the contract it is necessary to set out in the declaration, in order to avoid a variance between the pleadings and the evidence at the trial. (l) It should, however, be here observed, that it is sufficient to state those parts of the contract whereof a breach is complained, or in other words, to show so much of the terms beneficial to the plaintiff in a contract, as constitutes the point for the failure of which he sues; and that it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. (m) The statement of additional matter would be needless prolixity, which, though it does not vitiate the declaration, is much censured by the courts when carried to any excess. (n) And it has been justly observed that the perfection of pleading consists in combining brevity with the requisite certainty and precision. (o) Thus in declaring in covenant upon a lease for non-payment of rent, it is advisable not to set out the premises at length as in the deed, but to state that the plaintiff demised to the defendant, "certain premises particularly mentioned and described in the said indenture except as therein is excepted;" to hold the same for a certain term or terms (showing the

(h) 1 Saund. 276 a; Bac. Ab. Stat. L. 3; ante, 244; [ante, 244, and note (n).] But the declaration on a demise of tolls by trustees of a turnpike road under 3 Geo. 4, c. 123, ss. 55, 57, must state that the demise was in writing and signed by two or more trustees or their clerk. *Oldroyd v. Crampton*, 4 Bing. N. C. 24. There are circumstances which may render it advisable although not necessary, to show in the declaration that the contract was in writing. See *Whittaker v. Mason*, 2 Bing. N. C. 359, where the plaintiff was prejudiced by the want of such averment.

(i) *Rist v. Hobson*, 1 Sim. & Stu. 543; [1 Dan. Ch. Pr. (4th Am. ed.) 365;] and see *Chalie v. Belshaw*, 6 Bing. 329, as to stating the acceptance of a bill to have been in writing since the stat. 1 & 2 G. 4, c. 78, requiring the acceptance of an inland bill to be in writing.

(j) 1 Saund. 276 a; Bac. Ab. Stat. L. 3; ante, 244; [Walker v. Richards, 39 N. H. 259; Nelson v. Dubois, 13 John. 177; Miller v. Drake, 1 Caines, 46; Elting v. Vanderlyn, 4 John. 237; Cleaves v. Foss, 4 Greenl. 1; Wallis v. Frazer, 2 Nott & McC.

180; Blick v. Brigg, 6 Ala. 687; Brown v. Barnes, 6 Ala. 694.]

(k) See *Mitchinson v. Hewson*, 7 T. R. 351, note. It has, however, been held, that a plea must show that the statute has been satisfied; but see *Steph. on Pleading*, 5th ed. 349, 412, 413.

(l) *Post*.

(m) *Cotterill v. Cuff*, 4 Taunt. 285; *Tempest v. Rawling*, 13 East, 18.

(n) *Dundas v. Ld. Weymouth*, Cowp. 665; *Price v. Fletcher*, Cowp. 727; *Yates v. Carlisle*, 1 Bl. Rep. 270; *Bristow v. Wright*, Dougl. 667; [Smith v. Boston, Conc. & M. R. R. 36 N. H. 485; *Fisk v. Hicks*, 31 N. H. 535. An unnecessary averment of a breach or infringement of a contract declared on, need not be proved, but may be rejected as surplusage. *Ferguson v. Tucker*, 5 H. & Gill, 183.] See as to surplusage, ante, 252, 253.

(o) *Steph. on Pleading*, 5th ed. [The rules of the common law as to materiality, certainty, prolixity, obscurity, are rules of logic; and have not been abolished by the North Carolina Code. *Crump v. Mims*, 64 N. C. 767.]

extent of it, or that it is still unexpired) yielding the rent payable on, &c. ; and then to state the covenant for payment of the rent, the entry of the defendant, and the breach in not paying the rent due. Or if the action be for the breach of any other covenants, the plaintiff should in such case state the parts of the indenture referring to the rent, in the like concise way in which he should state the other parts of the indenture not connected with the rent, in an action for non-payment of rent, viz. "at a certain rent, payable by the defendant to the plaintiff, as in the said indenture is mentioned," and then set forth only the particular covenants which he alleges to have been broken. (p) This mode of declaring, it is obvious, is equally applicable and advisable where the lease is not under seal, but by a written agreement only ; and also in other actions upon long written agreements, embracing a variety of provisions. (q)

It is a general rule, that the contract must be stated correctly, and if the *evidence differ from the statement*, the whole foundation of the * action fails, because the contract is entire in its nature, and must be proved as laid. (s) In this respect there is a material distinction between the statement of *torts* and of contracts, the former being divisible in their nature, and the proof of part of the tort or injury being, in general, sufficient to support the declaration. (s¹)

It is laid down as a principle on this subject, that a contract or written instrument should be stated *according to its legal effect*. (t) This rule is of very extensive operation, and applies not only to the statement of contracts in the action of *assumpsit*, but also to the statement by either party of contracts and obligations of every description, whether verbal, written, or specialty, in any form of action. (t¹) The party

2. Of variance between the statement and the evidence.

Contract to be stated according to its legal effect and intent of parties though varying from words.

(p) See 1 Wms. Saund. 233, note (2) ; Dundas v. Ld. Weymouth, Cowp. 665 ; Bristow v. Wright, Dougl. 667.

(q) And see Martin v. Smith, 6 East, 563.

(s) King v. Pippett, 1 T. R. 240 ; Gwinnet v. Phillips, 3 T. R. 646, per Buller J. See, also, Head v. Baldrey, 2 N. & P. 217 ; [Rich v. Boyce, 39 Md. 325 ; Walsh v. Gilmor, 3 Harr. & J. 408 ; Obert v. Whitehead, 6 Halst. 294 ; Wheelright v. Moore, 1 Hall, 301 ; Snell v. Moses, 1 John. 105 ; Allaire v. Ouland, 2 John. Cas. 55 ; Perry v. Aaron, 1 John. 133. Rule under New York Code, Szesdorff v. Schmidt, 55 N. Y. 324. A contract in the alternative must be stated in the declaration according to the terms of it.

Thus, to transport fifteen or twenty tons of marble from one place to another, if stated as an absolute contract, will be a fatal variance. Stone v. Knowlton, 3 Wend. 374. So, to allege a consideration for the promise different from the true consideration, not supported by the proof, will be cause of nonsuit. Stone v. Knowlton, 3 Wend. 374 ; New Hampshire Mut. Fire Ins. Co. v. Hunt, 30 N. H. 219.]

(s¹) [Fisk v. Hicks, 31 N. H. 535.]

(t) Stroud v. Lady Gerrard, 1 Salk. 8 ; Barker v. Lade, 4 Mod. 149 ; 2 Vent. 145 ; 3 Lev. 291 ; Skinner, 315, S. C. ; Howell v. Richards, 11 East, 633 ; Moore v. Earl of Plymouth, 3 B. & Ald. 66 ; Wilson v. Bag-

(t¹) [The Massachusetts practice act requires that all written instruments, except policies of insurance, shall be declared on by setting out a copy of such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action.

Genl. Sta. c. 129, § 2, div. 9. Under this provision the legal effect may be stated, without alleging that the contract is in writing, or setting forth a copy. Higgins v. McDonald, 16 Gray, 386 ; Suffolk Bank v. Lowell Bank, 8 Allen, 357.]

is not *compelled* to follow the precise form of words in which the contract was made; it suffices if he state its true legal effect and operation; (*u*) and it has been observed that a deed may be declared on, without using a word which was contained therein, except the names of the parties and the sums. (*x*) Indeed, in some cases it has been held proper, and indeed absolutely necessary, to depart from the terms of the contract; and a party has been defeated on the ground of variance, when he has used the precise words of the contract, but misstated its legal operation; (*y*) and where a written contract stated that a bill should be given for 14*l.* 19*s.* whereas it was really intended to be for 13*l.* 19*s.* and was so described in the declaration, it was held that this was proper and no variance. (*z*)

Thus, when a conveyance from a joint tenant to his companion is pleaded, and the expressions used in the conveyance are, "gives, grants, &c." it has been held improper to follow the terms of the deed; for although it purports to be a grant, yet its legal effect and operation is not that of a grant but a release; and it should therefore be pleaded *not that he *granted* but that he *released*. (*a*) So, if a tenant for life *grant* his estate to him in reversion, this is in effect a *surrender*,

shaw, 5 M. & R. 448; 1 Wms. Saund. 235 b, (9); 2 Ib. 97 b, (2); Com. Dig. Pleader, C. 37; Bac. Abr. Pleas and Pleading; Bushell v. Beavan, 1 Bing. N. C. 120; Price v. Birch, 4 M. & Gr. 1; Blake v. Beaumont, 4 M. & Gr. 9; Stephen on Pleading, 5th ed. 349, 428; [Lent v. Padelford, 10 Mass. 230; Hopkins v. Young, 11 Mass. 307; Higgins v. Bogan, 4 Harr. (Del.) 330; Gates v. Caldwell, 7 Mass. 68; Dexter v. Manley, 4 Cush. 14; Commercial Bank v. French, 21 Pick. 469; Andrews v. Williams, 11 Conn. 326; Morris v. Fort, 2 McCord, 398; Close v. Miller, 10 John. 90; Keyes v. Dearborn, 12 N. H. 52; Fish v. Brown, 17 Conn. 341; Adams v. Davis, 16 Ala. 748; Scott v. Leiber, 2 Wend. 479; Davis v. Shoemaker, 1 Rawle, 135; Suffolk Bank v. Lowell Bank, 8 Allen, 356, 357.] The rule is less strict where a conveyance is alleged merely as matter of inducement or introduction to that which forms the substance of the allegation. Bultivant v. Holman, Cro. Jac. 537; 2 Roll. Rep. 110, S. C. Where it is doubtful whether an agreement amounts to an actual demise or not, the declaration need not allege what it amounts to in law; it is sufficient to set out the agreement in terms. Price v. Williams, 1 M. & W. 6; 1 Tyr. & Gr. 197, S. C. An agreement in the following terms: "I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 1st of January next, for £60," is an agreement to sell an interest in fee simple, and will not support a declaration alleging a contract for the sale of a dwelling-house and fixtures for the residue of a term of years, although the agreement given in evidence was really intended to

convey the latter interest; Hughes v. Parker, 8 M. & W. 244; 1 Dowl. N. S. 80, S. C.

(*u*) As to setting out a deed on oyer, see post; [Lent v. Padelford, 10 Mass. 230; Crocker v. Whitney, 10 Mass. 320; Hopkins v. Young, 11 Mass. 307; Walsh v. Gilmer, 3 Harr. & J. 407; Grannis v. Clark, 8 Cowen, 36; Ridgley v. Riggs, 4 Harr. & J. 363; Silver v. Kendrick, 2 N. H. 160; Thomas v. Van Ness, 4 Wend. 549; Hastings v. Lovering, 2 Pick. 222; Osborne v. Lawrence, 9 Wend. 135; Churchill v. Merchants Bank, 19 Pick. 532; Dorr v. Fenno, 12 Pick. 521; Keyes v. Dearborn, 12 N. H. 52; Pye v. Rutter, 7 Missou. 548; Dickerson v. Morrison, 5 Pick. 316; White v. Guest, 6 Blackf. 228; Moore v. Platte County, 8 Missou. 467; Maxfield v. Scott, 17 Vt. 634. It is not necessary that the instrument should be described by its right name, if a copy thereof be given and made a part of the pleadings. English v. Helms, 4 Texas, 228; Salinas v. Wright, 11 Texas, 572; Smith v. Webb, 15 Ill. 105.]

(*x*) Waugh v. Russell, 1 Marsh. 216, 217.
(*y*) Barker v. Lade, 4 Mod. 150, 151. See 2 Saund. 97 b, note (2); Moore v. The Earl of Plymouth, 3 B. & Ald. 66; Wickes v. Gordon, 1 Chit. Rep. 66, 67, per Bayley J. & Holroyd J.; Steph. on Pleading, 5th ed. 429. See observations of Parke B. in Simpson v. Nicholls, 3 M. & W. 243; and see Attwood v. Taylor, 1 M. & Gr. 281, note (*d*).
(*z*) Rose v. Sims, 1 B. & Ad. 522, note (*b*). See, also, Hart v. Proudfoot, 8 Dowl. 306.

(*a*) Barker v. Lade, 4 Mod. 150; 3 Lev. 291.

and it has been held that it must be pleaded as such, and not as a *grant*. (b) So, if a deed be in the words, "gives and grants," and operates as a bargain and sale, it must be pleaded as the latter. (c) And it is said that if on a promise to A. to pay B. a sum of money, the action be brought by the latter, it is proper to state that the promise was made to B. (d)

It frequently becomes an important question, when the party is about to set out some *written instrument*, whether it will be advisable to follow the *terms* of the instrument, or to give merely its *substance*. The latter, if given correctly, will be a sufficient compliance with the rule, which only requires the legal effect to be stated; (d¹) but there is this danger, that possibly the party, or the pleader, may mistake the legal effect; while, on the other hand, if he profess to give the terms of the deed, he becomes more liable to misrecitals and literal mistakes. We have already noticed some cases in which it has been held *necessary to depart* from the terms of the instrument; and there are other cases in which it has been laid down that a party must, at his peril, always state an instrument as he intends to use it; and that where a party in pleading sets forth a title by conveyance, in which are the words "give, grant, release, confirm, bargain, sell," &c. he must express for which of them he will use it. (e) And it was agreed in one case, that setting forth the special matter, which showed that a deed did not operate according to its terms, and leaving the determination of law to the court, was impertinent and idle. And although three of the judges held in that case that the party having set forth the words of the deed, it was sufficient, the fourth judge differed, and held that the party was bound to state the legal effect; and the decision was afterwards reversed upon this ground on a writ of error. (f) From some later cases, however, it rather appears that the above doctrine should be received with some qualification; and that the true rule in setting out a written contract may be, that where the party *professes* to give the legal effect and operation of the deed, and the legal operation is different from that which appears by his statement, a fatal variance will occur, although * he adopts the exact expressions contained in the instrument; but that where he does *not profess* to give the substance and legal effect only, but to

(b) *Ibid*.

(c) *Taylor v. Vale*, Cro. Eliz. 166; *Chaloner v. Davies*, 1 Ld. Raym. 403, 404; 2 Saund. 97 b, note (2).

(d) *Per Eyre C. J. Company of Felt-makers v. Davis*, 1 B. & P. 102; *ante*, 4.

(d¹) [*Woody v. Flournoy*, 6 Munf. 506; *Candler v. Rossiter*, 10 Wend. 487; *Allen v. Douglass*, 2 Brevard, 93; *Royalton v. R. & W. Turnp. Co.* 14 Vt. 311; *Cook v. Simms*, 2 Call, 39; *White v. Thomas*, 39 Ill. 227; *Lent v. Padelford*, 10 Mass. 230.]

(e) See *Monnington v. William*, 1 Vent.

109; *Co. Litt.* 301 b; *Osmere v. Sheafe*, Carth. 308; *Barker v. Lade*, 3 Lev. 291; 2 Saund. 97 b. As to stating the effect of the terms of tenancy, where a party is let into possession of premises under an agreement for a lease, see *Price v. Birch*, 1 Dowl. N. S. 720; 4 M. & Gr. 1, S. C.; and as to what is not a variance in the statement of the legal effect of an acceptance of a bill of exchange, see *Blake v. Beaumont*, 1 Dowl. N. S. 697; 4 M. & Gr. 9, S. C.

(f) *Barker v. Lade*, 3 Lev. 291; 4 Mod. 149, S. C.; 2 Saund. 97 b.

state *the very words* of the deed, the court will then construe the deed for him. Thus, when it was stated that A. was entitled to the equity of redemption, and that, subject thereto, B. was seised in fee, and that they, by lease and release, granted, bargained, &c. the premises, *excepted and always reserved to A.* a right of hunting, &c.; it was held, that as A. had no legal interest, there could be no *exception* or *reservation* to him, and that the statement was therefore bad. (g) And the court said that the party had purported to set out the deed according to its legal operation, and had misstated such operation; that if he had wished the court to construe the deed for him, he should have set it out in *hæc verba*, or at least so much as he meant to rely on, and that the court could form no judgment what operation it might have, unless they saw the very words of the deed. (h) And in a subsequent case, when it was objected that the legal operation of a deed was different from the statement in the declaration, it was held that there could be no variance, since the declaration did not affect to state the legal effect of the deed, but merely stated that by a certain deed "it was witnessed, &c." following the words of the deed. (i)

If these cases may be considered as establishing the position, that if, in a doubtful case, a party set out the words of a deed or written instrument, as being those contained in the document itself, the court will put the proper construction upon it, it seems to be advisable to adopt this course (namely, to profess to set forth the instrument, and to give its precise words) when there exists any uncertainty as to the exact legal effect and construction of them; especially, as by the late statutes, which will be particularly noticed hereafter, (k) certain variances in setting out contracts are amendable at the trial.

A misdescription of the contract with regard to the *parties thereto*, and *with whom* it was made, will also in general be fatal as a variance at the trial. (k¹) Thus, where the plaintiff was a surviving partner, and sued upon a contract made with

Misdescription
of the
parties to
the contract.

(g) *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66. See, also, *Price v. Williams*, 1 M. & W. 6.

(h) *Per Abbott C. J. and Bayley J.* 3 B. & Ald. 69, 70.

(i) *Ross v. Parker*, 1 B. & C. 358; 2 D. & R. 662, S. C.

(k) *Post*, 328; 9 Geo. 4, c. 15. See 3 & 4 W. 4, c. 42, s. 23, more extensive.

(k¹) [*Shepard v. Palmer*, 6 Conn. 95; *Bunel v. Taintor*, 5 Conn. 273. The words "and company," or "survivor," following a plaintiff's name, may be rejected as surplusage, if the declaration makes out a cause of action in the plaintiff himself. *Robinson v. Cornwell*, 2 Bailey, 137; *M'Cool v. M'Cluney*,

Harper, 486. In an action on a promissory note, against the maker, the declaration alleged that the note was made by "John C." and the note offered in evidence was signed by "J. C." It was held that this was not a variance. *Cantly v. Hopkins*, 5 Stew. & P. 58; *Robertson v. Banks*, 1 Sm. & M. 666; *King v. Clark*, 7 Misson. 259; *Wood v. Hancock*, 4 Humph. 465. The use of the name "Josiah," in the petition, and of "Josier" in the note recited, is not variance. *Schooler v. Asherst*, 1 Litt. 216. A bond signed "Philip T." will support a declaration in the name "Philip T." *Taylor v. Rogers*, Minor, 197; *De Kentland v. Somers*, 2 Root, 437; *Franklin v. Talmadge*, 5 John. 84.]

himself and his deceased partner, but without stating that he was a surviving partner, so that the contract appeared from the declaration to have been made with himself alone, he was nonsuited for the variance; and the court held the nonsuit right. (*l*) Upon the same principle, where a contract for *the sale of goods was stated to be made with two persons, and it appeared in evidence that it was made with those two *and another*, it was ruled to be a fatal variance, though the declaration stated correctly the quantity of goods which the two were to have. (*m*) And where the plaintiff set forth in his declaration a contract for the sale of goods, but misstated the party to whom the goods were to be delivered, the variance was considered fatal. (*n*) Here we may again allude to the instance of a contract made between A.'s wife and B. of the one part, and C. of the other part, being described as a contract made between A. and his wife, and B. and C. (*o*) But a lease between A. *and his wife* of the one part, and B. of the other part, may be set out as a deed between A. and B., such being its legal effect. (*p*) So if a bond be given to husband and wife administratrix, the husband alone may declare on it, as on a bond made to himself. (*q*) If a contract, whether verbal or written, or a bill of exchange, &c. be made *by* two persons, and it be stated that it was made by one only, viz. the defendant, he can only plead in abatement, and cannot treat the omission as a material variance at the trial on the general issue. (*r*)

Again, where there are two or more distinct special contracts, it will be a fatal misdescription to blend them together and treat them as one contract; thus, where different lots were sold at an auction for different sums, the contracts were deemed separate both in law and in fact, and the plaintiff having, in assumpsit for refusing to comply with the conditions of sale, consolidated the two contracts, and declared upon them as one agreement, he was nonsuited. (*s*) Where, however, an agreement has been made

Blending
distinct con-
tracts in one
count.

(*l*) *Jell v. Douglas*, 4 B. & Ald. 374. See, also, *Latch v. Wedlake*, 3 P. & D. 499. So a mistake in an avowry as to the parties of whom plaintiff held as tenant, is fatal. *Philpott v. Dobbinson*, 6 Bing. 104. So is a misstatement of the condition of a bond as to the parties by whom the money was to be paid, although the bond was joint and several, &c. *Adams v. Bateson*, 6 Bing. 110; 3 M. & P. 339, S. C. So where to an action for use and occupation, the defendant pleaded an agreement by the *plaintiffs* and the defendant, that a third party should be taken as tenant, and the defendant discharged from liability for the subsequent rent, it was held that the plea was not supported by proof that one of the plaintiffs had so agreed, even although the agreement by that one might bind the others. *Turner v. Hardey*, 9 M. &

W. 770. See, also, *Ireland v. Johnson*, 1 Bing. N. C. 162.

(*m*) *Parish v. Burwood*, 5 Esp. 33; *Everett v. Tindall*, 5 Esp. 169. So where the declaration stated an agreement to be made between the *plaintiff* and the defendants, where there were other parties to it of the first part, besides the plaintiff, from whom the consideration for the defendant's promise moved as well as from the plaintiff, it was held a fatal variance. *Chanter v. Leese*, in error, 5 M. & W. 698.

(*n*) *Leery v. Goodson*, 4 T. R. 687.

(*o*) *Ante*, 306.

(*p*) *Arnold v. Revault*, 4 Moore, 66.

(*q*) *Ankerstein v. Clarke*, 4 T. R. 616.

(*r*) *Mountstephen v. Brooke*, 1 B. & Ald. 224; *ante*, 14, 53.

(*s*) *James v. Shore*, 1 Stark. 426. See *Emmersen v. Heelis*, 2 Taunt. 38.

between two parties, and by a subsequent contract between them the terms of the former agreement have been modified and altered, the plaintiff may declare upon the contract as it stands altered by the subsequent arrangement, without noticing the original terms which have been dispensed with. (t)

The plaintiff being bound to state his contract correctly, it follows that a misstatement of the quality or nature of the defendant's promise, and his consequent liability, will be a fatal error, and will, if * the defendant's plea put the fact in issue, subject the plaintiff to a nonsuit. (t¹) Thus when a contract is made in the *alternative*, as to deliver one or other of two specified quantities of goods at a particular time, it must be stated in the declaration according to the original terms, and if stated as an absolute contract, it will be a fatal variance, notwithstanding the party who, under the agreement, was to have the option of deciding on the particular quantity may have determined his option; for the mode of executing the contract could not change the original contract itself. (u) And on the other hand, when the contract is *absolute*, and it is stated in the declaration as an alternative contract, the variance will be equally serious; thus, where the plaintiff declared on a contract to deliver soil or breeze, and the evidence was of a contract to deliver soil only, and soil and breeze appeared to be different things, it was held the plaintiff could not recover. (x) So where the contract is *conditional*, it will be a fatal misdescription to state it as an absolute one. (x¹) Thus, when a party accepted a bill of exchange, thereby engaging to pay it as soon as a particular event occurred, and this was stated in the declaration as an absolute acceptance, the variance was held fatal. (y) And upon the same principle, it should seem that in cases of debts which have been barred by the statute of limitations, if the plaintiff rely on a subsequent promise, to take the case out of the statute, and such promise were qualified or conditional, as to pay when the defendant is able, &c. the plaintiff should declare upon such subsequent promise according to the terms in which it was made, and

(t) See *Boone v. Mitchell*, 1 B. & C. 18; *Thresh v. Rake*, 1 Esp. 53; *Robinson v. Tobin*, 1 Stark. R. 336.

(t¹) [*Connolly v. Cottle, Breese*, 286; *Mulford v. Bowen*, 4 Halst. 315; *Davis v. Campbell*, 3 Stewart, 319; *Rogers v. Estes*, Litt. Sel. Cas. 2; *Bell v. Scott*, 3 Miss. 212; *Palmer v. McGinnis, Hardin*, 505; *Adams v. Brown*, 4 Litt. 7. But if an objection on account of variance between the declaration and the proof be not taken at the trial it will be considered as waived. *McConihe v. Sawyer*, 12 N. H. 396.]

(u) *Penny v. Porter*, 2 East, 2. See, also, *Tate v. Wellings*, 3 T. R. 531; *White v. Wilson*, 3 Bos. & P. 116; and see per Lord Ellenborough, *Miles v. Sheward*, 8 East, 8; [*Hosmer C. J. in Carley v. Dean*, 4 Conn.

265; *Stone v. Knowlton*, 3 Wend. 374; *Russell v. South Britain Society*, 9 Conn. 508; *Williams v. Kinnard, Minor*, 196; *Trask v. Duval*, 4 Wash. C. C. 97. The payee of a note, payable to himself or order, declared on it as payable to himself, and this was held not a material variance. *Fay v. Goulding*, 10 Pick. 122.]

(x) *Clark v. Manstone*, 5 Esp. 239. [See *Hilt v. Campbell*, 6 Greenl. 109.]

(x¹) [*Smith v. Boston, Conc. & M. R. R.* 36 N. H. 488; although the condition has been performed. *Stanwood v. Scovel*, 4 Pick. 422; *Whitaker v. Smith*, 4 Pick. 83; *Lower v. Winters*, 7 Cowen, 263; *Couch v. Hooper*, 2 Leigh, 557; *Wait v. Morris*, 6 Wend. 304.]

(y) *Langston v. Corney*, 4 Camph. 176.

not upon the original promise. (z) In actions upon bills of exchange and promissory notes many cases of variances have arisen in consequence of the acceptance or promise being stated to be general and absolute, when in fact it was qualified, the bill or note having been made payable at a particular place. With respect to bills of exchange, an acceptance payable at a particular place is not now a qualified acceptance, unless the payment be expressly restricted to that place *only*, and *not elsewhere*; (a) but in cases where it is so restricted, and also in all cases of promissory notes made payable in the *body* of the note at a particular place, it will be a variance to state a qualified contract of this description as an absolute one. (b) And on the other hand, where the contract is absolute, and is described in the declaration as conditional or qualified, the variance will be equally fatal: as where in declaring on a * promissory note the plaintiff alleged that it was thereby made payable at a particular place, and it appeared, on production of the note, that there was no such restriction contained in the body of the note, but merely in a memorandum at the foot of it, it was held that this was a general and not a qualified promise, and that consequently there was a material misdescription. (c) If an instrument be so ambiguous in its terms that it may be regarded with reason either as a bill of exchange or a promissory note, the plaintiff has the election to declare upon it either as one or the other of those instruments, at least as against the maker. (d)

If the defendant's promise or engagement, whether it be verbal, in writing, or under seal, embody or contain, *as part of it*, an *exception* or *proviso* which *qualifies* his liability, or in certain instances renders him altogether irresponsible, so that he was not in law *absolutely* bound, the declaration must notice the exception or proviso, or there will be a fatal misstatement, Thus where the declaration stated that the defendant had undertaken to carry and deliver goods safely, and the contract proved was to carry and deliver them safely, *fire and robbery excepted*, it was held that there was a fatal variance. (e) And the same will be the case where

Exceptions or provisos when qualifying liability.

(z) *Tanner v. Smart*, 6 B. & C. 603, 609; 9 D. & R. 549, S. C.; *Pittam v. Foster*, 1 B. & C. 248; 2 D. & R. 363, S. C.; *Haydon v. Williams*, 7 Bing. 163, *acc.*; [*Lonsdale v. Brown*, 4 Wash. C. C. 148; *Betton v. Cutts*, 11 N. H. 170; 2 Chitty Contr. (11th Am. ed.) 1261 *et seq.*]

(a) Stat. 1 & 2 Geo. 4, c. 78, s. 1. If a bill be drawn, payable at a particular place, and accepted generally, this is not a qualified acceptance. *Selby v. Eden*, 11 Moore, 511; 3 Bing. 611, S. C.

(b) *Roche v. Campbell*, 3 Campb. 247; *Hodge v. Fillis*, 3 Campb. 463; *Price v. Mitchell*, 4 Campb. 200; *Sanderson v. Bowes*, 14 East, 500.

(c) *Exon v. Russell*, 4 M. & Sel. 505;

and see *Jelf v. Oriel*, 4 Car. & P. 22. [The words "value received" in a promissory note are words of description, and if omitted in the declaration, the variance is fatal. *Saxton v. Johnson*, 10 John. 418; *Rositer v. Marsh*, 4 Conn. 196.]

(d) *Edis v. Bury*, 6 B. & C. 433; 9 D. & R. 493, S. C.

(e) *Latham v. Rutley*, 2 B. & C. 20; 3 D. & R. 211, S. C.; [*Ferguson v. Cappeau*, 6 Harr. & J. 394; *Stanwood v. Scovel*, 4 Pick. 423; *Bridge v. Austin*, 4 Mass. 116; *Railroad Co. v. Robeson*, 5 Ired. 391.] Instance of variance in action on policy in not setting out the rules of the society, &c. *Strong v. Rule*, 11 Moore, 86; 3 Bing. 315, S. C.

Where the regulations of an association of

a like absolute contract is stated, and it is proved to be one of the terms of the contract, that the carrier is not to be liable *to any extent* upon goods above a certain value, unless insured. (*f*) Where the plaintiff averred in his declaration generally that the defendant had warranted a horse to be sound, and the proof was that the latter had warranted the horse to be sound everywhere *except a kick in the leg*, the court held this to be a qualified and not a general warranty, and that consequently there was a fatal mistake. (*g*) So also, in cases of contracts between landlord and tenant, if the declaration set out a general agreement or covenant to repair, and omit to state an exception as to the cases of fire and other casualties, the variance will be fatal. (*h*) And where the declaration averred that the defendant had become tenant to the plaintiff, and in consideration thereof had promised to use the lands in a husbandlike manner, *to be kept constantly in *grass*, it was held that the omission of this stipulation was a variance; for though in most cases the keeping of the land in grass might be farming it in a husbandlike manner, still there might be some cases in which it would not be so; it was therefore a qualification of the previous stipulation, and ought to have been stated in the declaration as part of the description of the contract. (*i*) So, if a lease contain a covenant to repair "except in case of fire," the covenant must not be described as an absolute covenant. (*k*) And in covenant on a lease for non-payment of rent, the *reddendum* must not be described as absolute, if it be "yielding, &c. *except as hereinafter is excepted*." (*l*) Where, however, the proviso in a written instrument is *distinct* from and not even *referred* to by the clause on which the debt is charged, it is considered matter of defeasance, &c. which ought to come from the other side, and then it need not be set forth by the plaintiff. (*m*)

There are a great variety of instances of variances in the statement

ship-owners combined for the mutual insurance of each other's ships were indorsed on the back of the policy, and declared to form part of the policy to which the ship-owners were subscribers, it was held necessary in an action for a loss under the policy to set out the regulations as well as the policy. *Strong v. Rule*, 3 Bing. 315.

(*f*) *Per Abbott C. J. Latham v. Rutley*, 3 D. & R. 212; and see *Clarke v. Gray*, 6 East, 569; *post*, 324.

(*g*) *Jones v. Cowley*, 4 B. & C. 446; 6 Dowl. & Ryl. 533. See *Heming v. Parry*, 6 Car. & P. 580; *Alderson B.* said that *that case, although correctly decided, was a disgrace to the English law*. [In case for deceit by a warranty that a horse was well and sound; a breach was alleged that he was not well and sound, but that he was infected with glanders, and otherwise unsound and diseased; it was held, that the

allegation as to the glanders might be struck out as surplusage there being a sufficient breach without it, and it need not therefore be proved. *Fisk v. Hicks*, 31 N. H. 535. But if, in an action on a promissory note, the plaintiff unnecessarily specifies wherein the value received consisted, he must prove it as laid. *Jerome v. Whitney*, 7 John. 351.]

(*h*) *Tempany v. Burnand*, 4 Campb. 20; *Browne v. Knill*, 2 B. & B. 395; 5 Moore, 164, S. C.; *Beech v. White*, 12 Ad. & El. 668; 4 P. & D. 399, S. C.

(*i*) *Saunderson v. Griffiths*, 5 B. & C. 909; 8 D. & R. 643, S. C.

(*k*) *Tempany v. Burnand*, 4 Campb. 20, 21; *Browne v. Knill*, 5 Moore, 164; 2 B. & B. 395, S. C.

(*l*) *Vavasour v. Ormrod*, 6 B. & C. 430; 9 D. & R. 597, S. C.; *ante*, 246.

(*m*) *Ante*, 246.

of some particular *part* or *term* of the contract. Errors of this description are, as we have already observed, in general as fatal to the plaintiff's case, as where he has erred in stating the whole contract, or the parties with whom it was made. It may be useful to enumerate some of the cases which have arisen upon this subject. (*m*¹)

Instances of a misstatement of the contract.

The misstatement of the *date* of a written instrument is a fatal variance, if the declaration expressly describe it as "bearing date" upon a certain day, instead of stating, that "heretofore, to wit, on, &c." it was made, &c. (*n*)

In stating a bill of exchange or other instrument, it seems not to be a fatal variance to state that the defendant "subscribed it with his own proper hand," although it was signed by his agent only. (*o*)

Where the plaintiff in a special action of assumpsit against the defendant for refusing to retain the plaintiff in his service according to agreement, stated in his declaration that the defendant had agreed to retain him at a specific sum *per annum*, and it appeared from the evidence that neither a specific sum, nor any specific time had been agreed upon, this was ruled to be variance, notwithstanding the sum

(*m*¹) [Baylies v. Fettyplace, 7 Mass. 325; Colt v. Root, 17 Mass. 236; Goulding v. Skinner, 1 Pick. 162; Robbins v. Otis, 1 Pick. 368; Hart v. Tyler, 15 Pick. 171; Clark v. Todd, 1 Chip. 213; Crawford v. Morrell, 8 John. 253; Pope v. Barrett, 1 Mason, 123; Smith v. Barker, 3 Day, 312; Harris v. Harris, 2 Rand. 431; Obert v. Whitehead, 6 Halst. 293; Scott v. Massick, 4 Monr. 538. Variance in proof of record. Rodman v. Forman, 8 John. 26; Page v. Woods, 9 John. 82; Brooks v. Bemis, 8 John. 455; of writs, executions, &c.; Bissell v. Kip, 5 John. 89; Beers v. Botsford, 3 Day, 159; proceedings in chancery; Thompson v. Jameson, 1 Cranch, 283; grants, leases, bonds, and other instruments under seal; Phillips v. Rose, 8 John. 392; Franklin v. Talmadge, 5 John. 84; Gordon v. Brown, 3 Hen. & M. 219; Adams v. Spear, 1 Hayw. 215; Evans v. Smith, 1 Wash. 72; Drummond v. Crutcher, 2 Wash. 218; James v. Walrath, 8 John. 410; bills of exchange and promissory notes; Pease v. Morgan, 7 John. 468; Saxton v. Johnson, 10 John. 418; Wood v. Bulkley, 13 John. 486; Wilmot v. Monson, 4 Day, 114; Sheehy v. Mandeville, 7 Cranch, 208; other simple contracts; Crawford v. Morrell, 8 John. 253; Smith v. Barker, 3 Day, 312; Baylies v. Fettyplace, 7 Mass. 325; Drake v. Watson, 4 Day, 37; Barnham v. Webster, 5 Mass. 270; Alexander v. Harris, 4 Cranch, 299; in name of corporation; People v. Runkel, 9 John. 47; Gilbert v. Nantucket Bank, 5 Mass. 98; Medway Cotton Manuf. v. Adams, 10 Mass. 360; other cases of variance. Lewis v. Few, 5 John. 1; Southwick v. Stevens, 10 John. 443; De Forrest v. Brainerd, 3 Day, 528. Under the New York Code

(§ 169), no variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. (Sec. 170.) Where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.]

(*n*) See Chitty's Bills, 7th ed. 354; Coxon v. Lyon, 2 Campb. 307, note; Bentzing v. Scott, 4 C. & P. 24; [Bank v. Simmons, 1 Harring. 331; Stephens v. Graham, 6 Serg. & R. 405; Church v. Feterow, 2 Pennsylv. 301; Drown v. Smith, 3 N. H. 301; Penn v. Flack, 3 Gill & J. 369; Thomas v. Thomas, 3 J. J. Marsh. 590; Field v. Field, 9 Wend. 394; Grant v. Winn, 7 Missou. 188.] It may be shown that the instrument was made on another day. Hall v. Cazenove, 4 East, 477. See further as to date, Styles v. Wardle, 4 B. & C. 908; 7 D. & R. 507, S. C.; Williams v. Jones, 5 B. & C. 108; 7 D. & R. 548. Not necessary to state in a declaration that a guaranty within the statute against frauds was in writing, *ante*, 310.

(*o*) See Booth v. Grove, 2 M. & M. 182; and the cases Chitty on Bills, 7th ed. 357, 358; [Boulware v. McComb, Harper, 393; but see Pease v. Morgan, 7 John. 468; Mack v. Spencer, 4 Wend. 412; Porter v. Cummings, 7 Wend. 172. An averment that "A. & B. indorsed a note, their own proper handwriting being subscribed thereto," is not met by proof of their signatures in the handwriting of one of them, there being no averment of partnership. Fullerton v. Seymour, 5 Vt. 249.]

mentioned in the declaration was laid under a *videlicet*. (p) And * where in an action against a carrier, the *termini* of the journey on which the goods are to be carried is incorrectly stated, the mistake will be a ground of nonsuit. (q) In declaring on special agreements relative to goods, misdescriptions as to quality, quantity, and price, have been held fatal. A declaration on a promise to deliver good *merchantable* wheat has been ruled not to be supported by evidence of an agreement to deliver good *second sort* of wheat. (r) When the plaintiff stated an agreement to take in a *full cargo* of certain goods, and the contract proved was to take in a certain specified quantity, it was ruled to be a variance, notwithstanding such quantity might amount to a full cargo. (s) And where the contract declared on was, that the defendant should sell and deliver to the plaintiff certain goods "at 4s. *per stone*," and the evidence was, that the plaintiff was to give 4s. *per stone*, and if he should pay more to any other person for similar goods, that he should then give the same price to the defendant, it was held that the declaration was not supported by the proof. (t)

Several cases have also occurred in which variances as to the *time of performing* the contract declared on have been held fatal. (t¹) Thus, when the plaintiff stated a contract to remove goods within a *reasonable time*, and the agreement proved was to remove in a *month*,

(p) *Preston v. Butcher*, 1 Stark. 3; *Routledge v. Grant*, 1 M. & P. 735; and see *White v. Wilson*, 2 B. & P. 116; *ante*, 303; see *post*, 325, as to the *videlicet*. [See *Cranmer v. Graham*, 1 Blackf. 406; *Carley v. Dean*, 4 Conn. 259.] An allegation in a plea of an offer to pay a just and reasonable sum in satisfaction of a demand of an attorney's bill, is not supported by proof of an offer to pay the costs "when the bill is taxed." *Filmer v. Burnby*, 2 M. & Gr. 539; 9 Dowl. 466, S. C.

(q) *Tucker v. Cracklin*, 2 Stark. 385. See the notes to the precedent, *post*, vol. ii. 104; when not, *Woodward v. Booth*, 7 B. & C. 301.

(r) *Anonymous*, 1 Ld. Raym. 735. [See *Hastings v. Lovering*, 2 Pick. 214. A count for pine timber sold and delivered is not supported by evidence of spruce timber sold and delivered. *Robbins v. Otis*, 1 Pick. 368. See, also, to same effect, *Goulding v. Skinner*, 1 Pick. 162; *Bridge v. Austin*, 4 Mass. 115.]

(s) *Harrison v. Wilson*, 2 Esp. Rep. 708.

(t) *Churchill v. Wilkins*, 1 T. R. 447. [Proof of a sale of whiskey in Philadelphia, to be delivered in Boston, does not sustain an allegation of a sale of whiskey in Philadelphia, without specification of a place of delivery; nor is an allegation of a sale of the whiskey for a certain sum sustained by proof of its sale for that sum, together with payment, by the buyer, of charges on the whiskey

key to which the seller was liable. But amendments of the declaration may be allowed, in Massachusetts, to cure such variances, after verdict, and even after the argument of exceptions taken at the trial. *Peck v. Waters*, 104 Mass. 345. See *Stone v. White*, 8 Gray, 589.] What do not amount to material variances in statement of contract, see *Guthing v. Lynn*, 2 B. & Ad. 232. Sums of money, as stated in pleading, are not material, unless, from the nature of the case, as by their forming an essential part of some calculation or otherwise, they necessarily become material. Per Lord Denman *C. J. Cooper v. Blick*, 2 G. & D. 299. The statement of the sum in a bill of exchange is material as part of the description, and laying it under a *videlicet* would not make it immaterial. 2 G. & D. 298, 300. So in debt on a recognizance of bail, the declaration stated judgment to have been recovered for £50, whereas the record showed it was for £25. This was held a fatal variance. *Davis v. Dunn*, 1 Dowl. N. S. 317.

(t¹) [Where the time of suing a thing is material, it must be proved as laid; but it is otherwise where the time is immaterial. *Jordan v. Cooper*, 4 Serg. & R. 576; *Hough v. Young*, 1 Ham. 504; *Perry v. Botsford*, 5 Pick. 189; *Drown v. Smith*, 3 N. H. 301; *Hilt v. Campbell*, 6 Greenl. 109; *Vail v. Lewis*, 4 John. 450. As to matter of description, a variance in time is fatal. *Gates v. Bowker*, 18 Vt. 23.]

it was ruled to be a fatal variance. (u) Where an usurious contract was set out in a declaration, and the period of forbearance was stated to be from the 21st December, 1774, until the 23d December, 1776, it was held that evidence of a contract on the 23d December, 1774, for two years, would not support the declaration. (x) And when a similar contract was alleged to be for the forbearance of money until a certain specified day absolutely, but the contract proved was for forbearance until the day named, or a certain other day at the option of the borrower, it was held that the evidence would not support the statement. (y)

A great variety of cases are to be found in the books with regard to *literal errors* in setting out deeds (and in this respect the rule equally applies to all written instruments). (z) Thus, in an action on * a lease, the following have been deemed fatal variances; namely, in the name of a close, "Cellar Beer Field" for "Allar Beer Field;" (a) and "storehouses" for "store house;" (b) and a mistake of the late tenant's name, (b¹) in setting out the premises demised. (c) So an error in stating the local situation to be contrary to that given by the lease is a material variance. (d) But the statement of a demise of "lands and premises" is correct, although one piece of ground only was granted. (e) So is an averment that "a farm and buildings, and certain pieces of land mentioned in the indenture," were demised, although the lease was of "all that farm or land, and buildings," enumerating the parcels; for the declaration sufficiently states the legal effect of the demise. (f) However, these literal variances have now become of less importance, as the late statutes (g) give the judge the discretionary power to allow them to be amended at the trial.

In the cases we have hitherto noticed, an actual misstatement of some part of the contract had been made, but instances have arisen when the plaintiff has followed the precise terms of the contract, but has nevertheless been defeated on the ground of variance, the state-

(u) *Hore v. Milner*, Peake N. P. R. 42, note (a), 2d ed.

(z) *Carlisle v. Trears*, Cowp. 671; *Fox v. Keeling*, 2 Ad. & El. 620.

(y) *Tate v. Wellings*, 3 T. R. 531. [And so, a count on a note payable on the occurrence of a certain event, or in a reasonable time, is not supported by evidence of a note payable only on the occurrence of the event. *Hilt v. Campbell*, 6 Greenl. 109.] See, as to alternative contracts, *ante*, 315, 316.

(x) As to surplusage in stating irrelevant clauses, &c. *ante*, 251, 252.

(a) *Pitt v. Green*, 9 East, 188.

(b) *Hoar v. Mill*, 4 M. & Sel. 470.

(b¹) [See *Whitlock v. Ramsey*, 2 Munf. 510; *Moore v. Fenwick*, Gilmer, 214, and cases there cited.]

(c) *Bowditch v. Mawley*, 1 Campb. 195;

Binfield v. Maxwell, 15 East, 159. See *Acerro v. Petroni*, 1 Stark. 100; but see *Abithol v. Bristow*, 2 Marsh. 159; *Forman v. Jacob*, 1 Stark. 47.

(d) *Guest v. Caumont*, 3 Campb. 235; *Bowditch v. Mawley*, note (1); 3 Campb. 195; *Morgan v. Edwards*, 6 Taunt. 394; 2 Marsh. 96, S. C.

(e) *Birch v. Gibbs*, 6 M. & Sel. 115.

(f) *Wilson v. Bramhall*, 1 Y. & J. 2. See *Farewell v. Dickenson*, 6 B. & C. 252; 9 D. & R. 243, S. C.; demise of house and fixtures, described as a demise of a house only.

(g) 9 Geo. 4, c. 15; and 3 & 4 W. 4, c. 42, s. 23; giving more extensive powers, and which ought to be acted upon liberally. See observations of Alderson B. in *Heming v. Parry*, 6 Car. & P. 580, 581; and *post*, 323.

ment in the record being by *legal intendment* different from that given in evidence. Thus where the declaration stated a contract to deliver 400 "bushels" of oats, the plaintiff was nonsuited, on proof that the bushels actually contracted for were to be of a particular local measure, and not the ordinary statute measure, which the general description in the declaration was held to import. (*h*) And where in declaring upon contracts made in Ireland, relative to the payment of any sum of money of and in the currency of that country, the plaintiff merely followed the terms of the contract, without distinctly showing that the money was to be of Irish currency, it was held to give rise to a fatal variance; the intendment being that when a sum of money is stated generally, English money is meant to be designated. (*i*)

Although in general a misstatement of any part of a contract will be fatal, in consequence of the entire nature of the contract, yet many cases may arise in which slight variations between the statement and the proof will be of no importance. (*i*¹) We have before noticed * the leading and important rule in the statement of contracts, that it will in all cases suffice, if the legal effect of the contract be stated, and that the party is not compelled to follow the exact words of the contract. (*k*) We will here notice several cases in which, although the declaration was not literally supported by the proof, it was held that no variance arose, the legal effect and substance of the statement and the evidence being the same. Thus where a demise from a tenant from year to year to another, to hold from year to year, was stated as a demise from year to year during the continuance of the original demise by the superior landlord; and it appeared that in point of fact no such qualification was mentioned in the contract; it was nevertheless held that no variance arose, the legal effect of the demise being according to the statement. (*l*) In another case, where a declaration stated that by a certain indenture, made between the plaintiff and the defendant, the plaintiff did demise, &c. "a certain farm and buildings, and certain pieces or parcels of land particularly mentioned and described in the said indenture;" and then set out the particular covenants and the breaches complained of; and at the trial the terms

(*h*) *Hockin v. Cooke*, 4 T. R. 314; *Master &c. of St. Cross v. Lord Howard de Walden*, 6 T. R. 338. See, also, *Doe dem. Spicer v. Lea*, 11 East, 312; *ante*, 239.

(*i*) *Sprawle v. Legge*, 1 B. & C. 16; 2 D. & R. 15, S. C.; *Kearney v. King*, 2 B. & Ald. 301; *ante*, 240.

(*i*¹) [Under the Missouri Code of Procedure no variance between the allegations and proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence on the merits. *Fischer v. Max*, 49 Missou. 404. See *James v. Goodenough*, 7 Nevada, 324. If a declaration on a contract, by mistake, contains the name of the vendee in a

context which shows that the vendor was intended, the variance is not material. *Story J.* after discussing this point, said: "We are satisfied that the variance is immaterial, because it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration." *Ferguson v. Harwood*, 7 Cranch, 408, 414.]

(*k*) *Ante*, 312; [*De Forrest v. Brainerd*, 9 Day, 528; *Beers v. Botsford*, 3 Day, 159; *Rodman v. Forman*, 8 John. 26; *Page v. Wood*, 9 John. 82; *Ferguson v. Harwood*, 7 Cranch, 413.]

(*l*) *Pike v. Eyre*, 9 B. & C. 909.

of the lease appeared to be, "all that farm and buildings herein particularly contained," and then enumerated the particular closes of which the farm consisted; it was objected that there was a variance, the statement in the declaration being more extensive than the proof; but the court held that a verbatim description was unnecessary, and that the declaration contained a sufficient description of the substance and legal effect of the demise. (m) So it has been held that a *revocation* of a submission to arbitration before award made is in effect a breach of an agreement "to stand to and perform the award;" and that an agreement not to make such revocation, being in legal effect implied in the engagement to stand to the award, the plaintiff may state a promise by the defendant to that effect in the declaration, although no such stipulation in words were contained in the agreement to refer. (n) Many other instances may be given where the contract declared on has not been literally supported by the evidence, but the statement has been held sufficient, on account of the legal effect of the statement and the proof being identical. (n') Thus when the contract was for the purchase of a certain parcel of hemp, which not being precisely ascertained at the time, was described in the contract as about "eight tons," it was held that it might be declared on under a *videlicet* as a contract for eight tons. (o) And when the plaintiffs declared that they agreed to sell, and the defendant agreed to buy, certain goods and merchandise, to wit, 328 chests and thirty half-chests of oranges and lemons, at and for a certain * price, to wit, the price of 623*l.* 3*s.*, and the contract proved was for 308 chests and thirty half-chests of China oranges, and twenty chests of lemons, without specifying any price; the court held that the particular count of the declaration upon which the question arose, was, in substance, a count for goods bargained and sold; that the precise quantity of goods could not be considered as of the essence of the contract; and that the plaintiffs having shown that in substance they were entitled to recover, they were not, under the particular circumstances of the case, tied down by the statement under the *videlicet*, and that therefore the variance was not material. (p) In a case where a contract upon which the plaintiffs declared was to deliver stock on the "27th February," and the agreement proved was to deliver it upon "the settling day," which, at the time of the contract, was fixed for the 27th of February, as the parties fully understood; it was held that the contract was substantially and in legal effect for the 27th of February, that the parties might use either one phrase or another to express the same thing, and consequently that there was no variance between the

(m) *Wilson v. Bramhall*, 1 Y. & J. 2.(n) *Brown v. Tanner*, M'Clel. & Y. 464.See *Phillips v. Crutchley*, 1 M. & P. 239;*Crofts v. Stockley*, 2 M. & P. 81.(n') [*Ferguson v. Harwood*, 7 Cranch, 408.](o) *Gladstone v. Neale*, 13 East, 410; andsee *Wildman v. Glossop*, 1 B. & Ald. 9.(p) *Crispin v. Williamson*, 1 Moore, 547;8 Taunt. 107, S. C. See *post*, 325, 326. See,also, *Robson v. Fallows*, 3 Bing. N. C. 392.

contract proved and that stated in the declaration. (*q*) So, where the declaration alleged a loan of lawful money of Great Britain, it was held no variance to show a loan in a foreign country in the coin of that country. (*r*) And where the declaration states a contract for the sale of goods at a certain specific sum, which is proved, but it also appears in evidence, as part of the terms of the contract, that the vendor was to receive from the purchaser other goods, in liquidation of a certain specific part of the stipulated purchase-money, it will be no variance; for such a stipulation will only be considered as prescribing a particular mode of payment of part of the purchase-money. (*s*)

We have already seen that the omission of any part of the contract which materially qualifies and alters the legal nature of the promise which is alleged to have been broken, will be fatal; but it is by no means necessary that parts of the contract should be stated which are distinct and collateral provisions, or respect only the liquidation of damages under particular circumstances without extending to absolve the defendant from responsibility. (*t*) Thus, where in an action by a sailor against the captain of a ship, the declaration stated a contract for the payment of a certain sum of money to the plaintiff for rum money, and an agreement to this effect was proved, but such *agreement contained also an additional stipulation for certain allowance of spirits, it was held no variance, for the agreement given in evidence corresponded with the declaration as far as the declaration went. (*u*) So when the plaintiff declared upon a promise by the defendant to deliver him a horse which should be worth 80*l.* and be a young horse, and the evidence was not only of a promise to the above effect, but also of a warranty that the horse to be delivered by the defendant was sound, and had never been in harness, it was held that there was no variance; and it was laid down by the court, that if any substantive part of the warranty stated, not qualified by another part omitted, be proved not to be true, it was sufficient to maintain the action; and that it was no more necessary to set out other collateral parts of the contract, whereof no breach was alleged, than it was necessary that in an action of covenant the plaintiff should set out all the covenants contained in the deed, when he did not complain that most of them had been broken. (*x*) Upon the same principle, where the plaintiff declared

(*q*) *Wickes v. Gordon*, 2 B. & Ald. 335; Bul. N. P. 145, overruled by the case stated in the text.

(*r*) *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33, S. C.; see *ante*, 242, 320.

(*s*) *Hands v. Burton*, 9 East, 349. See *Sheldon v. Cox*, 3 B. & C. 420; 5 D. & R. 277, S. C.; *Barbe v. Parker*, 1 H. Bl. 283; *Forsyth v. Jervis*, 1 Stark. Rep. 437.

(*t*) There are a great variety of agree-

ments not under seal, containing detailed provisions, regulating prices of labor, rates of hire, times and manner of performance, adjustment of differences, &c. which it may not be necessary to set forth. Per Lord Ellenborough, *Clarke v. Gray*, 6 East, 569; *Tempest v. Rawling*, 13 East, 20; [Marsh v. Dodge, 5 Lansing, 541.]

(*u*) *Baptiste v. Cobbold*, 1 B. & P. 7.

(*x*) *Miles v. Sheward*, 8 East, 7.

upon a promise by the defendant, that certain bacon which he had purchased of the defendant should be prime bacon, and then averred a breach of this contract, it was held to be no variance that the contract proved was for prime *singed* bacon, for the plaintiff was only bound to state all that related to the point of which he complained, and beyond that it was needless for him to go. (y) And where, in an action for the non-delivery of goods, the plaintiff stated a contract to deliver goods to be paid for by bill at two months, and the proof was that they were paid for by such bill on invoice or delivery, it was held not to amount to a variance. (z) So where, in an action for not accepting goods sold, it was averred in the declaration that the defendant bought of the plaintiff a certain quantity of rice, according to certain conditions, and it appeared in evidence that in addition to these conditions the rice was sold *per sample*, it was held not to constitute a variance, the words "per sample" not being an essential part of the description of the contract declared upon, but a mere collateral engagement or warranty that the goods sold should answer the description of a small parcel exhibited at the sale. (a) An example of such stipulations as do in some measure vary the liability of the defendant, but which only affect the amount of damages to be recovered in particular cases, and do not altogether destroy the plaintiff's right to recover, may arise in the case of actions against carriers who give notice that they will not be liable in respect of certain goods beyond a particular sum. A stipulation of this description need not be set out in describing the contract, but may be given in evidence by the defendant in reduction * of damages. (b) The result of the cases upon this subject is, that if the carrier only *limit* his responsibility, that need not be noticed in pleading; but if a stipulation be made that under certain circumstances he shall not be liable *at all*, that must be stated. (c)

Trifling omissions of immaterial forms, not in any way affecting the substance of the contract, will be of no more importance than misdescriptions of the like nature. (d) The plaintiff is not bound to state more than the substance and legal effect of the contract he declares on; and except when he renders his allegation of the contract descriptive of a written instrument, he is not bound to support his declaration literally, but substantially. When, therefore, the evidence is precisely the same in substance with the declaration, though some immaterial term may have been omitted in the latter, the plaintiff will not be liable to be nonsuited on the ground of variance. Thus, a declaration

(y) *Cotterill v. Cuff*, 4 Taunt. 285. See *Ward v. Smith*, 11 Price, 19.

(z) *Squier v. Hunt*, 3 Price, 68.

(a) *Parker v. Palmer*, 4 B. & Ald. 387.

(b) *Clarke v. Gray*, 6 East, 563; and see

Latham v. Rutley, 2 B. & C. 22; 3 D. & R. 211, S. C.

(c) Per Abbott C. J. *Latham v. Rutley*, 2 B. & C. 22; 3 D. & R. 213, S. C.; *ante*, 317.

(d) See *ante*, 319, 320.

on a contract, for not delivering gum Senegal, is supported by evidence of a contract for rough gum Senegal, if it appear that all gum Senegal, on its arrival in this country, is called rough. (e) So, in an action for not accepting goods, evidence of a contract for the sale of goods to be ready for delivery *from ship or warehouse* before a certain day, will support an averment of a contract for goods to be ready for delivery generally before that day; for the evidence showing that the goods contracted for must be delivered from one or other of the places specified, and the option being with the purchaser, it was tantamount to a contract to deliver generally. (f) The omission of a term necessarily implied from the statement in the declaration will come under the same principle and be quite immaterial. Thus, where the plaintiff stated a contract relative to the loan of a horse by him to the defendant, and averred that the defendant promised to take care of the horse, and return him in good condition or pay a certain sum of money; and the contract proved was, that in addition to these terms the defendant should find the horse meat for his work, it was held that the contract was sufficiently proved according to its legal effect, for the law would imply that a party borrowing a horse was to keep it, unless the contrary appeared. (g)

In stating the consideration, we have seen that it is in all cases absolutely necessary that *the whole of the entire consideration* for the performance of the act in question should be set forth, and that even where the contract has consisted of several engagements and promises, quite distinct from each other, but founded on one and the same entire consideration, an action cannot be brought for the breach of any one of such engagements or promises, without setting forth in * the declaration the *entire consideration* applicable to all the promises collectively. (h) The rule is different in stating the defendant's *promise* itself: here the plaintiff is only required to set forth with correctness that particular part of the contract which he alleges the defendant to have broken, or, as we have before observed, to show so much of the terms of the agreement, beneficial to the plaintiff, as constitutes the point for the failure of which he sues. (i)

We may here take occasion to mention a form or phrase which is *of scilicet* very frequently used in pleading, and is not altogether un-
or videlicet. worthy of consideration. The expression alluded to is the *videlicet*, or *scilicet* ("to wit," or "that is to say"), which is con-

(e) *Silver v. Heseltine*, 1 Chit. Rep. 39.

(f) *Thornton v. Jones*, 6 Taunt. 581; 2 Marsh. 287, S. C.

(g) *Handford v. Palmer*, 2 B. & B. 359; and see *Ward v. Smith*, 11 Price, 19.

(h) *Ante*, 305. See, particularly, *Strong v.*

Rule, 11 Moore, 18; 3 Bing. 315, S. C.; *Symonds v. Carr*, 1 Campb. 361.

(i) *Ante*, 311; *Cotterill v. Cuff*, 4 Taunt. 285; *Clarke v. Gray*, 6 East, 564; *Miles v. Sheward*, 8 East, 7; *Tempest v. Rawling*, 13 East, 18; *Strong v. Rule*, 11 Moore, 88, 89; [*Smith v. Webster*, 48 N. H. 142.]

stantly adopted, not only in mentioning time or place, but also in stating the description or value, &c. of goods, and in other averments in all the forms of action. It is clear that when the matter alleged is *material* and traversable, and must be stated with exactness and certainty, the statement of such matter under a *videlicet* will not avoid the consequences of a variance (*i*¹) or repugnancy if the matter be misstated, and there would be a fatal variance in the absence of the *videlicet*; and this whether the matter be the consideration or promise in the case of a contract, or be time or place, when material, or relate to other subjects. (*k*) Thus, when it is necessary to state the grant of letters of administration to a plaintiff suing as administrator, if the *date* of the grant, though laid under a *scilicet*, be incorrectly stated to have been on a day *subsequent* to the alleged date of the promise to the intestate, it will be bad on *special demurrer*, although preceded with the words, that after the death of the intestate, to wit, on such *repugnant* day, the letters were granted. (*l*) In stating *such* matter, therefore, the **videlicet* is useless to avoid a variance; and although it be used, the averment is considered positive, direct, and traversable. (*m*)

It is laid down by very great authority, (*n*) that "on the other hand the *want* of a *videlicet* will in some cases make an averment material that would not otherwise be so; as if a thing which is not material be

(*i*¹) [Jansen v. Ostrander, 1 Cowen, 676; United States v. Burnham, 1 Mason, 57; Hastings v. Lovering, 2 Pick. 214, 222; Paine v. Fox, 16 Mass. 129, 133; Ladue v. Ladue, 16 Vt. 189. Where damages are laid subsequent to the commencement of the action in a case for the seduction of a daughter, or previous to the plaintiff having any right of action; in such case, if the matter be laid under a *videlicet*, the court may avail itself of that circumstance to say that it is not to be intended that the jury took the evidence given into consideration. Stiles v. Tilford, 10 Wend. 340.]

(*k*) 1 Saund. 170, note (1); 2 Saund. 290 a, note (1); Brown v. Sayce, 4 Taunt. 321; Nightingale v. Wilcoxon, 10 B. & C. 215, per Bayley J. Rex v. Pollman, 2 Campb. 231; Preston v. Butcher, 1 Stark. 3; Marks v. Lahee, 3 Bing. N. C. 408; 4 Scott, 137, S. C. As to *scilicets* in general, see 2 Saund. 290 a, note (1); The King v. Stevens, 5 East, 252; 1 Stark. Crim. Law, 238, 239; 1 Chit. Crim. Law, 226, 227; Steph. Index, *Videlicet*; Smith v. Dixon, 2 N. & P. 1; 7 Ad. & El. 1, S. C.; Cooper v. Blick, 2 G. & D. 295; Holmes v. Newlands, 11 Ad. & El. 50; 3 P. & D. 128, S. C.; Falcon v. Benn, 1 G. & D. 644. Its use is to particularize that which was general before, and to explain that which is indifferent, doubtful, or obscure; but it must be neither contrary to the premises, nor increase or diminish the precedent matter. 2 Saund. 291, and 291 a, note.

Quere, whether the insertion of a *videlicet* may not in some cases be *prejudicial*, see Parkinson v. Whitehead, M. & Gr. 329; 2 Scott N. R. 620. In that case the declaration stated that theretofore, *to wit*, on the 31st of May, 1825, by an agreement in writing, the defendant's testator agreed, within two years from *midsummer then next* to build certain houses, and alleged for breach that the houses at the commencement of the action (1839) were unbuilt, contrary to the agreement, and it was held bad on general demurrer, for not showing that two years from *midsummer next* after the making of the agreement had elapsed previous to the commencement of the suit. See, also, Anderson v. Thornton, 2 G. & D. 502.

(*l*) Ring v. Roxbrough, 2 Tyr. 468; 2 Crom. & J. 418, S. C.; see *ante*, 274, 275. So in an action of debt to recover penalties for usury, the day of the usurious contract must be stated in the declaration, and proved as laid, although under a *videlicet*, and the plaintiff must be nonsuited if he fail to give evidence of the day, although he prove the contract was made within such a time and upon such terms that it must have been usurious. Fox v. Keeling, 2 Ad. & El. 620. See, also, Carlisle v. Trears, Cowp. 671; Grimwood v. Barrit, 6 T. R. 463.

(*m*) 2 Saund. 291 a, note; Hayman v. Rogers, 1 Stra. 333.

(*n*) Mr. Serjeant Williams, 2 Saund. 291 c, note.

positively averred *without a videlicet*, though it were not necessary to be so, yet it is thereby made material and must be proved: therefore where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet*: for if he do not, he will be bound to prove the exact sum or day laid, (*n*¹) it being a settled distinction, that where anything which is not material is laid under a *videlicet*, the party is not concluded by it, but he is where there is no *videlicet*." (*n*²) And there are decisions and *dicta* in support of this doctrine that matter may become material, and must be proved as laid, merely because it is averred without the intervention of the *videlicet*. (*o*) But there are also some authorities, though less numerous, which appear to impeach the doctrine, at least as a general rule. (*p*) And it seems not to apply even to criminal pleadings. (*q*) It is true that the *videlicet* is often considered to be adopted as expressive of the intention of the pleader, not to bind himself to a positive and minute proof of the averment; but still it seems to be a harsh construction that the omission of the phrase shall be held to import that he restricts himself to such limited proof, in cases where in law the matter does not *of itself*, and if averred under a *videlicet*, call for such particular and strict evidence. A *videlicet* will not avoid a variance in an allegation of material matter, neither should the omission of it create the necessity of proving precisely as stated matter which would not otherwise require such precise proof.

One of the most important effects of the new rules of pleading is, that unless there be a plea upon the record denying the *contract* as alleged, it need not be proved (*q*¹) and in actions on bills and notes, those rules exclude the *general issue* non-assumpsit, and require some *special or particular denial*; as that the bill or note was not made, not indorsed, or not accepted, &c.: (*r*) and in other respects those rules very much

Unless the statement of the contract be denied by the plea, it will not be material, and will be in effect admitted.

(*n*¹) [Times and sums, if material, must be proved as laid, although under a *videlicet*. *Vail v. Lewis*, 4 John. 450; *Hastings v. Lovering*, 2 Pick. 223; *Paine v. Fox*, 16 Mass. 133; *Gleason v. M'Vickar*, 7 Cowen, 44.]

(*n*²) [*Deming v. Grand Trunk R. R. Co.* 48 N. H. 455, 463.]

(*o*) *Smith v. Dixon*, 7 Ad. & El. 1; 2 N. & P. 1, S. C.; *Cooper v. Blick*, 2 G. & D. 295; *Symmons v. Knox*, 3 T. R. 68; *Arnfield v. Bate*, 3 M. & Sel. 173; *Bray v. Freeman*, 2 Moore, 114; *Corporation of Arundel v. Bowman*, 2 Moore, 93; *Crispin v. Williamson*, 8 Taunt. 107, 112; *Gilbert v. Stanislaus*, 3 Price, 54; *Draper v. Garratt*, 2 B. & C. 2; 2 D. & R. 226, S. C.; *Sergeant v. Tilbury*, 16 East, 416, 419; *Gladstone v. Neal*,

13 East, 410; *Peake's Evid.* 4th ed. 217; *Attorney General v. Jefferys*, M'Clel. 377, 379.

(*p*) *Jones v. Mars*, 2 Campb. 307, note. And see 1 Phil. Evid. 4th ed. 227, 228, note; Index, *Videlicet*; 2 Saund. 291 c, note (*b*), to 5th ed. See *Forty v. Imber*, 6 East, 437.

(*q*) *Rex v. Burdett*, 1 Ld. Raym. 149; *Rex v. Gillham*, 6 T. R. 265; *Gwinnet v. Phillips*, 3 T. R. 643; 1 Phil. Evid. 4th ed. 227, 228, note; Index, *Videlicet*; *Starkie's & Chitty's Criminal Law*; ante, 325, note (*k*).

(*q*¹) [Under the New York Code (§ 168) every material allegation of the complaint, not controverted by the answer, as prescribed by the Code (§ 149), and every material allegation of new matter in the answer, const

(*r*) Reg. Gen. Hil. T. 4 W. 4; Pleadings in Particular Actions, I. Assumpsit.

limit the risks of *variance*. So, if the defendant pay *money into court under a plea of tender, he cannot afterwards avail himself of a *variance* in the statement of the contract. (s)

Moreover by the 9 Geo. 4, c. 15, (t) intituled, "An act to prevent a failure of justice by reason of variances between *records* and *writings*, produced in evidence in support thereof;" after reciting that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between *writings* produced in evidence and the *recital* or *setting forth* thereof upon the record on which the trial is had in *matters not material to the merits of the case*, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; for remedy thereof it is enacted, "that it shall be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, *if such court or judge shall see fit so to do*, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in *writing or in print* produced in evidence, and the *recital* or *setting forth* thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court on payment of such costs (if any) to the other party, as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the *postea* and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly."

Amendment of variance in stating written instruments at the trial, under 9 G. 4, c. 15.

Upon this statute, in an undefended action upon a bill of exchange, the plaintiff was allowed to amend at the trial, without the payment of any costs, a mistake in stating the *date* of a bill of exchange; (u) and in another case, where it was incorrectly stated in *assumpsit* for not indemnifying the plaintiff, that a judgment was recovered in B. R., whereas it was recovered in C. B., Lord Tenterden C. J.

tating a counter claim, not controverted by the reply, as prescribed by the Code (§ 153), shall, for the purposes of the action, be taken as true. See *Newman v. Otto*, 4 Sandf. 668; *Sands v. St. John*, 36 Barb. 628; *Albany v. Cunliffe* 2 Comst. 165, 171; *Fry v. Bennett*, 5 Sandf. 54; *Connors v. Meir*, 2 E. D. Smith, 314. Under the practice act of Massachusetts (Genl. Sts. c. 129, § 27) any substantive fact alleged with substantial precision and certainty, and not denied in clear and precise

terms, shall be deemed to be admitted. See *Hawes v. Rider*, 100 Mass. 217; *Van Buren v. Swan*, 4 Allen, 380; *Boston Lead Co. v. McGuirk*, 15 Gray, 87; *Murphy v. People's Equitable Mut. Fire Ins. Co.* 7 Allen, 239; *Stevens v. Parker*, 7 Allen, 361.]

(s) *Bulwer v. Horne*, 4 B. & Ad. 132.

(t) See 2 Chit. Col. Stat. 736, tit. Nisi Prius.

(u) *Bentzing v. Scots*, 4 C. & P. 24.

allowed the error to be amended at the trial. (v) But it is reported to have been held by one judge that the statute only applies to cases where some particular written instrument is *professed* to be set out or recited in the pleading; (w) and therefore where a common avowry in *replevin misstated the terms on which the plaintiff held the premises by demise, an amendment at the trial was refused. (x)

The subsequent act, 3 & 4 W. 4, c. 42, sect. 23, is more extensive, and authorizes a judge pending a trial (y) to amend *every description of variance* when such amendment would not prejudice either party in the *just conduct* of his action or defence *on the merits*. (y¹) And provided the judges respectively will *in practice* carry into effect the powers with which they have certainly been invested, the law *might* in every case be rescued from its present disgraced state as regards the effects given to *variances* on trivial *points*; but at present the instances of permitting amendments are too limited, and at *all events*, as regards the duties of a pleader, he is not relieved from the task of exerting the utmost care to avoid a variance, which at least occasions considerable risk and great expense. (z)

(v) *Briant v. Eicke*, M. & M. 359.

(w) *Ryder v. Malbon*, 3 C. & P. 549. If this be law it would be judicious, in declaring upon a written agreement, to profess to set it out, as by averring that by a certain agreement or instrument in writing, made between, &c. it was agreed, &c. rather than to state it by showing only its substance or effect, without referring to it as a written instrument.

(x) *Roder v. Malbon*, 3 C. & P. 594; *Reeves v. Scott*, 21st Feb. 1829, at Guildhall, per Lord Tenterden. It is not to be taken that a judge is *bound* to permit an amendment. It is discretionary, and if a party has unnecessarily stated irrelevant matter in which there is a variance, he is not bound to amend. So in *Jelf v. Oriel*, against drawer of bill, Guildhall, 20th October, 1829, *cor.* Lord Tenterden, where the declaration stated a special acceptance at A. or at B. but the bill produced appeared to be only accepted at A. and the words at B. were written on the bill, merely as the address of the drawer, which the pleader or attorney mistook for part of the acceptance, Lord Tenterden refused to amend, saying it would only encourage want of care in drawing pleadings, and he was not bound to permit amendments; that the act was meant only to aid clerical mistakes, and not such as any man who could read would avoid making; plaintiff obtained a verdict on the account stated. *Campbell and Brodrick* for plaintiff, *Dennan and Richards* for defendant.

(y) The amendment must be made *at the trial*, at least unless the consent of both parties be obtained to its being made afterwards. *Brashier v. Jackson*, 6 M. & W. 549.

(y¹) [The statute of amendments in Massachusetts (Genl. Sta. c. 129, §§ 40, 41, 42) is still more extensive and remedial, as to variances, than the English statute. The New York Code provides for the most liberal practice as to amendments: "Of course" (§ 172), "by the court" (§ 173), "after demurrer" (§ 174).]

(z) Since the last edition of this work a great variety of cases have occurred in which amendments *ad nisi prius* have been allowed. The following are cases of the kind. In an action on a promissory note, described as bearing date on the 9th of November, 1838, and as made by the defendant payable to the plaintiffs or order on demand, where the defendant, by his plea, denied the making of the note; and the plaintiffs, on the trial, proved a joint and several promissory note made by the defendant and his wife, dated the 6th of November, 1837, and payable *twelve months after date*, the judge allowed an amendment, it not appearing that any other note was made between the parties, and the amendment was afterwards sanctioned by the court of Q. B. See *Beckett v. Dutton*, 7 M. & W. 157; 8 Dowl. 865, S. C. So where a declaration charged the defendant on a guaranty for payment on behalf of A. B. of £24, also of the further sum of £2 per week, to be advanced by the plaintiff to the said A. B. and such other sums as he should lend and advance to the said A. B. and claimed in addition to the £24 and the £2 per week, a gross sum of £138 6s. 3d. for further advances; but the guaranty on production at the trial was found to be limited to the £24 and the £2 per week; the judge having amended accordingly, the court held

*4thly. An *Averment* signifies a positive statement of facts in opposition to argument or inference; (b) and when the obligation on the defendant to perform his contract depended on any event which would not otherwise appear from the declaration to have occurred, it is obvious that an averment of such event is essential to a logical statement of the cause of action, and should precede the statement of the defendant's breach. Such averments in a special action of *assumpsit* usually are, 1st, Of the *performance* or excuse for non-performance of a condition precedent, or of the happening of some event essential to the cause of action: 2dly, That the defendant had *notice* of such performance or of such event; and 3dly, That he was *requested* to perform his contract. (c)

4thly. The necessary averments in *assumpsit*.

When the consideration of the defendant's contract was *executed*, or past at the time of making the contract, and his performance was not to depend on any subsequent event, or other circumstance essential to the action, the declaration should proceed at once from the statement of the contract to the breach, without any intermediate averments, as in a count on an *indebitatus assumpsit*, &c. But when the consideration of the defendant's contract was *executory*, (d) or his performance was to depend on some act to be done or forborne by the plaintiff, or on some other event, the plaintiff must aver the fulfilment of such condition precedent, (d¹) whether it were in the affirmative or negative, or to be performed or observed by him or by the defendant, or by any other person, or must show some excuse for the non-performance. (e) And

1st. Of averments of plaintiff's performance of his part.

it within the statute. *Smith v. Brandram*, 9 Dowl. 431. So where the declaration alleged that the defendant was retained to lay out a certain sum in a government annuity, and the proof was a government security, this was held an amendable variance. *Gurford v. Daley*, 4 Scott N. R. 398; 1 Dowl. N. S. 519, S. C. So in actions on other special contracts, amendments have been allowed, in some cases, by introducing exceptions which were not stated in the declaration. *Read v. Dunsmore*, 9 C. & P. 588; *Clark v. Morrell*, 2 Scott N. R. 17; 9 Dowl. 461, S. C.; *Gladwell v. Steggall*, 8 Scott, 60; 5 Bing. N. C. 733, S. C.; *Duckworth v. Harrison*, 5 M. & W. 427; 7 Dowl. 463; *Boys v. Ansell*, 5 Bing. N. C. 390; 7 Scott, 364, S. C.; *Ward v. Pearson*, 7 Dowl. 382; 5 M. & W. 16, S. C.; *Whitwell v. Scheer*, 8 Ad. & El. 301; in others by striking out qualifying averments; *Evans v. Fryer*, 10 Ad. & El. 609; 2 P. & D. 540, S. C.; in actions of libel and slander, by varying and qualifying the words; *Smith v. Knowelden*, 2 Scott N. R. 659; 2 M. & Gr. 561; 9 Dowl. 402, S. C.; *Foster v. Pointer*, 9 C. & P. 718; *Jenkins v. Phillips*, 9 C. & P. 766; in ejectment, by altering the day of the demise;

Doe dem. Edwards v. Leach, 9 Dowl. 877; and in replevin, by varying the amount of rent; *Roberts v. Snell*, 1 M. & Gr. 577 (when not, *Sergeant v. Chafy*, 5 Ad. & El. 354). See, also, various other cases collected on the subject, in 3 Chitty's Genl. Prac. by Lush, 796; but as the decision of the judge on the trial is conclusive as to the *disallowance* of an amendment (*Parker v. Edge*, 3 Tyrw. 364; *Hanbury v. Ella*, 1 Ad. & El. 64), and his decision in favor of an amendment cannot be calculated upon with certainty, the advice given in the text is still very important to be attended to.

(b) *Rex v. Horne*, Cowp. 683, 684; Bac. Ab. Pleas, B.

(c) See Com. Dig. Pleader, C. 50, &c.; Bac. Ab. Pleas; 1 Saund. 235, note (8).

(d) *Ante*, 302.

(d¹) [*Murdock v. Caldwell*, 8 Allen, 309; Genl. Sts. Mass. c. 129, § 2, pt. 10; *Wilcox v. Cohn*, 5 Blatchf. C. C. 346. It is sufficient to set out performance of a condition precedent in the language of the condition. *Smith v. Lloyd*, 16 Grattan, 295.]

(e) *Ughtred's case*, 7 Co. 10 a; Com. Dig. Pleader, C. 51, 52; *Jones v. Barkley*, Dougl. 686; *Hotham v. The East India Company*,

in the case of reciprocal covenants, constituting *mutual conditions* to be performed *at the same time*, the plaintiff must aver performance or a readiness to perform his part of the contract. (f) Thus, in declaring on a promise to pay a sum of money in consideration *that the plaintiff would execute a release, the declaration must aver that such release was executed or tendered and refused. (g) So, on a promise to pay money in consideration of forbearance by the plaintiff, the declaration must aver such forbearance; (h) and in actions for not delivering goods sold, the plaintiff must in general aver a readiness on his part to pay the price, &c. (i) But upon a lessor's covenant that lessee *paying the rent at the appointed time* should quietly enjoy, it was held that the lessee might sue for a disturbance in possession, although he

1 T. R. 638; [Smith v. Wright, 4 N. Y. App. Dec. (Abbott) 274; Lester v. Jewett, 11 N. Y. 453; Bank of Columbia v. Hagner 1 Peters (U. S.), 467; Justice v. Board of Justices, 2 Blackf. 149; M'Intire v. Clark, 7 Wend. 330; Zenger v. Sailer, 6 Binn. 24; Salmon v. Jenkins, 4 McCord, 288; Graves v. Legg, 9 Exch. 709, 716; 2 Chitty Contr. (11th Am. ed.) 1083; Lonsdale v. Brown, 4 Wash. 148; Harrison v. Taylor, 3 A. K. Marsh. 168; Parker v. Parmele, 20 John. 130; Robb v. Montgomery, 20 John. 15; Bean v. Atwater, 4 Conn. 3; Tinney v. Ashley, 15 Pick. 552; Smith v. Christmas, 7 Yerger, 565; Jones v. Somerville, 1 Porter, 437; Gardiner v. Corson, 15 Mass. 505; Fannen v. Beauford, 1 Bay, 637; Hounsford v. Fisher, Wright, 580; Pollard v. M'Clain, 3 A. K. Marsh. 25; Clendennen v. Paulsel, 3 Missou. 230; Hilt v. Campbell, 6 Greenl. 111; Jennings v. Camp, 13 John. 94; M'Millan v. Vanderlip, 12 John. 165; Faxon v. Mansfield, 2 Mass. 147; Ferris v. Purdy, 10 John. 359; Wilt v. Ogden, 13 John. 57; Thorpe v. White, 13 John. 53; M'Intire v. Clark, 7 Wend. 330; Wright v. Tuttle, 4 Day, 322; Bailey v. Clay, 4 Rand. 346; Helm v. Wilson, 4 Missou. 481; Genl. Sts. Mass. c. 129, § 2, pt. 10; Hitchcock v. Galveston, U. S. Dist. Ct. East Dist. Texas, Dec. 1874, 2 Central Law Jour. 331; Jennings v. Moss, 4 Texas, 452. In declaring on a promise to pay money when collected, it must be averred that it has been collected. Dodge v. Codrington, 3 John. 146.] A declaration in covenant by the vendor against an intended purchaser of lands for non-payment of the purchase-money according to the contract, need not aver that the plaintiff offered or tendered a conveyance to the defendant; it is sufficient to allege that the plaintiff has always been *ready and willing* to execute a conveyance; for in the absence of an express stipulation to the contrary, it is the duty of the purchaser to prepare the conveyance and tender it to the vendor for execution. Poole v. Hill, 6 M. & W. 835. See, also, De Medina v. Norman, 2 Dowl. N. S. 239. [In most of the American states it is the duty of the vendor to prepare and tender

the instrument of conveyance. 1 Chitty Contr. (11th Am. ed.) 424, note (t); 1 Sugden V. & P. (8th Am. ed.) 242, note (m), and cases cited.]

(f) Ughtred's case, 7 Co. 10 a; Rawson v. Johnson, 1 East, 203; ante, 303; [Vankirk v. Talbot, 4 Blackf. 367; Low v. Marshall, 17 Maine, 232; Wadlington v. Hill, 18 Miss. 560.] As to where a general allegation of performance is sufficient, see Procter v. Sargent, 2 M. & Gr. 20; [Wright v. Tuttle, 4 Day, 313; Byrne v. M'Nulty, 7 Ill. 424. That it is insufficient, see Barbee v. Willard, 4 McLean, 356.] Where by an agreement concurrent acts are to be done by the plaintiff and the defendant, a declaration against the defendant for not doing the act on his part should allege that the plaintiff was ready and willing to do the *concurrent act* on his part; but if the plaintiff merely allege that he was ready and willing to *perform the agreement* on his part, it is sufficient if the defendant demur generally, or if he plead over. Where a declaration in assumption describes the terms of the contract in language denoting that a particular act which the plaintiff has engaged to do is to be independent of or concurrent with an act or acts to be done on the part of the defendant, if, from the position of the parties, or from the nature of the agreement, such act is to be considered as intended to constitute a condition precedent, the proper course is to plead *non assumption*, and give the special matter in evidence. Per Maule J. Kemble v. Mills, 1 M. & Gr. 757.

(g) Collins v. Gibbs, 2 Burr. 899; Smith v. Wilson, 8 East, 437; Andrews v. Whitehead, 13 East, 117; 2 Saund. 108, note (3); [Parker v. Parmele, 20 John. 130, and cases there cited; Miller v. Drake, 1 Caines, 45; Green v. Reynolds, 2 John. 207.]

(h) Com. Dig. Pleader, C. 22; *post*, vol. ii. 131, 132.

(i) Rawson v. Johnson, 1 East, 203; *post*, vol. ii. 239 *et seq.* An offer need not be alleged, when, Wilks v. Atkinson, 1 Marsh. 412; Levy v. Ld. Herbert, 7 Taunt. 314; 2 Saund. 352, notes; [Porter v. Rose, 12 John. 209; West v. Emmons, 5 John. 179.]

had not duly paid his rent. (j) A perusal of the forms of the special counts in assumpsit, which are given in the second volume, will further illustrate this rule. But where an estate or interest passed or vested immediately in the plaintiff, and was to be defeated by a condition *subsequent*, or matter *ex post facto*, whether in the affirmative or negative, or to be performed by the plaintiff or defendant, or by any other person, performance of that matter need not be averred; (k) as if a grant of an annuity were till the plaintiff should be advanced to a benefice, he need not say that he is not yet advanced. (l)

As observed by Lord Mansfield, in delivering his judgment in *Kingston v. Preston*, (m) "there are three kinds of covenants: 1st, such as are called *mutual* and *independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2dly, There are covenants which are *conditions dependent* on each other; in which the performance of one depends on the prior performance of the other, and therefore till this prior condition be performed the other party is not liable to an action on his covenant. 3dly, There is also a third sort of covenants, which are *mutual conditions* to be performed at *the same time*; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and *however transposed they may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. In the case before the court it would be the greatest injustice if the plaintiff should prevail; the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but before he delivered up his stock and business should have good security for the payment of the money; the giving such security therefore must necessarily be a condition precedent." (m¹)

There are no precise technical words in a deed or other contract to make a stipulation a condition precedent or subsequent; neither does

(j) *Dawson v. Dyer*, 6 B. & Ad. 584.
(k) 7 Co. 10 a; *Cornish v. Bolitho*, Willes, 145, 146.

(l) *Ib.*; *Plowd. Com.* 25 b, 30 a, 32 b; *Hotham v. The East India Company*, 1 T. R. 645, 646; *Wood v. Worley*, 2 H. Bl. 379.

(m) Cited *Dougl.* 690, 691; and see the note to *Acherley v. Vernon*, Willes, 157, note (a); 1 *Saund.* 320, note (4); 2 *Saund.* 108, note (3), 352, note (1); *Platt on Cov.*

70; *Rawson v. Johnson*, 1 East, 208; *Com. Dig. Pleader*, C. 50 to C. 68; *Mattock v. Kinglake*, 2 P. & D. 343; *Hallewell v. Morrell*, 1 M. & Gr. 367; *Wynne v. Wynne*, 2 M. & Gr. 8; and Mr. Smith's notes to *Cutter v. Powell* (2 Smith's Leading Cases), as to conditions precedent and averment of performance in general.

(m¹) [*Ackley v. Elwell*, 5 Halst. 304; *Bank of Columbia v. Hagner*, 1 Peters, 464.]

it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. (n) The contradiction in the determinations has arisen not from a denial, but from a misapplication of this principle in the particular instance. (o)

The words by which conditions precedent are usually created are, *for*: (p) *in consideration of*; (q) *provided, &c.*; (r) *doing, &c.*; *performing, &c.*; (s) *upon condition, &c.*; (t) *having so done, &c.*; (u) *ita quod*; (x) *proinde*; (y) *&c.* In general, if the agreement be that one party shall do an act, and that *for the doing thereof* the other shall pay a sum of money, the *doing of the act is a condition* precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed. (y¹) If there be a condition precedent, however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest; (z) as if the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, it is clear that the right which was to depend on the performance of that condition did not arise; and if a person undertake for the act of a stranger, the cases are uniform to show that such act must be performed. (a) And on this principle, where by the proposals of the Phoenix Insurance Company against fire, it was stipulated * that persons insured should, in case of loss by fire, procure a certificate of the minister, &c. of the parish, importing that they knew the character of the assured, and believed that he had really sustained the loss without fraud, it was held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that although it was found by verdict that the minister, &c. wrongfully refused to sign the certificate, yet as it was

(n) Per Ashurst J. *Hotham v. The East India Company*, 1 T. R. 645; *Campbell v. Jones*, 6 T. R. 570; *Porter v. Shiphard*, 6 T. R. 668; *Morton v. Lamb*, 7 T. R. 130; *Platt on Cov.* 72-79; [*Putnam J. in Powers v. Ware*, 2 Pick. 456; *Barruso v. Madan*, 2 John. 158; *Cunningham v. Morrell*, 10 John. 205.]

(o) 1 Saund. 320 a; *Acherley v. Vernon*, Willes, 157, note (a).

(p) *Jones v. Barkley*, Dougl. 688; *Acherley v. Vernon*, Willes, 157, note (a); *Tidd*, 9th ed. 437; *Lock v. Wright*, 1 Stra. 569; *Peters v. Opie*, 1 Vent. 177; 2 Saund. 350, S. C.

(q) *Thorpe v. Thorpe*, 1 Ld. Raym. 665; *Feltham v. Cudworth*, 2 Ld. Raym. 766; *Martindale v. Fisher*, 1 Wils. 88; *Acherley v. Vernon*, Willes, 157.

(r) *Shadforth v. Higgin*, 3 Campb. 385; *Thomas v. Cadwallader*, Willes, 498.

(s) *Boone v. Eyre*, 2 Bl. Rep. 1313, 1314;

Thomas v. Cadwallader, Willes, 496; *Acherley v. Vernon*, Willes, 158, &c.; but see *Dawson v. Dyer*, 5 B. & Ad. 584.

(t) Co. Litt. 202 b; *Acherley v. Vernon*, Willes, 153; *Doe v. Pitcher*, 3 M. & Sel. 408.

(u) *Doe v. Pitcher*, 3 M. & Sel. 408.

(x) *Feltham v. Cudworth*, 2 Ld. Raym. 766.

(y) *Jones v. Barkley*, Dougl. 688; *Mucklestone v. Thomas*, Willes, 149; *Platt on Cor.* 72.

(y¹) [See *Dodge v. Coddington*, 3 John. 146; *Cunningham v. Morrell*, 10 John. 203; *Green v. Reynolds*, 2 John. 207; *Jones v. Gardner*, 10 John. 266; *Stevenson v. Clepinger*, 6 Watts, 420.]

(z) *Worsley v. Wood*, 6 T. R. 710, 722. See *Glazebrook v. Woodron*, 8 T. R. 373; 1 Saund. 320 d.

(a) Per Lord Kenyon C. J. and Lawrence J. *Worsley v. Wood*, 6 T. R. 719, 722.

not averred in the declaration that the certificate was actually obtained, the judgment was arrested. (b)

Some rules have been collected, by which to discover the intention of the parties and to ascertain when performance or excuse of performance by the plaintiff is necessary to be averred in the declaration. (c) *First*, Where a day was appointed for payment by the defendant of money, or part of it, or for his doing any other act, and such day was to happen *before* the thing which was the consideration of the defendant's contract was to be performed, an action may be brought for the money, or for not doing such other act, before performance by the plaintiff; (c¹) for it appears that the defendant relied upon the mere *agreement* to do the act, and upon his remedy if not performed, and did not intend to make the plaintiff's performance, (c²) a condition precedent. (d) And so it is where no time is fixed for the performance of that which is the consideration of the money or other act. (e) *2dly*, But when a day was appointed for the performance of the defendant's contract, and such day was to happen *after the time* when the consideration of the defendant's contract was to be performed, in such case in general no action can be supported until the plaintiff has performed his act, and such performance must be averred. (f) *3dly*, That where the plaintiff's covenant or stipulation constituted only a *part* of the consideration of the defendant's

(b) *Worsley v. Wood*, 6 T. R. 710. [Where a party agrees to perform work to the entire satisfaction of the defendant and third persons; in an action to recover the price, it must be averred, that the work was done to the satisfaction of such third persons, though it may not be necessary to aver that it was done to the satisfaction of the defendant. *Butler v. Tucker*, 24 Wend. 447; *Walker v. Orange*, 16 Gray, 193; *Walker v. Tirrell*, 101 Mass. 257.]

(c) 1 Saund. 320, note (4); *Tidd*, 9th ed. 437, 438. Distinction between a covenant and a condition, *Platt*, 70, &c.; and see construction in *Allen v. Cameron*, 1 Cr. & M. 833.

(c¹) [*Robb v. Montgomery*, 20 John. 15; *Cunningham v. Morrell*, 10 John. 204; *Barroso v. Madan*, 2 John. 145. In *Cunningham v. Morrell*, 10 John. 203, where there was an agreement to pay the plaintiff a sum of money for completing the whole of a work, to be paid in instalments as the work progressed, it was held that, if the plaintiff went for the whole of the consideration money, he must aver performance of the whole work, or if for a ratable part of the money, he must show a ratable performance. Cases of this kind are clearly distinguishable from those in which the day of payment was fixed *before* the performance of the consideration on the part of the defendant, for here either the whole or some part of the work was to be done, before the whole or any part of the

price could be demanded. See *Wilcox v. Ten Eyck*, 5 John. 78; *Gould v. Banks*, 8 Wend. 562; *Kane v. Hood*, 13 Pick. 281; *Ackley v. Elwell*, 5 Halst. 304.]

(c²) [*Close v. Miller*, 10 John. 90; *Jones v. Gardner*, 10 John. 266.]

(d) See the cases referred to in 1 Saund. 320 a, note (4); *Martindale v. Fisher*, 1 Wils. 88; *Smith v. Woodhouse*, 2 New Rep. 239; *Wilks v. Smith*, 10 M. & W. 355; *Platt on Cov.* 95. A declaration in assumpsit, stating that the plaintiff was possessed for a term of years of a dwelling-house, and that it was agreed he should on or before the 24th of June let the same to the defendant, and that the defendant should become tenant by a lease to be granted by the plaintiff for twenty-one years from the 24th of June, and averring that the plaintiff was on the 24th of June *ready and willing* to let to the defendant, yet the defendant would not become tenant, was held good on general demurrer; the words *ready and willing* implying disposition, capacity, and ability. *De Medina v. Norman*, 2 Dowl. N. S. 239.

(e) 1 Saund. 320 a.

(f) 2 Saund. 320 b; and *Ib.* note (a), 5th ed.; *Smith v. Wilson*, 8 East, 437; *Gibbon v. Mendez*, 2 B. & Ald. 17; *Platt on Cov.* 83. There are instances in which the plaintiff, having partly performed work, &c. may recover *pro tanto*, the defendant receiving the benefit of such part. See *post*, as to the common counts for work and labor.

contract, and the defendant has actually received a *partial* benefit, and the breach on the part of the plaintiff might be compensated in damages, an action may be supported against the defendant, without averring performance by the plaintiff; (g) for where a party has received a part * of the consideration for his agreement, it would be unjust that because he had not had the whole, he should enjoy that part without paying or doing anything for it, and therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. (h) In these cases, however, it seems necessary to aver in the declaration performance of at least a part of that which the plaintiff covenanted to do, or to show *that the defendant has otherwise received a partial benefit.* (i) 4thly, But where the mutual covenants constitute the *whole* consideration on both sides, they are mutual conditions, the one precedent to the other, and the plaintiff must aver performance on his part. (j) 5thly, Where two acts are to be done at *the same time*, as where A. covenants or agrees to convey an estate, or to deliver goods to B. on a named day, or generally, and in consideration thereof B. covenants to pay A. a sum of money on the *same day*, or *generally*; neither can maintain an action without showing performance of, or an offer to perform, or at *least a readiness* to perform his part, though it is not certain which of them was obliged to do the first act, (j¹) and this rule particularly applies to contracts of sale. (k) It is to be observed that several modern cases,

(g) 1 Saund. 320 b; Boon v. Eyre, 1 H. Bl. 273; is a leading case, and see Franklin v. Miller, 4 Ad. & El. 599; Campbell v. Jones, 6 T. R. 572; Ritchie v. Atkinson, 10 East, 295; Havelock v. Geddes, 10 East, 555, 563; Davidson v. Gwynne, 12 East, 389; Storer v. Gordon, 3 M. & Sel. 308; Fothergill v. Walton, 8 Taunt. 576; 2 Moore, 630, S. C.; Platt on Cov. 90; [Pepper v. Haight, 20 Barb. 429; Bennett v. Pixley, 7 John. 249; Obermeyer v. Nichols, 6 Binn. 159.]

(h) See last note.

(i) 1 Saund. 320 c, d; Ritchie v. Atkinson, 10 East, 295; Bragg v. Cole, 6 Moore, 114.

(j) 1 Saund. 320, note (4); Platt on Cov. 80; [Harrison v. Taylor, 3 A. K. Marsh. 168; Tanner v. Beareford, 1 Bay, 237; Hounsford v. Fisher, Wright, 580; Holloway v. Davis, Wright, 130; Goodwin v. Lynn, 4 Wash. C. C. 714; Leonard v. Bates, 1 Blackf. 175; Bean v. Atwater, 4 Conn. 3; Tinney v. Ashley, 15 Pick. 552; Jones v. Somerville, 1 Porter, 437; Smith v. Christmas, 7 Yerger, 565; Clendennen v. Paulsel, 3 Missou. 230; Marshall v. Craig, 1 Bibb, 379; Couch v. Ingersoll, 2 Pick. 292; Farnham v. Ross, 2 Hall, 167; Dakin v. Williams, 11 Wend. 70; Tompkins v. Elliot, 5 Wend. 496.] By averment of performance in this case, must be understood an aver-

ment that the plaintiff was *ready and willing* to perform his part of the contract, and this averment will be proved by showing that he called on the defendant to accomplish his part. Wilks v. Atkinson, 1 Marsh. 412; Levy v. Ld. Herbert, 7 Taunt. 314; 1 B. M. 56, by Dallas, L. C. J. See ante, 332, note (d).

(j¹) [See Green v. Reynolds, 2 John. 207; Porter v. Rose, 12 John. 209.]

(k) 1 Saund. 320 d, note (4); 2 Saund. 352, note (3); and 108, note (3); Rawson v. Johnson, 1 East, 203; Glazebrook v. Woodrow, 8 T. R. 366; Morton v. Lamb, 7 T. R. 130; Levy v. Ld. Herbert, 7 Taunt. 314; 1 Moore, 56, S. C.; Fenny v. Williams, 8 Taunt. 62; 1 Moore, 498, S. C.; [Dana v. King, 2 Pick. 156; Kilgour v. Miles, 7 Gill & J. 268; Howland v. Leach, 11 Pick. 151; Kane v. Hood, 13 Pick. 281; Tinney v. Ashley, 15 Pick. 546; M'Gehee v. Hill, 4 Porter, 170.] Where there are two acts to be done in pursuance of an agreement, and a day is specified for the performance of one and none for the other, an action will lie for the omission to comply with the act at the specified time, without averring performance of the other act. See Mattock v. Kinglake, 10 Ad. & El. 50; 2 P. & D. 343; Wilks v. Smith, 10 M. & W. 355. [Where there is an entire contract to deliver, within a specified time, a large quantity of goods consisting of dis-

before the pleading rules, show that *under the general issue* the defendant might have given in evidence non-performance of a condition precedent in *reduction of damages*. (l)

In *point of form*, an *averment* may be in any words amounting to an express allegation that such a fact or facts existed; (m) as, "the plaintiff *avers*," or "*in fact saith*," or "*although*," or "*because*," or "*with this that*," or "*being*," &c. The *simple* and, therefore, *best mode* of averment is, "*and the plaintiff saith that, &c.*" and the words, "*avers, &c.*" or "*in fact saith*," are obviously unnecessary. Where it is necessary to aver the life of a person in pleading, it is often *sufficient if it appear by implication that the life continues; (o) as where one who claims under a rector, states that the rector was and *yet is* seised, this is a sufficient averment of his life. (p) So if it be stated that A. was seised in fee and died, and that the land descended to B. as his son and heir, this is a sufficient averment that A. died seised. (q) It is not unusual in declarations on mutual promises, and in covenant between landlord and tenant, to aver that the plaintiff hath performed all things on his part to be performed, but this is unnecessary; (r) though it may after the verdict aid the omission of an averment of plaintiff's performance of a particular act. (s)

Where it is necessary on the part of the plaintiff to aver *performance*, it must be shown to have been according to the *intent* of the contract, for it is not sufficient to pursue the words if the intent be not also performed, as on a promise in consideration that the plaintiff would cause A. to come to be bound to the defendant for £20, it is

tinct parcels, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part; and the purchaser may, if the seller fail to complete his contract, return the part delivered. *Wright v. Barnes*, 14 Conn. 518; *Roberts v. Beatty*, 2 Penn. 63. But if he retain the part delivered, after the period for the delivery of the remainder, he will be liable on a *quantum meruit* for the value of that part. *Oxendale v. Wetherell*, 9 B. & C. 386; *Mavor v. Pyne*, 3 Bing. 285; *Wilde J. in Snow v. Ware*, 13 Met. 49; *Bowker v. Hoyt*, 18 Pick. 555; 2 Kent, 509, and note. A different doctrine prevails in New York. See *Champlin v. Rowley*, 18 Wend. 187; *Mead v. Degolyer*, 16 Wend. 632; *M'Knight v. Dunlop*, 4 Barb. 36; *Paige v. Ott*, 5 Denio, 406; *Kein v. Tupper*, 52 N. Y. 550, where it is held, that if a party, contracting to deliver a quantity of chattels by a certain day, at a certain price, to be paid for on delivery and acceptance of the whole, delivers only a part, he cannot recover for the part so delivered, though it be used and enjoyed by the vendee. See *Witherow v. Witherow*, 16 Ohio, 238; *Roberts v. Beatty*, 2 Penn. 63; *Topping v. Root*, 5 Cowen, 404.]

(l) *Allen v. Cameron*, 1 Cr. & M. 836,

and cases there cited. As to the proper mode of taking advantage of it now, see *Kemble v. Mills*, 1 M. & Gr. 757; *ante*, 329, note (f).

(m) 1 Saund. 117, note (4); Com. Dig. Pleader, C. 77. As to the manner of making an averment, see *Rex v. Horne*, Cowp. 683, 684; 1 Saund. 117, note (4); *Eaton v. Southby*, Willes, 134; *Mead v. Robinson*, Willes, 427. [Each paragraph in a pleading must be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another. *Silvers v. The Junction R. R. Co.* 43 Ind. 435.]

(o) *Thursby v. Plant*, 1 Saund. 235, note (8); *Posterne v. Hanson*, 2 Saund. 61, note (9); but see *Dayrell v. Hoare*, 12 Ad. & El. 356; and Mr. Justice Patteson's observations on the note *Thursby v. Plant*.

(p) *Ib.*; *Dyer*, 304 a; *Scamler v. Johnson*, Sir T. Jones, 227.

(q) 2 Saund. 61 g, note (9).

(r) 1 Saund. 234 c, note (5).

(s) *Thorpe v. Thorpe*, Lutw. 253; *Prideaux v. Rawlins*, Sir T. Jones, 125; Com. Dig. Pleader, C. 61; *Kemble v. Mills*, 1 M. & Gr. 757; *Proctor v. Sargent*, 2 M. & Gr. 20.

not sufficient to aver that the plaintiff caused A. to come to be bound, but it ought to be also alleged that A. was bound. (t) And an *exact performance* must also be stated; as on a promise in consideration that the plaintiff would procure the loan of £20 for one year, it is not sufficient to allege that he procured part at one time and part at another, for he ought to procure the whole for the whole year. (u) And performance ought to be shown with such certainty, that the court may judge whether the intent of the covenant has been duly fulfilled, as in consideration that the plaintiff would acquit A. of a debt, it is not sufficient to say that he acquitted him without showing how, viz. by deed. (x) Where the matter to be performed is a condition precedent, the performance of that matter must be shown, although a third person was to do the act, and he unreasonably refuse his concurrence; and a substituted performance is insufficient; as where a fire policy required that the minister and churchwardens should certify as to the plaintiff's character, &c. it was held that such certificate by those persons was indispensable. (y) But if the plaintiff show a substantial performance of a matter of a general nature, it is frequently sufficient to state it in general terms, without alleging particularly how he performed; as on a promise to pay so much as the plaintiff should expend for the officers of the army in such a suit, an averment that he spent so much is sufficient, without showing for what officers in particular. (z) And there are some instances where the thing agreed to be done by the plaintiff having been substantially performed though not in the exact manner, nor with all the minute circumstances mentioned, it was considered as a sufficient performance; (a) as where the condition was to enfeoff, a conveyance by lease and release was held sufficient; (b) so where the condition was to deliver the will of the testator, and the plaintiff delivered letters testamentary. (c) So, in a declaration on a contract to pay so much money, if the plaintiff would marry the daughter of the defendant at his request, an allegation that he did marry her, without saying at the defendant's request, is sufficiently certain. (d) Where the condition precedent was in the disjunctive, the averment of performance must

(t) Com. Dig. Pleader, C. 58. As to pleas of performance, see *post*.

(u) Com. Dig. Pleader, C. 59; Donington v. East, Yelv. 87.

(x) Leneret v. Rivet, Cro. Jac. 503; Com. Dig. Pleader, C. 60; King v. Hobs, Cro. Eliz. 914; Prideaux v. Rawlins, Sir T. Jones, 125; [Thomas v. Van Ness, 4 Wend. 553; Zenger v. Sailer, 6 Binn. 24. In a case in Connecticut, where the plaintiff averred generally that he had kept and performed all the covenants in the indenture on his part to be performed, it was held not only sufficient, but the most proper form; and that the dis-

inction was, that where the act involved in it a question of law, viz. whether it was done as the law directed, the *quo modo* must be pointed out, but where it is a mere matter of fact, a general averment of performance is the most proper. Wright v. Tuttle, 4 Day, 313.]

(y) Worsley v. Wood, 6 T. R. 710; *ant*, 332.

(z) Com. Dig. Pleader, C. 61.

(a) Worsley v. Wood, 6 T. R. 722.

(b) Co. Litt. 207 a.

(c) 1 Rol. Abr. 426, pl. 4.

(d) Poynter v. Poynter, Cro. Car. 194.

be framed accordingly, and not in the conjunctive. (e) Where the defendant's agreement was to pay £45 if the plaintiff would make "a set of sails worth £45," the court held that an averment that the plaintiff made "the said" sails (not showing their value) was sufficient on demurrer. (f)

In averring an *excuse* of performance by the plaintiff, he must state his readiness to perform the act, and the particular circumstances which constitute such excuse; and therefore where the declaration stated that arbitrators *could not* make their award, without showing the special cause which prevented them, it was held insufficient. (g)

In stating an excuse for non-performance of a condition precedent, the plaintiff must in general show that the defendant either *prevented* the performance, or rendered it unnecessary to do the prior act, by his neglect, or by his *discharging* the plaintiff from performance. (h) The performance of a condition precedent may also be excused by the *absence* of the defendant, if his presence were necessary for the plaintiff's performance; or by his *neglect* to do the first act, if it were incumbent on him to perform it. (i) It may also be excused in some cases by the defendants not giving *notice* to the plaintiff. (k)

(e) *Burgess v. Brazier*, 1 Stra. 594; 2 Ld. Raym. 1366, S. C.

(f) *Ib.* 88.

(g) 2 Saund. 129, 132; [*Baker v. Fuller*, 21 Pick. 318; *Pomroy v. Gold*, 2 Met. 500; *Couch v. Ingersoll*, 2 Pick. 292. The code of Indiana has modified the strictness of the rule as it existed at common law, by providing that in pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party had performed all the conditions on his part to be performed. But this provision has not been extended beyond an allegation of performance, for it has been held that, where the party intends to rely upon an excuse for not performing, such as a waiver or negligence of the other contracting party, or a refusal on his part to perform, the particular circumstances constituting such excuse should be averred. *Home Ins. Co. of New York v. Duke*, 43 Ind. 418.]

(h) *Hotham v. The East India Company*, 1 T. R. 638; *Jones v. Barkley*, Doug. 684, 687, 688; Co. Litt. 206 b; *Bowes v. Howe*, 5 Taunt. 30; *Ferry v. Williams*, 8 Taunt. 70; *Smith v. Wilson*, 8 East, 443; *ante*, 329, 330; [*Mill Dam Foundry*, 21 Pick. 417; *Shaw v. Turnpike Co.* 2 Penn. 454; 2 Chitty Contr. (11th Am. ed.) 1083, and note (g)¹. So where the defendant has disabled himself from performing his part of the contract. *Newcomb v. Brackett*, 16 Mass. 161; *Miller v. Whittier*, 32 Maine, 203; *Hawley v. Keeler*, 53 N. Y. 121; *Sands v. Clarke*, 8 C. B. 751, 762; *Clark v. Crandall*, 3 Barb. 612; *Bannister v. Weatherford*, 7 B. Mon. 271; *Bastrick v. Holden*, 8 Cush. 233, 235, 236;

Harris v. Williams, 3 Jones (Law) N. Car. 483; *Yelv.* (Am. ed.) 76, in notes; 2 Chitty Contr. (11th Am. ed.) 1084; *Lord v. Belknap*, 1 Cush. 279; *Smith v. Lewis*, 26 Conn. 110; *Couch v. Ingersoll*, 2 Pick. 292. Wherever a special agreement has been entered into to do certain work, and the person for whom it is to be done refuses to perform, or renders himself incapable of performing, his part of the agreement, the other party may either sue for a breach of the agreement, or, if he so elects, he may rescind the agreement and sue on a *quantum meruit* for the work actually done. *De Bernardy v. Harding*, 8 Exch. 822; *Prickett v. Badger*, 1 C. B. (N. S.) 296; *Moulton v. Trask*, 9 Met. 577; *Canada v. Canada*, 6 Cush. 15; *Mullaly v. Austin*, 97 Mass. 32, 33. It would seem that a condition precedent may be divisible; and where this is the case, performance as to one part will entitle the party to sue for the performance of the corresponding part of the agreement. *Per cur.* *Neale v. Ratcliffe*, 15 Q. B. 916, 927; *Leonard v. Dyer*, 26 Conn. 172, 178; *Grant v. Johnson*, 1 Selden, 247. And where a party has accepted a part performance of the contract, he precludes himself from insisting on the performance of the remainder, as a condition precedent to the plaintiff's right to recover. *White v. Beeton*, 7 H. & N. 42. But a declaration averring that the plaintiff had performed as nearly as was possible, without adding that it was accepted as full performance, would be bad. *Stagg v. Munro*, 8 Wend. 399.]

(i) 1 Rol. Abr. 457, 458.

(k) *Ib.*; Co. Litt. 207 a.

We have seen that if a third person was to perform the condition, it is no excuse for the plaintiff that such third person refused to do the act. (*l*)

Where the respective acts to be done by the plaintiff and defendant were *mutual*, and were to be performed at the *same time*, the plaintiff should aver his *readiness* to perform *his part*, (*l*¹) and either state that the defendant neglected to attend when necessary, or refused to perform *his part, or discharged the plaintiff from his performance. (*m*) Thus where the defendant stipulated to pay a sum of money on the plaintiff's assigning to him a certain equity of redemption, and the declaration averred that the plaintiff was ready and willing and offered to assign, and tendered a draft of an assignment to the defendant for his approbation, and offered to execute and deliver, and would have executed and delivered such assignment to the defendant, but that he absolutely *discharged* the plaintiff from executing the same or any assignment whatever, and had not paid the money, such declaration was, on demurrer, held sufficient. (*n*) So, in an action of assumpsit for not delivering bonds and other securities pursuant to an agreement, where the consideration money was to be paid on the receipt of the securities, it is not necessary to aver an actual tender of the money; an allegation of the plaintiff's readiness

(*l*) *Ante*, 331, 334.

(*l*¹) [But it is not necessary for him to allege actual performance. *Whitall v. Morse*, 5 Serg. & R. 358.]

(*m*) *Jones v. Barkley*, Dougl. 684; *Rawson v. Johnson*, 1 East, 203; 2 Saund. 352, note (3); *Morton v. Lamb*, 7 T. R. 130; *Levy v. Lord Herbert*, 7 Taunt. 314; 1 Moore, 56, S. C.; [2 Chitty Contr. (11th Am. ed.) 1084, and note (*l*¹); *Smith v. Lewis*, 26 Conn. 110; *Howland v. Leach*, 11 Pick. 151; *Swan v. Drury*, 22 Pick. 485; *Howe v. Huntington*, 15 Maine, 350; *Warren v. Wheeler*, 21 Maine, 484; *Jones v. Marsh*, 22 Vt. 144; *Campbell v. Gittings*, 19 Ohio, 347; *Williams v. Healey*, 3 Denio, 363; *Gazley v. Price*, 16 John. 267; *Hough v. Rawson*, 17 Ill. 588; *Grandy v. McCleese*, 2 Jones (N. Car.) Law, 142; *Cornwall v. Haight*, 8 Barb. 327; *Shaw v. Turnpike Co.* 2 Penn. 454; *Barbee v. Willard*, 4 McLean, 356; *Giles v. Giles*, 9 Q. B. 164; *Atkinson v. Smith*, 14 M. & W. 695; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Smith v. Lipscomb*, 13 Texas, 532; *Tinney v. Ashley*, 15 Pick. 552; *Smith v. Christmas*, 7 Yerger, 565; *Dakin v. Williams*, 11 Wend. 67; *Leonard v. Bates*, 1 Blackf. 175; *Clendennen v. Paulsel*, 3 Missou. 230; *Goodwin v. Lynn*, 4 Wash. 714; *Miller v. Drake*, 1 Caines, 45; *Porter v. Rose*, 12 John. 209; *Topping v. Root*, 5 Cowen, 404; *M'Gehee v. Hill*, 4 Porter, 170; *Savary v. Goe*, 8 Wash. C. C. 140; *Kane v. Hood*, 13 Pick. 281; *Anderson v. Garth*, 1 Stewart, 160. And where there has been such discharge, the plaintiff must

show notice to the other side, of his readiness and willingness to perform the contract. *Doogood v. Rose*, 9 C. B. 132. See *Smith v. Lewis*, 26 Conn. 110; S. C. 24 Conn. 624. In the case of independent mutual contracts or promises, each party has his remedy on the promise made in his favor, without performing his part of the contract. 1 Wms. Saund. 320, note (4); *Franklin v. Miller*, 4 Ad. & El. 599; *Lucas v. Godwin*, 4 Scott, 502; *Sumner v. Parker*, 36 N. H. 449; *Allard v. Belfast*, 40 Maine, 369; *Putnam v. Mellen*, 34 N. H. 71; *Knight v. New England Worsted Co.* 2 Cush. 271; *Shaw C. J. in Lord v. Belknap*, 1 Cush. 284; *Kane v. Hood*, 13 Pick. 281; *Nelson J. in Dey v. Dox*, 9 Wend. 133; 2 Chitty Contr. (11th Am. ed.) 1086, and notes.]

(*n*) *Jones v. Barkley*, Dougl. 684, 685. So where in an action by a vendor against a purchaser of land, for the amount of the purchase-money, the declaration stated that in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same, and averred that although the plaintiff had allowed the defendants to enter into possession of the land, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing, it was holden good on general demurrer. *Laird v. Pim*, 7 M. & W. 474.

to pay is sufficient. (o) So, in an action for the non-delivery of goods, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration, without alleging an actual tender of the price, to aver such request, and that he was ready and willing to receive the goods, (o¹) and to pay for them according to the terms of the sale, (o²) and that the defendant had notice of such readiness, but refused to deliver them; (p) or if the defendant did not attend at the appointed place, such non-attendance should be stated, which would render an averment of request unnecessary. (q) And where the acts to be performed by each party are mutual, and to take place at the same time, the plaintiff, it appears, should not only aver his readiness to perform his act, but also a notice of his readiness, or insert some other allegation to dispense with it; thus in an action against a woman for not marrying plaintiff within a reasonable time, an averment of notice of readiness to marry should be stated, though the omission would suffice after verdict. (r)

The omission of the averment of performance of a condition precedent, or of an excuse for the non-performance, is fatal on demurrer, or in case of judgment by default; (s) but after verdict the omission *may in some cases be aided by the common law intendment, that everything may be presumed to have been proved which was necessary to sustain the action; for a verdict will cure a case defectively stated. (t) Thus, in actions upon agreements to sell or assign leasehold property, an averment by the plaintiff, the vendor, that he was "ready and willing and offered to

Consequences of insufficient averments.

(o) *Levy v. Lord Herbert*, 1 Moore, 56; 7 Taunt. 314, S. C.; *Morton v. Lamb*, 7 T. R. 130.

(o¹) [This averment is a material one, and must be proved as alleged. *Robinson v. Tyson*, 46 Penn. St. 286.]

(o²) [There need not, in such case, be any averment or proof of a tender of the price. *Robinson v. Tyson*, 46 Penn. St. 286.]

(p) *Rawson v. Johnson*, 1 East, 203.

(q) *Morton v. Lamb*, 7 T. R. 129, 131; *Bordenave v. Gregory*, 5 East, 107. See *Lilly v. Hewit*, 11 Price, 494. [Where the power to perform a covenant on the part of the plaintiff depends on an act previously to be done by the defendant, it is unnecessary for the plaintiff to aver a tender and refusal, but an averment of a readiness to perform is sufficient, as where A. covenants to convey land, and B. covenants to execute a bond and mortgage for the land, in an action by B. against A. it is sufficient for the plaintiff to aver his readiness to perform. *West v. Emmons*, 5 John. 179. See *Robbins v. Luce*, 4 Mass. 474.]

(r) *Seymour v. Gartside*, 2 D. & R. 55.

(s) *Collins v. Gibbs*, 2 Burr. 899; 2 Saund. 352, note (3). [See *Troy v. Greenfield R. R. Co. v. Newton*, 1 Gray, 544.]

(t) *Ferry v. Williams*, 8 Taunt. 62; 1 Moore, 498, S. C.; *Rawson v. Johnson*, 1 East, 209, 210; 2 Saund. 352, note (3); *Collins v. Gibbs*, 2 Burr. 900; *Jones v. Barkley*, Dougl. 687, notes (g) and (h); 1 Saund. 228, note (1); [Helm v. Wilson, 4 Missou. 481; *Thompson v. Gray*, 2 Stew. & P. 60; *Owens v. Morehouse*, 1 John. 276, 277; *Leffingwell v. White*, 1 John. Cas. 99; *Bayard v. Malcolm*, 2 John. 571; *Bailey v. Clay*, 4 Rand. 346. So the omission of the averment of performance of a condition precedent is cured if it appear in the defendant's plea, or in his notice under the plea that it has been performed by the plaintiff. *Zerger v. Sailer*, 6 Binn. 14; *Slack v. Lyon*, 9 Pick. 65.] See *vide* *Rush v. Aspinall*, Dougl. 679; *Leneret v. Rivet*, Cro. Jac. 503. The rules as to a verdict, &c. curing a defect in pleading will be considered hereafter.

assign," seems to be sufficient *after verdict*, without alleging that he had a good title. (u) And, at least, *after verdict*, an averment of *readiness and willingness to assign*, &c. is tantamount to an averment of a tender of an assignment. (x) But where the non-performance of the condition precedent appears on the face of the pleadings, a verdict will not aid the defect. (y)

It is frequently necessary, particularly in special actions of assumption, to aver that the defendant *had notice of* some fact or facts previously stated; and a great variety of the instances where such averment is necessary are collected in the books referred to in the note. (z) From these it appears, that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof; (z¹) as where the defendant promised to give the plaintiff as much for a commodity as another person had given, or should give him, for the like; or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff his costs of suit; (a) and in a declaration against the drawer or indorser of a bill of exchange, it is material to aver notice of non-payment by the acceptor, or some excuse for the neglect. (b) But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred. (c) Therefore, if the defendant contracted to do a thing on the performance of an act by a *stranger*, notice need not be averred, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril; (d) and though it is usual in practice in a declaration of debt upon an award, and in the replication in debt on bond conditioned for performance of an award, to aver that the de-

(u) *Ferry v. Williams*, 8 Taunt. 62; 1 Moore, 498, S. C. As to the sufficiency of a general allegation of performance, even on general demurrer, see *Procter v. Sargent*, 2 M. & Gr. 20.

(x) *Ib.*

(y) *Worsley v. Wood*, 6 T. R. 710; [*Childress v. Foster*, 3 Ark. 252.]

(z) As to averring notice, see Com. Dig. Pleader, C. 73-75; Vin. Abr. Notice; *Harris v. Ferrand*, Hardr. 42; *The King v. Holland*, 5 T. R. 621, 624; 1 Saund. 117, note (2); *Vyse v. Wakefield*, 8 Dowd. 377, 912; [*Kingsley v. Bill*, 9 Mass. 198; *Colt v. Root*, 17 Mass. 229.]

(z¹) [*Huff v. Campbell*, 1 Stewart, 543; *Spooner v. Baxter*, 16 Pick. 411; *Lent v. Padelford*, 10 Mass. 238; *Dix v. Flanders*, 1 N. H. 246; *Watson v. Walker*, 23 N. H. 471; *Austin v. Richardson*, 3 Call, 201; *Bush v. Critchfield*, 4 Ohio, 103; *Whitaker v. Smith*, 4 Pick. 83.]

(a) 2 Saund. 62 a, note (4); — v. Hem-

ming, Cro. Jac. 432; *Harris v. Ferrand*, Hard. 42; Com. Dig. Pleader, C. 73; *The King v. Holland*, 5 T. R. 621, 624; *Smith v. —*, 11 Mod. 48; [*Watson v. Walker*, 23 N. H. 471, 491.]

(b) *Rushton v. Aspinall*, Dougl. 679, 680; *Bristow v. Waddington*, 2 New Rep. 355; *Lundie v. Robertson*, 7 East, 231; [*Watson v. Walker*, 23 N. H. 491; *Slacum v. Powery*, 6 Cranch, 221.]

(c) 1 Saund. 117, note (2); 2 Saund. 62 a, note (4); *Rowley v. Dad*, Freem. Rep. C. 285; [*Watson v. Walker*, 23 N. H. 491; *Bush v. Critchfield*, 4 Ohio, 105; *Keys v. Powell*, 2 A. K. Marsh. 253; *Peck v. M'Murtry*, 2 A. K. Marsh. 358; *Muldrow v. McClelland*, 1 Litt. 5.]

(d) Com. Dig. Pleader, C. 75; [*Lent v. Padelford*, 10 Mass. 230, 238; *Clough v. Hoffman*, 5 Wend. 500; *Trask v. Duval*, 4 Wash. C. C. 181; *Kees v. Powell*, 2 Marsh. 254; *Kemble v. Wallis*, 10 Wend. 374.]

fendant had *notice of the award, such averment is unnecessary, because the defendant ought to take notice of the award, unless it was expressly provided in the submission that the award should be notified to the parties, when notice must be alleged. (e) So, if upon a treaty of marriage a promise be made by a third person to pay the feme 100*l*. after the death of the husband, it is not necessary in an action upon this promise, to aver that the defendant had notice of the death; and in a declaration on a promise to pay a sum of money at the full age of an infant, notice of his attaining that age need not be alleged, because it is as notorious to one as to the other. (f) On the same principle, if a man be bound to another to indemnify him against the acts of a third person, no notice of those acts is necessary to be alleged; (g) and in an action on a promissory note by the indorsee against the drawer, notice of the indorsement need not be averred. (h) If the defendant's promise were to pay on the performance of a certain act, even by the plaintiff himself, to the defendant or a stranger, there are cases in which it has been decided that notice of the act need not be averred, because by the terms of the contract the defendant engaged to take notice of it at his peril, (h¹) as if the defendant contracted to pay on the marriage of the obligee with B.; (i) and in the case of a precedent condition to be performed by the plaintiff to the defendant in person, notice of the plaintiff's performance need not be averred, because it is implied. (k) But we have before seen (l) that where the acts to be performed by each party are mutual, and to take place at the same time, the plaintiff should not only aver a readiness to perform his act, but also a notice of such readiness, or insert some other allegation to dispense with it.

Where notice is necessary, it ought to appear that *the notice was given in due time, and to a proper person*; (m) but where a special request is averred, notice will sometimes be presumed. (n) Where no notice whatever has been given, the absconding of the party, or other circumstances, should be stated as an excuse for the want of notice; (o) but where a notice has been given, but a justifiable *delay* in giving it at the regular time (as in the case of the notice of the dishonor of a bill) has occurred, under the averment that notice was

(e) 2 Saund. 62 a, note (4); Harris v. Ferrand, Hardr. 42; Com. Dig. Pleader, C. 75; The King v. Holland, 5 T. R. 621, 624. See Marsh v. Bulteel, 5 B. & Ald. 507.

(f) Harris v. Ferrand, Hard. 42; Smith v. —, 11 Mod. 48.

(g) 1 Saund. 116; Lilley v. Hewitt, 11 Price, 494. [But in an action on a guaranty of a sale of goods, the plaintiff must allege and prove that the purchaser has been requested and refused or failed to pay. Ilsey v. Jones, 12 Allen, 260.]

(h) Reynolds v. Davies, 1 B. & P. 625.

(h¹) [Kemble v. Wallis, 10 Wend. 374;

Williams v. Granger, 4 Day, 444; Lent v. Padelford, 10 Mass. 230, 238.]

(i) Selby v. Wilkinson, 2 Bulst. 254; Com. Dig. Pleader, C. 75.

(k) Com. Dig. Pleader, C. 75.

(l) Ante, 330, 333.

(m) Com. Dig. Pleader, C. 74; [Watson v. Walker, 23 N. H. 491.]

(n) Bradley v. Toder, Cro. Jac. 228, 229; Reynolds v. Davies, 1 B. & P. 626; Alfrey v. Blackamore, 3 Bulst. 326, 327.

(o) Chitty on Bills, 7th ed. 362; Nurse v. Frampton, 1 Salk, 214; Vin. Abr. Notice, A. 2.

given, sometimes the facts excusing the delay may be proved. (p) But a careful pleader should consider whether it would not be better to state the facts of the excuse. The omission of an averment of *notice when necessary will be fatal on demurrer, or judgment by default; (q) but may be aided by a verdict, (r) unless in an action against the drawer of a bill, when the omission of the averment of notice of non-payment of the acceptor is fatal even after verdict. (s)

Whenever it is essential to the cause of action that the plaintiff should have *actually formally requested* the defendant to perform his contract, such *request must be* stated in the declaration and proved. (t) It has been observed, that if it had been held that a request were *always* essential to be averred and proved, many vexatious actions might be avoided, but there are a variety of instances in which it is settled that *no request is necessary* anterior to the action, and consequently need not be stated in pleading; (u) thus, where the declaration is upon a contract to pay a *precedent* debt, as in the case of common counts for goods sold, work and labor, money lent, &c. no request need be stated or proved. (x) And in these instances, although the promise has been laid to pay *on request*, the "*licet sæpius requisitus*" need not be laid or proved. (y) And though formerly a distinction was made between a promise to pay a precedent debt, and one to become due on a subsequent event, that distinction appears not to be tenable; thus, where the declaration stated that the defendant, in consideration that the plaintiff *would* make him a set of sails worth 45*l.*, promised to pay so much for them on request, it was decided that no request to pay was necessary to be stated, because, on making of the sails the money immediately became due, and the court said the case differed from those where the payment is to be to a third person, or where an award directs a request. (z) Where the defendant was to perform the first act, (a) or has so acted as to render a

(p) *Firth v. Thrush*, 8 B. & C. 387; 2 M. & R. 359, S. C.

(q) — *v. Henning*, Cro. Jac. 432.

(r) *Palgrave v. Wyndham*, 1 Stra. 214; 1 Saund. 228 a; *Seymour v. Gartside*, 2 D. & R. 55; [*Pasteur v. Parker*, 3 Rand. (Va.) 458; *Spencer v. Overton*, 1 Day, 183; *Weigley v. Weir*, 7 Serg. & R. 309.]

(s) *Rushton v. Aspinall*, Dougl. 679; *Lundie v. Robertson*, 7 East, 231; [*Miles v. O'Hara*, 4 Binn. 180; *Weigley v. Weir*, 7 Serg. & R. 310; *Boot v. Franklin*, 3 John. 207.]

(t) *Williams v. Germaine*, 7 B. & C. 468; 1 M. & R. 394, S. C.; [*Read v. Smith*, 1 Allen, 521; *Watson v. Walker*, 23 N. H. 471; *Gibbs v. Stone*, 7 T. B. Mon. 302; *Rush v. Stephens*, 24 Wend. 256; *Nelson v. Boetwick*, 5 Hill, 37.] As to requests in general, see Com. Dig. Pleader, C. 69-73; 1 Saund. 33 a, note (2); *Wallis v. Scott*, 1 Stra. 88; *Bockenham v. Thacker*, 2 Vent.

75; *The Master of the Butchers' Company v. Bullock*, 3 B. & P. 438.

(u) *Morgan v. Sargent*, 1 B. & P. 59, 60; *Capp v. Lancaster*, Cro. Eliz. 548, post; [*Carpenter v. Brown*, 6 Barb. 147.]

(x) 1 Saund. 33, note (2); Bul. N. P. 151; [*Walker v. Welch*, 13 Ill. 674; *Greenwood v. Curtis*, 6 Mass. 366; *Ernst v. Bartle*, 1 John. Cas. 319; *Leffingwell v. White*, 1 John. Cas. 99; *Thomas v. Roosa*, 7 John. 462; *Maddox v. Brown*, 9 Porter, 118.]

(y) *Ring v. Roxbrough*, 2 Tyr. 468, 470; 2 Cr. & J. 418, S. C.; [*Pettibone v. Pettibone*, 5 Day, 324; *Henderson v. Howard*, 2 Ala. 342.]

(z) *Wallis v. Scott*, 1 Stra. 88; *Bockenham v. Thacker*, 2 Vent. 75; *Hill v. Wade*, Cro. Jac. 523.

(a) *Bristow v. Waddington*, 2 New Rep 355.

previous request of performance useless and unnecessary, (b) the statement of a request may be omitted. (b¹)

But when by the express or implied terms of the contract it was incumbent on the plaintiff, before the commencement of his action, to request the defendant to perform his contract, such request being as it were a condition precedent, must be averred. (c) Thus, in an action for not delivering a horse sold, by defendant to the plaintiff, *or for not finding timber for repairs, the declaration should allege a special request to deliver the same. (d) Upon a note payable "one month after demand," a demand must be made. (e) So, if the contract were to deliver up a bond to be cancelled "on request;" (f) or to pay money "on request;" (g) or if an award direct the defendant to perform some act "on request;" (h) or if the defendant contracted as surety to pay the debt or rent of a third person "on request;" (i) in these cases the request is parcel of the contract, and must be alleged

(b) *Amory v. Brodrick*, 5 B. & Ald. 712; 1 D. & R. 361, S. C.; *Bowdell v. Parsons*, 10 East, 359.

(b¹) [See *Lent v. Padelford*, 10 Mass. 230; *Townsend v. Wells*, 3 Day, 327.]

(c) *Com. Dig. Pleader, C. 69*; *Phillips v. Fielding*, 2 H. Bl. 131; 1 Saund. 32, 33 a, note (2); *Bach v. Owen*, 5 T. R. 409; *Peck v. Methold*, 3 Bulst. 297; and see the remarks of Parke B. on *Bach v. Owen* in *Radford v. Smith*, 3 M. & W. 258. [In actions on notes payable in specific articles on demand, a demand before action brought must be alleged and proved. *Greenwood v. Curtis*, 6 Mass. 634; *Loddell v. Hopkins*, 5 Cowen, 516; *Benness v. Howard*, 1 Taylor, 149. In an action of assumpsit on an award, which directs the defendant to pay a certain sum, unless he shall himself cause certain work to be done, it must be averred in the declaration and proved on the trial, either that the defendant made his election to pay the money, and notified the plaintiff thereof, or that the plaintiff made a demand on the defendant to do the work, and that the defendant refused. *Nelson v. Clough*, 3 Cush. 463. Where a previous demand is necessary to maintain a suit against two joint promisors, it is sufficient to aver a demand on one. *Griswold v. Plumb*, 13 Mass. 293; *M'Farland v. Crary*, 8 Cowen, 253.]

(d) *Bach v. Owen*, 5 T. R. 409; *Lowe v. Kirby*, Sir W. Jones, 56; *Rawson v. Johnson*, 1 East, 304; *Com. Dig. Pleader, C. 69*; [*Ernst v. Bartle*, 1 John. Cas. 327.]

(e) *Thorpe v. Booth*, 1 R. & M. 388. No demand is necessary previous to the commencement of an action on a note payable on demand. *Rumball v. Ball*, 10 Mod. 38; *Pierce v. Fothergill*, 2 Bing. N. C. 167. In an action on a contract to buy of the plaintiff a quantity of linseed, to be worked by the defendants within fourteen days after it arrived in the river, and was ready for delivery and to be paid for in ready money minus

a certain discount, or by their acceptance at two months, the declaration stated the arrival of the linseed, and that it was ready for delivery, and averred that it was duly tendered to the defendants for their acceptance, and that they were requested to pay for it in ready money or to give their acceptance, and discharged the plaintiff from drawing upon them, and then averred as a breach that the defendants did not accept or work the linseed or pay for it in ready money. The defendants pleaded that they were not requested to pay for the linseed in ready money, or to give their acceptance; 2dly, that they did not refuse to give their acceptance, or discharge the plaintiff from drawing on them; and it was held that the pleas were bad, the averments traversed being immaterial. *Spaeth v. Hare*, 9 M. & W. 326; 1 Dowl. N. S. 595, S. C. See, also, *Waters v. Earl of Thanet*, 2 G. & D. 166.

(f) *Peck v. Methold*, 3 Bulst. 297.

(g) *Carter v. Ring*, 3 Campb. 459. In debt on a single bond for the payment of money on demand, a demand must be made before action. *Simpson v. Routh*, 2 B. & C. 685; and see 1 Bac. Ab. 671; *Fitzhugh v. Dennington*, 6 Mod. 227, 259; 2 Salk. 585, S. C. acc.; *sed vide* *Capp v. Lancaster*, Cro. Eliz. 548; *Thomson v. Butler*, Cro. Eliz. 721, case of an annuity payable on request; and in *Gibbs v. Southam*, 5 B. & Ad. 911, it was held that an action on a bond, conditioned generally for the payment of a specified sum with interest, may be brought without a demand being made.

(h) 1 Saund. 32.

(i) *Sicklimore v. Thistleton*, 6 M. & Sel. 9. See *Lilley v. Hewitt*, 11 Price, 494. Even assuming that a surety is in general entitled to a demand on him, yet he cannot be so entitled where there was no express stipulation to that effect, and the money was to be paid at the creditor's house on a named day. *Rede v. Farr*, 6 M. & Sel. 121, 125.

and proved; (*k*) or there must be some allegation to dispense with it. (*l*) But on a bond *conditioned generally for payment* of a specified sum with interest, an action may be supported without alleging or proving a prior demand. (*m*) It should seem, in an action for not marrying *in a reasonable time*, plaintiff should aver a request to marry, or make some other allegation to dispense with it. (*n*) In an action against an agent for not accounting, &c. a request to account and pay over the balance must be stated. (*o*)

In point of *form* there are in *pleading* two descriptions of requests : one termed a *special request*, it alleging by whom and the time when it was made; the other, the *licet sapius requisitus*, or, "although often requested so to do." When an actual request is essential to the support of the action, a special request must be stated, and it must be shown by and to whom the same was made and the time of making it, in order that the court may judge whether the request were sufficient. (*p*) Since the pleading rules Hil. T. 4 W. 4, requiring *venue or place to be stated only in the *margin* and not to be repeated in the *body*, no *place* of request need be stated, unless a request at a particular place be material according to the terms of the contract. The statement of a general instead of a special request, when necessary, has been holden bad on a general demurrer; (*q*) and it has even been decided that it would not be aided by verdict; (*r*) but from the principle deducible from other cases, it should seem that a judgment by default or a verdict would aid the defect, (*s*) and that the objection must now be taken by a special demurrer. (*t*) The *licet sapius requisitus*, or "although often requested so to do," without stating the time of request,

(*k*) *Batesby v. Brooksbeck*, Cro. Jac. 500; *Sackford v. Phillips*, Owen, 109; *Birks v. Trippett*, 1 Saund. 32, 33 a, note (2); S. C. cited in *Simpson v. Routh*, 2 B. & C. 685; 4 D. & R. 181; *sed vide* *Wallis v. Scott*, 1 Stra. 88, 89.

(*l*) *Bowdell v. Parsons*, 10 East, 359, 361; *Lilley v. Hewitt*, 11 Price, 494.

(*m*) *Gibbs v. Southam*, 5 B. & Ad. 911.

(*n*) *Seymour v. Gartside*, 2 D. & R. 55.

(*o*) *Topham v. Braddick*, 1 Taunt. 572.

(*p*) *Wallis v. Scott*, 1 Stra. 89; Com. Dig. Pleader, C. 69, 70, &c.; 1 Saund. 33; *Bach v. Owen*, 5 T. R. 409; [*Morse v. Aldrich*, 1 Met. 544; *Carley v. Vance*, 17 Mass. 391; *Letcher v. Taylor*, Hardin, 79; *Wilmouth v. Patton*, 2 Bibb, 280; *Grant v. Groshon*, Hardin, 85; *Adams v. Macy*, 1 Bibb, 328; *Lobdell v. Hopkins*, 5 Cowen, 516; *Robbins v. Luce*, 4 Mass. 494; *Baker v. Fuller*, 21 Pick. 318; *Pennsylvania &c. Canal v. Webb*, 9 Ohio, 136. So of notice to the defendant of any fact. *Kingsley v. Bill*, 9 Mass. 198; *Colt v. Root*, 17 Mass. 229. Where no previous demand is necessary to sustain the action, the general allegation "though often requested," is suffi-

cient. *Dyer v. Rich*, 1 Met. 180; *Smith v. Emery*, 7 Halst. 53. Where covenants are independent, a general averment of readiness to perform on the part of the plaintiff is sufficient. *Slocum v. Despard*, 8 Wend. 615.]

(*q*) *Bach v. Owen*, 5 T. R. 409; [*Taylor v. Patterson*, 3 Ark. 238;] *sed vide* *Bowdell v. Parsons*, 10 East, 359, 365.

(*r*) *Peck v. Methold*, 3 Bulst. 299; *Devenley v. Welbore*, Cro. Eliz. 85; *Lowe v. Kirby*, Sir W. Jones, 56; 1 Saund. 33 a, note (2); Com. Dig. Pleader, C. 69.

(*s*) *Bowdell v. Parsons*, 10 East, 359; *Wallis v. Scott*, 1 Stra. 89; *Wegerslofe v. Keene*, 1 Stra. 214; *Frampton v. Coulson*, 1 Wils. 33; *Macmurdo v. Smith*, 7 T. R. 522; 1 Saund. 228, note (1); [*Rodgers v. Love*, 2 Humph. 417.]

(*t*) *Bowdell v. Parsons* 10 East, 359, 365; *Tidd*, 9th ed. 439, note (*f*); *Seymour v. Gartside*, 2 D. & R. 55, acc. [See *Leffingwell v. White*, 1 John. Cas. 100; *Rodgers v. Love*, 2 Humph. 417; *Bacon v. Wilbur*, 1 Cowen, 117; *Hall v. Williams*, 13 Minn. 260.]

though sometimes inserted in the common breach to the money counts, is of no avail in pleading, (u) and the omission of it will in no case vitiate the declaration. (x) And therefore where in a declaration upon a note payable four months after date, it was objected in error, that the request to pay the money in the note was laid in the common breach at the end of the declaration to have been upon the same day and year aforesaid, which was the date of the note and four months before it became due, it was adjudged upon a writ of error that there was no occasion to lay any request at all, for the bringing of the action was a request in law; (y) and if a special request be unnecessarily stated, it need not be proved. (z)

5thly. The *breach of the contract* being obviously an essential part of the cause of action, must in all cases be stated in the declaration. (a) When the special count in assumpsit is merely for a money demand, and other common counts are subjoined, the usual breach in the conclusion of the declaration will in general suffice; and in declarations on bills of exchange and promissory notes, it has not been usual to state any other breach than that at the end of the common counts. (b) But when the breach is special, and not merely the non-payment of money, it is usually stated in each special count. The allegation of the breach must obviously be governed by the nature of the stipulation. (b¹) It should be assigned in the words of the contract, either negatively or affirmatively, (b²) or in words which are coextensive * with the import and effect of it; (c) and in many cases this will suffice; thus in assumpsit on a promise to manage a farm in a good and husbandlike manner, and according to the custom of the country, it may suffice to assign a breach in the words

(u) Unless as it may be considered as aiding the omission of a special request, on general demurrer, or after verdict, &c. See *Bowdell v. Parsons*, 10 East, 359.

(z) *Phillips v. Fielding*, 2 H. Bl. 131; *Morgan v. Sargent*, 1 B. & P. 59, 60; *Buckley v. Thomas*, Plowd. 128; *Harris v. Ferriand*, Hard. 38; *Reynolds v. Prosser*, Hard. 72; *Ring v. Roxbrough*, 2 Cr. & J. 418; 2 Tyr. 168, 470, S. C.

(y) *Frampton v. Coulson*, 1 Wils. 33; *Morgan v. Sargent*, 1 B. & P. 59, 60.

(z) *Buckley v. Thomas*, Plowd. 128.

(a) Com. Dig. Pleader, C. 44, &c.; [*Benden v. Manning*, 2 N. H. 289.]

(b) *Frampton v. Coulson*, 1 Wils. 33; *Butterworth v. Lord Le Despencer*, 3 M. & Sel. 150; and see the prescribed form of breach in Reg. Gen. Trin. Term, 1 W. 4, post, vol. ii.

(b¹) [*Withers v. Knox*, 4 Ala. 138.]

(b²) [*M'Geehan v. M'Laughlin*, 1 Hall, 33; *Karthaas v. Owings*, 2 Gill & J. 441. The exception to the general rule is, that when such general assignment does not necessarily amount to a breach, the breach must be

specially assigned. *Karthaas v. Owings*, 2 Gill & J. 441; *Jullian v. Burgott*, 11 John. 6.]

(c) Com. Dig. Pleader, C. 45-49; Com. Dig. Pleader, 2, V. 2; 2 Saund. 181 a; *Wilcocks v. Nicholls*, 1 Price, 109; but see *Serra v. Wright*, 6 Taunt. 45, 47; and see cases and observations in *Earl Falmouth v. Thomas*, 3 Tyr. 38, 41, 42, 50. [It is enough that the words of the assignment show, unequivocally, a substantial breach. *Fletcher v. Peck*, 6 Cranch, 127. The assignment of breaches may be according to the legal effect, or in the words of the covenant, or words containing its sense and substance. *Wilcox v. Cohn*, 5 Blatchf. C. C. 346. See further as to the mode of assigning breaches, *Hughes v. Smith*, 5 John. 168; *Smith v. Jansen*, 8 John. 111; *Sedgwick v. Hollenback*, 7 John. 376; *Craghill v. Page*, 2 H. & M. 446; *Bender v. Fromberger*, 4 Dall. 436; *Potter v. Bacon*, 2 Wend. 583; *Randel v. Chesapeake & Canal Co.* 1 Harring. 151; *Breckenridge v. Lee*, 3 Bibb, 330; *Hord v. Trimble*, 3 A. K. Marsh. 533.]

of the promise. (d) Therefore in debt on a bond, conditioned for payment of an annual sum to the *wife* of the obligee, a breach assigned in non-payment of the annual sum to the *obligee* is insufficient. (e) But, though a breach may be assigned in the words of the contract, *it must not be too general*; it must show the subject-matter of complaint. (f) And therefore it seems that a general averment *quod non performavit*, or that "the defendant did *not perform* the said agreement," is insufficient; (g) because "did not perform his agreement" might involve a question of law, and also because the object of pleading is to apprise the defendant of the cause of complaint, so that he may prepare his plea and defence and evidence in answer. And yet, as the defendant must know in what respects he has or has not performed his contract, any great particularity, it should seem, ought not on principle to be required. (h) Where the contract was specific, to do or forbear some particular act, it is in general sufficient to assign the breach in the words of the contract; (h¹) thus, if the contract were to show a sufficient record, it is enough to allege that the defendant "did not show a sufficient record," though issue cannot be joined upon it, because sufficiency of matter of record cannot be tried by a jury; but the defendant, on such breach assigned, may plead that he showed such a record, and upon demurrer the court will judge whether it be sufficient. (i) In an action of covenant for revoking an arbitrator's authority, it is sufficient to aver that the defendant by deed revoked, without stating that the defendant gave *notice* of the revocation to the arbitrators; (k) for without such notice there could be no *revocation*. (l) So in covenant by an apprentice for not finding victuals and other necessities, a breach in the words of the contract is sufficient; (m) and a breach in the words of the covenant for not repairing, when not qualified, without enumerating the particular dilapidations, will suffice. (n) So in assumpsit against a tenant on his implied contract to manage, use, and cultivate a farm in a good *and husbandlike manner, and according to the custom of the country, it is sufficient even on special demurrer to assign as a breach that the defendant did not so manage, use, or cultivate the said farm, but on the contrary managed, used, and cultivated the said farm, lands, and premises in a bad, improper, and unhusbandlike

(d) *Earl Falmouth v. Thomas*, 1 Cr. & M. 89; 3 Tyr. 38, 41, 50.

(e) *Lunn v. Payne*, 6 Taunt. 140; 1 Marsh. 495, S. C.

(f) *Warn v. Bickford*, 7 Price, 530.

(g) *Knight v. Keech*, Skin. 344; [*ante*, 329, note (f).]

(h) *Supra*, note (d).

(h¹) [*Carter v. Denman*, 23 N. J. (Law) 260.]

(i) *Heyford v. Reve*, Yelv. 39, 40; 2 Com. Dig. Pleader, C. 45; *Wilcocks v. Nicholls*,

1 Price, 109; but see *Sorra v. Wright*, 6 Taunt. 45, 47.

(k) *Marsh v. Bulteel*, 5 B. & Ald. 507; 1 D. & R. 106, S. C.; 8 Co. 162, *sed quere*.

(l) See the principle, *ante*, 331, 332.

(m) *Procter v. Burdet*, 3 Lev. 170; *sed vide*, 2 Cro. 486.

(n) *Lee v. Johnson*, Lutw. 329, cited by Lord Lyndhurst C. B. with approbation in *Earl Falmouth v. Thomas*, 3 Tyr. 41; *Harris v. Mantle*, 3 T. R. 308; per Buller J. 1 Saund. 235, note (6).

manner, and contrary to the custom of the country where the said farm was so situate, without stating any particular acts of bad husbandry, or showing what particular custom of the country had been violated, (*o*) and that seems to be the safest course of declaring. And in general, if a breach be assigned in words containing the sense and substance of the contract, though they are not in the precise words of such contract, it is sufficient; (*p*) as if the defendant's promise were to *guaranty* the payment of the debt of a third person, a breach that the defendant did *not pay* (*q*) the debt will suffice; so, if a policy insured a ship against the *barratry* of the captain, and the breach assigned was that the ship was lost by the *fraud* of the captain, it was held sufficient. (*r*)

If the matter to be performed by the defendant depend on some *other event*, it seems proper not merely to assign the breach in the terms of the contract, but first to aver that such event took place; (*s*) as in debt on a bond, conditioned that a collector of poor rates should render an account of moneys received, it should be averred that he did receive moneys, and then that he did not render an account of such moneys. (*t*) So in assumpsit against a tenant for not managing a farm according to the custom of the country, although the court held the declaration sufficient, without showing what the custom was, yet the court considered it safer to state the custom affirmatively and then the breach. (*u*)

If the contract was in the *disjunctive*, the breach ought to be assigned that the defendant did not do one act or the other; as on a promise to deliver a horse by a particular day, *or* pay a sum of money; (*x*) and if a covenant be "that the defendant and his executors and assigns should repair," a breach for not repairing ought not to be in the conjunctive. (*y*) But in assigning the breach of a covenant or contract to pay or "*cause to be paid*" a sum of money, (*z*) it is sufficient to say that the defendant did not pay, omitting the disjunctive words, for he who causes to pay pays; (*a*)

(*o*) *Earl Falmouth v. Thomas*, 3 Tyr. 26.

(*p*) Com. Dig. Pleader, C. 46; *Seddon v. Senate*, 13 East, 63. See *ante*, 312; *Camp v. Allen*, 7 Halst. 1; *Potter v. Bacon*, 2 Wend. 583; *Jordan v. Blackmore*, 20 Ind. 419; *Rickert v. Snyder*, 9 Wend. 41; *Fisk v. Hicks*, 31 N. H. 541; *post*, 345, note (*R*).]

(*q*) *Baxter v. Jackson*, 1 Sid. 178; 2 Rol. 738, 1, 15. Indeed, a breach in the very words of the contract, stating that the defendant did not guaranty, would be untechnical and repugnant. [A declaration against a guarantor, which avers a non-payment of the debt by the principal debtor, but does not aver a non-payment by the guarantor, is bad, as alleging no breach. *Williams v. Staton*, 5 Sm. & M. 347.]

(*r*) *Knight v. Cambridge*, 1 Stra. 581.

(*s*) *Serra v. Wright*, 6 Taunt. 45, *acc.*; *Wilcocks v. Nicholls*, 1 Price, 109, *semb. contra*; [*M'Gehee v. Childress*, 2 Stewart, 506.]

(*t*) *Ib. Ibid.*

(*u*) *Earl Falmouth v. Thomas*, 1 Cr. & M. 110, 111.

(*x*) *Wright v. Johnson*, 1 Sid. 440; *Gibbons v. Northcott*, 1 Sid. 447; *Anonymous*, Hardr. 320; Com. Dig. Pleader, C.; *Aleberry v. Walby*, 1 Stra. 231.

(*y*) *Colt v. Howe*, Cro. Eliz. 348; *Gyse v. Ellis*, 1 Stra. 223.

(*z*) As to the words "or any part thereof," *Snell v. Snell*, 7 D. & R. 249.

(*a*) *Aleberry v. Walby*, 1 Stra. 231; 1 Saund. 235, note (*o*).

and a breach * that the defendant did not pay several persons is sufficient, without adding the words, or either of them. (b) So where there are several defendants, an averment that "they have not paid" is sufficient, for payment by one is payment by all. In *scire facias* on a *recognizance* of bail, conditioned that if J. B. and G. H. be condemned, they shall pay or render; after an allegation that J. B. was condemned, it is not sufficient to aver that J. B. and G. H. did not pay or render, without adding "or either of them," for though *payment* by one would be a payment by both, yet a *render* of one is not a render of both, and, consistently with the allegation, B., against whom only judgment was, might have rendered, which would have been sufficient to discharge the *recognizance*. (c) A distinction has been taken between a contract to perform a thing *to* a man or his assigns, and *by* a man or his assigns; and that if a thing be to be done *by* a man or his assigns, the breach must be in the disjunctive, that it was done by him or his assigns; but that where a thing is to be done *to* a man or his assigns, it is sufficient to assign for breach that it was not done to him; (d) but there appears to be no foundation for this distinction; and where the action is between the original parties to the contract, as no assignment will be presumed, it will be sufficient to state that the defendant did not perform the act to the plaintiff, without mentioning the assignee or heir; (e) but if the action be by or against the assignee, heir, or executor, the breach should then be in the disjunctive; (e¹) and the declaration by husband and wife, or by an administrator, merely stating that the defendant did not pay before the marriage, or that he did not pay since the death, would be bad on demurrer, though aided by verdict. (f)

If the breach *vary* from the *sense and substance* of the contract, and be either more limited or larger than the covenant, it will be insufficient: (g) as in covenant to repair a fence, except on the west side thereof, a breach that the defendant did not repair the fence, without showing that the want of repair was in other parts of the fence than on the west, is bad on demurrer, though aided by verdict. (h) But it is essential, where an exception or proviso is introduced into or referred to by the obligatory clause of an instrument,

(b) *Aleberry v. Walby*, 1 Stra. 231; 1 Saund. 235, note (6); but see *Wilkinson v. Thorley*, 4 M. & Sel. 33.

(c) *Wilkinson v. Thorley*, 4 M. & Sel. 33.

(d) *Smith v. Sharpe*, 1 Salk. 139; 5 Mod. 133, S. C.

(e) *Gyse v. Ellis*, 1 Stra. 228.

(e¹) [But see *Dubois v. Van Orden*, 6 John. 105.]

(f) *Elstob v. Thorogood*, 1 Ld. Raym. 284; *Hornsey v. Dimocke*, 1 Vent. 119; 2 Rich. C. P. 293.

(g) *Anon. Sir T. Jones*, 125; *Wilkinson*

v. Thorley, 4 M. & Sel. 36; but see *Butterworth v. Lord Le Despencer*, 3 M. & Sel. 152. A breach of an agreement to pay within three months *after notice*, is not well assigned by alleging the money to have been due, and that notice thereof had been given to the defendant, without alleging that notice had been given to pay the money. *Batson v. Spearman*, 9 Ad. & El. 298; 3 P. & D. 80 S. C. [See *Pomeroy v. Bruce*, 13 Serg. & R. 188, where the breach stated was broader than the covenant.]

(h) *Com. Dig. Pleader*, C. 47.

&c. upon which the defendant is charged, (i) to negative the exception, &c. restrictive of his liability, in averring the breach; otherwise *the declaration will, it seems, be bad after verdict. (k) So, if the covenant were for quiet enjoyment, without *lawful* disturbance, a breach merely stating that the plaintiff was disturbed is insufficient, for it should be that he was *legitimo modo* disturbed in the words of the covenant, or otherwise the plaintiff should show by whom he was disturbed, and how. (l) So, where the declaration is upon a covenant for good title, it should be shown that the person evicting had a lawful title (l¹) before or at the time of the date of the grant to the plaintiff, and an averment that he had a lawful title without this qualification is too general and bad after verdict, for it will be intended that the title of the person entering is derived from the plaintiff himself. (l²) But it seems that the plaintiff is under no necessity of setting out the title of the person who entered upon him, because he is a stranger to it; it being considered sufficient to allege generally that he had a lawful title before or at the time of the lease or conveyance to the plaintiff. (m)

On the other hand it is injudicious unnecessarily to *narrow* the breach. Thus, where the breach of covenant was assigned that the defendant had not used a farm in an husbandlike manner, "*but on the contrary* had committed *waste*;" it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner, if such misconduct did not amount to *waste*, though on the former words of the breach such evidence would have

(i) See *ante*, 246, 317.

(k) *Spiers v. Parker*, 1 T. R. 141.

(l) 2 Saund. 181 a; Com. Dig. Pleader, C. 47, 49; [*Greenby v. Wilcox*, 2 John. 1; *Wait v. Maxwell*, 4 Pick. 88; *Karthauss v. Owings*, 2 Gill & J. 441.]

(l¹) [*Pollard v. Wallace*, 2 John. 395.]

(l²) [The covenants for quiet enjoyment and of general warranty require the assignment of a breach by a specific ouster, or eviction by paramount title, although no particular formality is required in averring an eviction; but a breach of the covenant of seisin may be assigned by negating the words of the covenant, that the covenantor has good right to convey. *M'Geehan v. M'Laughlin*, 1 Hall (N. Y.), 33; *Marston v. Hobbs*, 2 Mass. 433; *Beare v. Jackson*, 4 Mass. 408; *Twambly v. Henley*, 4 Mass. 441; *Prescott v. Trueman*, 4 Mass. 627; *Rickert v. Snyder*, 9 Wend. 416; *Pollard v. Dwight*, 4 Cranch, 421; *Bacon v. Lincoln*, 4 Cush. 210; *Martin v. Baker*, 5 Blackf. 232; *Floom v. Beard*, 8 Blackf. 76; *Sedgwick v. Hollenback*, 7 John. 376; *Day v. Chism*, 10 Wheat. 449; *Reese v. M'Quilkin*, 7 Ind. 450; *Beddoes v. Wadsworth*, 21 Wend. 120; *Knepper v. Krutz*, 58 Penn. St. 58;

Robinson v. Neil, 3 Ohio, 525; *Carter v. Denman*, 23 N. J. (Law) 260; *Grannis v. Clark*, 8 Cowen, 36; *Le Roy v. Beard*, 8 How. (U. S.) 451; *Anderson v. Knox*, 20 Ala. 156; *Randel v. Chesapeake &c. Canal Co.* 1 Harr. (Del.) 151. A particular assignment of breaches is necessary in an action on the covenant against incumbrances. *Marston v. Hobbs*, 2 Mass. 433; *Mitchell v. Warner*, 5 Conn. 497; *Shelton v. Pease*, 10 Missou. 473. Where the declaration contained but one count, in which the plaintiff declared on all the covenants in the deed, being the covenant of seisin, of freedom from incumbrances, and to warrant and defend the premises, it was decided that the action could not be maintained, as the count is self destructive. *Hacker v. Storer*, 8 Greenl. 228; *Swett v. Patrick*, 2 Fairf. 179, 181. See *Wilcox v. Cohn*, 5 Blatchf. 346. But it is otherwise where breaches of these different covenants are assigned in separate counts. *Swett v. Patrick*, 2 Fairf. 179.]

(m) 2 Saund. 181, note (10); Com. Dig. Pleader, C. 47, 49; and see *post*, vol. ii. 201, and notes, as to actions for not having good title, and how to state the breach, and *Milner v. Horton*, M'Cle. & R. 647.

been admissible. (n) The safest course is to state a breach first in the words of the contract, and then to superadd that the defendant disregarding did so and so, showing any particular breaches not narrowing or prejudicing the previous general breach, so that the plaintiff retains the advantage of both; and no inconvenience can result to the plaintiff from laying the breach as extensively as the contract, for the plaintiff may recover though he only prove a part of the breach as laid. (o) In assigning the breach of a covenant not to release a debt, or not to assign without license, it must be averred that the release or alienation was without license, though the burden of proof of license would still be affirmatively on the defendant. (p)

The breach in general should be *certain* and express, and a general statement, "that the defendant *has not performed* (*non performavit*) his agreement or promise, is bad on demurrer, though aided by *verdict. (q) A distinction has been taken with regard to the *degree of requisite certainty* between an action on a bond conditioned for the performance of covenants, and an action of covenant; (r) however, no such distinction now prevails. (s) Where to debt on bond conditioned that one B. R. should account for and pay over to the plaintiffs as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance; and the plaintiffs *replied*, that B. R. had received "divers large sums amounting to a large sum, viz. 100*l.* from divers persons for divers voluntary contributions," for the use of the said charity, which he had not accounted for or paid over, &c. it was held on special demurrer that the replication was sufficiently certain; (t) for it is a general rule in pleading, that where the specification of every particular would tend to great prolixity, a more concise manner of pleading it may be admitted (u) and especially where the breach

(n) *Harris v. Mantle*, 3 T. R. 307; *Radford v. M'Intosh*, 3 T. R. 637; *Moore v. Clark*, 5 Taunt. 95, per Chambre J. *Query*, if the breach had been laid under a *videlicet*, 5 Taunt. 95; *ante*, 325; and see *Earl Falmouth v. Thomas*, 1 Cr. & M. 82; 3 Tyr. 38, 41, 50, S. C.

(o) *Barnard v. Duthy*, 5 Taunt. 27; *Forty v. Imber*, 6 East, 437; *Jones v. Clayton*, 4 M. & Sel. 349; *ante*, 324, 325.

(p) *Coppin v. Slaymaker*, Sir T. Jones, 229; *Skin*, 120, S. C.; *Vin. Abr. Covenant*, L. a. 43.

(q) *Ante*, note (i); *Com. Dig. Pleader*, C. 48; *Knight v. Keech*, *Skin*, 344; 4 Mod. 188, S. C.; *Keech v. Knight*, 3 Lev. 319; *Warn v. Bickford*, 7 Price, 550; [*ante*, 329, note (f)], 342; *Schenck v. Naylor*, 2 Duer, 675; *Smith v. Walker*, 1 Wash. 135. In *Syme v. Griffen*, 4 Hen. & M. 277, it was held

that a breach commencing with a "whereas," and continuing by way of recital to the end, without any direct averment, was bad on general demurrer.]

(r) *Farrow v. Chevalier*, 1 Salk. 139; *French v. Pierce*, 1 Lev. 94.

(s) See *Shum v. Farrington*, 1 B. & P. 642; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; 3 Tyr. 38, 41, S. C.

(t) *Barton v. Webb*, 8 T. R. 463; *Shum v. Farrington*, 1 B. & P. 640; *Gale v. Reed*, 8 East, 85; and see *Wilcocks v. Nicholls*, 1 Price, 109; *Serra v. Wright*, 6 Taunt. 45, 47; *Calvert v. Gordon*, 7 B. & C. 812; 1 M. & R. 497, S. C.; [*Hughes v. Smith*, 5 John. 168; *Postmaster General v. Cochran*, 2 John. 155.]

(u) *Ante*, 258; *Oldroyd v. Crampton*, 4 Bing. N. C. 24; *ante*, 245, note (p).

lies more in the defendant's than the plaintiff's knowledge less particularity is required. (x)

Two breaches of the same specific stipulation cannot well be assigned in one count; (y) for this would clearly amount to *duplicité*, (y¹) which, as we have already seen, (z) is a fault ^{Several breaches.} in every stage of pleading. The exception introduced by *statute* as regards *declarations* is confined to debt on bond conditioned for the performance of covenants, &c.; in this case several breaches may be assigned in one count. (a) But at common law also, where the defendant's contract was general, and several distinct breaches thereof *can in fact be committed*, as if a tenant agree to observe the due course of husbandry, which is obviously an engagement capable of embracing numerous acts of good husbandry, and extending over the whole tenancy, the declaration *may then state several breaches*, as different violations of the rules of good husbandry; (b) and the Reg. Gen. Hil. T. 4 W. 4, though it forbids several counts on the same cause of action, permits *several breaches*. (b¹)

In point of form it has been usual in *assumpsit* to introduce the statement of the breach, with the allegation that the defendant "contriving and fraudulently intending craftily and subtly to deceive and *defraud the plaintiff, neglected and refused, &c." But this introduction is unnecessary; the gist of the action of *assumpsit* being the injury sustained by the plaintiff from the breach of promise, without regard to the defendant's intention or fraud. (c) And in declarations against a peer the imputation of fraud was always to be omitted. (d) And the form of breach prescribed by Trin. T. 1 W. 4, is a sufficient model, and obviously intended that in future pleadings such useless verbiage should be omitted. (e)

The *omission* of a breach cannot be aided or cured even by verdict. (f) But the *insufficiency* of the breach will in general be aided by a verdict, by the common law intendment that it is not to be presumed that either the judge would direct the jury to give, or that the

(x) *Barton v. Webb*, 8 T. R. 462; *Parke v. Middleton*, Lutw. 421; *Gale v. Reed*, 8 East. 80; *ante*, 258.

(y) *Com. Dig. Pleader*, C. 33; *ante*, 249; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; 3 Tyr. 38, 41, S. C. See *Hoggett v. Exley*, 6 Bing. N. C. 207, as to when a breach is bad on this account.

(y¹) [Taft v. Brewster, 9 John. 325.]

(z) *Ante*, 249.

(a) *Ante*, 250; [Taft v. Brewster, 9 John. 334; *Postmaster General v. Cochran*, 2 John. 415; *Munroe v. Alaïre*, 2 Caines, 323.]

(b) *Legh v. Hewitt*, 4 East, 154. See the form by a landlord against a tenant, *post*, vol. ii. 189.

(b¹) [Smith v. Boston, Conc. & M. R. R.

36 N. H. 484. Under the Massachusetts practice act one count only need be inserted for each cause of action, but any number of breaches may be assigned in each count, and when the nature of the case requires it, breaches may be assigned in the alternative. *Genl. Sts. c. 129, § 2, div. 4*. This does not preclude the use of more than one count when the plaintiff deems it expedient, but leaves it at his option. *Lovett v. Salem & South Danvers R. R. Co.* 9 Allen, 561.]

(c) *The Bailiffs of Tewkesbury v. Diston*, 6 East, 443; *Gilb. Hist. C. B.* 65.

(d) *Imp. K. B.* 6th ed. 526.

(e) See *post*, vol. ii. 33.

(f) *Brickhead v. Archbishop of York*, Hob. 198; *Heard v. Basherville*, Hob. 223

jury would have given the verdict without sufficient proof of the breach of contract. (*g*) Therefore, where in an action against husband and wife on the covenant of the wife whilst sole to perform an award, it appeared that the award was made *after* the marriage which was a legal revocation of the arbitrator's authority, and consequently the breach was improperly assigned in the non-performance of such award, it was decided that the plaintiff was entitled to recover; because it appeared that the feme had broken her covenant by the very act of marriage, which, though a different breach to that assigned, was sufficient after verdict to support the declaration. (*h*) And where in an action on a replevin bond, the breach prominently laid and intended to be charged, but which was defective, was the non-return of the distress, the court held after verdict that the declaration might be upheld in regard to a breach by not prosecuting the replevin suit with effect; which, though not expressly declared upon, was to be collected from the declaration. (*i*) We have, however, seen that in some instances a defective statement of a breach, as of a covenant for quiet enjoyment, will be fatal even after verdict. (*k*) And if one of two breaches or part of a breach be improperly assigned, leaving a sufficient breach to support the count, the defendant cannot demur to the whole; (*l*) although if in such case the defendant plead, and general damages be given upon the whole declaration, the judgment might be arrested. (*m*)

* A very sensible author has observed that since the Reg. Gen. Hil. T. 2 W. 4, has subjected the unsuccessful party to the costs thereof, it is advisable when there has been a *part payment* or *part performance* expressly to admit the same on the face of the declaration, and thereby deprive the defendant of all pretence for pleading such part payment or performance. (*n*)

(*g*) Anon. Sir T. Jones, 125; 1 Salk. 140; Knight v. Keech, 4 Mod. 189 *b*; Skin. 344, S. C.; Charnley v. Winstanley, 5 East, 270, 271; Com. Dig. Pleader, C. 48; 1 Saund. 228, note (1); [Weigley v. Weir, 7 Serg. & R. 310; Thomas v. Roosa, 7 John. 461; Harrel v. M'Alexander, 3 Rand. 94. It is sufficient to allege that the defendant "has not paid said sum," without alleging that he has not paid any part of it. Judson v. Eelava, Minor, 3.] Bad breach, when not cured by pleading over, Warn v. Bickford, 7 Price, 550.

(*h*) Charnley v. Winstanley, 5 East, 270, 271.

(*i*) Perreau v. Bevan, 5 B. & C. 284, 306; 8 D. & R. 72, S. C.

(*k*) 2 Saund. 181, note (10); and see Wright v. Johnson, 1 Sid. 440; Lunn v. Payne, 6 Taunt. 140; 1 Marsh. 495, S. C.; *ante*, 344, 345. *Sed quare*. [Where it appeared from the plaintiff's own showing, that the breach alleged could not have taken

place before the action was brought, it was held bad after verdict. Gordon v. Kennedy, 2 Binn. 287.]

(*l*) Amory v. Brodrick, 5 B. & Ald. 712; 1 D. & R. 361, S. C. See 1 Saund. 285; Duffield v. Scott, 3 T. R. 374; Orton v. Butler, 5 B. & Ald. 652; 1 D. & R. 282, S. C.; Samuel v. Judin, 6 East, 333; Powdich v. Lyon, 11 East, 565; Doe v. Dyeball, 8 B. & C. 70; [Blanchard v. Hoxie, 34 Maine, 377; Gill v. Stebbins, 2 Paine, 417; Taylor v. Pope, 3 Ala. 190; Brown v. Tomlinson, 2 Greene (Iowa), 525; McCoy v. Hill, 2 Lit. 374.]

(*m*) Sicklemore v. Thistleton, 6 M. & Sel. 9; 2 Saund. 171 *a*, note. How corrected, &c. *ib*. [As to the proper mode of pleading where some of the breaches of covenant are not well assigned, Wait v. Maxwell, 4 Pick. 87.]

(*n*) Bosanquet's Rules, 50, note (48); but see note (*d*), *ante*, 295.

Whenever there has been a breach of contract, the plaintiff must necessarily be entitled to *some damages*, and, however difficult it may be to ascertain the amount, the court must give judgment for such damages in all personal actions. (o) The damages, however, must be proximate and not remote or depending upon a contingency, and therefore in an action for not replacing stock, (p) it will be of no avail to state in the declaration that the plaintiff was prevented from completing an advantageous contract he had entered into. (q) Such *damages* as may be presumed *necessarily* to result from the breach of contract, need not be stated with any great particularity in the declaration. (q¹) Therefore, in an action for not accepting goods sold to the defendant, damages resulting from a fall of the market price may be recovered under a special count, with a general allegation of loss of profit, without averring that the value of the goods was less at the time the contract was broken than when it was made. (r) But in other cases it is necessary to state the damage arising from the breach of contract specially and circumstantially, in order to apprise the defendant of the facts intended to be proved, or the plaintiff will not be permitted to give evidence of such damage on the trial. (s) And where the plaintiff seeks to recover special damage in regard to the non-completion by third persons of contracts the plaintiff had made with them, the names of such third persons should be stated. (t) In some cases, where the plaintiff seeks to recover *damages*, he must declare specially, though he might have recovered the principal part of his demand under a common count: thus, in an action against the vendor of an estate, for not making a good title to or conveying the same, only the deposit money can be recovered under

(o) *Hall v. Ross*, 1 Dow's Rep. 207.

(p) As to the damages in this action, *McArthur v. Lord Seaforth*, 2 Taunt. 557; *Dwyer v. Gurry*, 7 Taunt. 14.

(q) *Per cur.* in *Parkins and Howard*, K. B. Trinity Term, 1817. What are not damages recoverable, see *Vicars v. Wilcox*, 8 East, 3; *Flewster v. Royle*, 1 Campb. 187; *Fitzsimons v. Inglis*, 5 Taunt. 534; *Startup v. Cortazzi*, 2 Cr., M. & R. 165; *Clare v. Maynard*, 6 Ad. & El. 519. In an action for breach of a warranty, plaintiff may recover costs paid by him to a third person to whom he warranted. *Lewis v. Peake*, 2 Marsh. 431; 7 Taunt. 153, S. C.; and see *Barton v. Glover*, Holt's N. P. C. 43; *Edwards v. Williams*, 5 Taunt. 247; *Cobb v. Bryan*, 3 B. & P. 351.

(q¹) [*Smith v. Whitaker*, 23 Ill. 367; *Laraway v. Perkins*, 10 N. Y. 371; *Stevens v. Lyford*, 7 N. H. 360; *Hutchinson v. Granger*, 13 Vt. 386; *Barrusco v. Madan*, 2 John. 149; *Mullaly v. Austin*, 97 Mass. 33. Under the Massachusetts practice act (Genl. Sta. c. 129, § 2), it is not necessary to set out in detail the elements of damages sought to be recovered in an action; but under a general

averment, all such damages as naturally flow from the cause of action described in the declaration may be recovered. *Prentiss v. Barnes*, 6 Allen, 410.]

(r) *Boorman v. Nash*, 9 B. & C. 145, 152.

(s) As to damages in general, see Vin. Abr. Damages, and Sayer's Law of Damages; Chit. jr. Contr. 3d ed.; and see *post*, as to the statement of damages in actions for torts. See, also, *Hodsoll v. Stallebrass*, 3 P. & D. 200; [*Bristol & Co. v. Gridley*, 28 Conn. 201; *Olmstead v. Burke*, 25 Ill. 86; *Warner v. Bacon*, 8 Gray, 397; *Alston v. Huggins*, 3 Brevard, 185; *Lanig v. Colder*, 8 Penn. St. 479; *Hart v. Evans*, 8 Penn. St. 13; *Hallock v. Belcher*, 42 Barb. 199; *Solms v. Lias*, 16 Abb. Pr. 311; *Burrell v. New York & Co.* 14 Mich. 34; *Laraway v. Perkins*, 10 N. Y. 371; *Vanderlisse v. Newton*, 4 N. Y. 130; *Bogert v. Burkhalter*, 2 Barb. 525; *Low v. Archer*, 12 N. Y. 277; *Moloney v. Dows*, 15 How. Pr. 365; *Ryerson v. Marcellis*, 1 Harring. 450; 2 Greenl. Ev. § 254; *Dickinson v. Boyle*, 17 Pick. 78.]

(t) See 1 Saund. 243, note (5); *Ward v. Smith*, 11 Price, 19.

the count for money had and received, and if the purchaser proceed for interest and *expenses, he must declare specially, stating such expenses and the loss arising from the not having the use of the deposit money, &c. (u) And where a sum is named as a *penalty*, (x) the plaintiff may proceed for general damages, and may recover them beyond the amount of the penalty. (y) The damages should be stated according to the facts of the case and evidence, but no inconvenience will arise from the statement of the damage or injury being larger than the proof; (y¹) thus, in a declaration on a policy of insurance stating a total loss, a partial loss may be recovered. (z) Where it is positively and expressly averred in the declaration that the plaintiff has sustained damages from a cause *subsequent* to the commencement of the action, (z²) or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment would be arrested; (z²) but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment. (a) The jury cannot give more damages than are laid at the end of the declaration. (b) And if they should do so, the surplus should be *remitted* before judgment has been entered. (b¹) If the plaintiff have merely *incurred liability* to pay costs without having actually *paid* the amount, the declaration should be framed accord-

(u) See *Camfield v. Gilbert*, 4 Esp. Rep. 223; *Walker v. Constable*, 1 B. & P. 306; *Flureau v. Thornhill*, 2 Bl. Rep. 1078; *post*, vol. ii. 30. *Marshall v. Poole*, 13 East, 98; *Harrison v. Allen*, 2 Bing. 4. In an action for refusing to complete an agreement for the purchase of land, the measure of damages is not the amount of the purchase-money, but only such damage as the plaintiff has actually sustained by the breach of the contract. *Laird v. Pim*, 7 M. & W. 474; 8 Dowl. 860, S. C.

(x) As to the distinction between a penalty and liquidated damages, see *Kemble v. Farren*, 6 Bing. 141; *Chit. jr. Contr.* 3d ed.

(y) *Harrison v. Wright*, 13 East, 343; *Barton v. Glover*, Holt N. P. C. 44; *Davies v. Penton*, 6 B. & C. 224; 9 D. & R. 369; S. C.

(y¹) [*Van Rensselaer v. Platner*, 2 John. Cas. 18.]

(z) *Gardiner v. Croasdale*, 2 Burr. 904; 1 Bl. Rep. 198, S. C.; *Marshall on Insurance*, 629; *Sayer on Damages*, 45; *Tidd*, 9th ed. 871.

(z¹) [Damages arising subsequent to action brought, or even to the date of verdict, may be taken into consideration, when they are the natural result of the act complained of, and where they do not of themselves constitute a new cause of action. "On the other

hand, where the damages subsequent to the commencement of the action are not the necessary result of the alleged wrong, or where they might be the foundation of a fresh action, they cannot be included in the verdict of the jury." *Mayne on Damages*, 33-38; *Metcalf J. in Warner v. Bacon*, 8 Grav. 410; *Pierce v. Woodward*, 6 Pick. 206; *Hodsoll v. Stallebrass*, 3 P. & Dav. 203.]

(z²) [*Gordon v. Kennedy*, 2 Binn. 287. If entire damages are assessed where two distinct breaches are assigned, for one of which it appears that the plaintiff has no cause of action, it is error. *Morrow v. Governor, Hard. (Ky.)* 489; *Wilson v. Bowers*, 2 T. B. Mon. 87.]

(a) 2 Saund. 171 b; [*Shaw v. Wile*, 2 Rawle, 280.]

(b) *Tidd*, 9th ed. 896; [*M'Worter v. Sayre*, 2 Stewart, 225; *Treat v. Barker*, 7 Conn. 274; *Morton v. McClure*, 22 Ill. 257; *Russell v. Chicago*, 22 Ill. 283; *Rivis v. Kumber*, 27 Ind. 291; *Fish v. Dodge*, 4 Denio, 311; *Fowlkes v. Webber*, 8 Humph. 530; *Jones v. Robinson*, 8 Ark. 484; *Pleasants v. Bank of State*, 8 Ark. 456; *Dennison v. Leach*, 9 Penn. St. 164.]

(b¹) [*Tenant v. Gray*, 5 Munf. 494; *Harris v. Jaffray*, 3 Harr. & J. 546; *Hoit v. Molony*, 2 N. H. 322; *Grist v. Hodges*, 3 Dev. 203.]

ingly, (c) and even noting and postages on a bill must be declared for specially or cannot be recovered. (d)

The *common counts* in *assumpsit* are frequently sufficient without any special count; (d¹) and even where the declaration contains a special count, it is in general advisable to insert one or more of the common counts, although the pleading rules, Hil. T. 4 W. 4, now prohibit the use of *more than one count on the same cause* of action, excepting that a count upon *an account stated is always admissible* in addition to another count whether special or common, but which still in prudence, as regards costs under Reg. Gen. Hil. Term, 2 W. 4, should never in practice be added, unless there be adequate ground for expecting to prove it. Though it is a rule that when there was an *express* contract * the plaintiff cannot resort to an *implied one*, (e) yet he may in many cases recover on the *common count*, though there was a special agreement, provided it has been executed or completely performed. (f) A common count used sometimes to save a verdict where the evidence varied from the special count; thus, if the plaintiff declared specially, as having built a house

The *common counts* in *assumpsit*.

(c) Pritchett v. Boervey, 3 Tyr. 949.

(d) Kendrick v. Lomax, 2 Cr. & J. 408.

(d¹) [The Massachusetts practice act forbids using the common counts unitedly. Genl. Sts. c. 129, § 2, div. 6.]

(e) Toussant v. Martinant, 2 T. R. 105; Martin v. Court, 2 T. R. 640; Buckler v. Buttivant, 3 East, 80, 85; Cutter v. Powell, 6 T. R. 325; Weaver v. Boroughs, 1 Stra. 648; Wennall v. Adney, 3 B. & P. 247; Richardson v. Smith, 8 John. 439; Burlingame v. Burlingame, 7 Cowen, 93, 94; Londregon v. Crowley, 12 Conn. 558. When there is a special agreement to pay for goods or services, in any other way than money, it must be specially declared upon. Ranlett v. Moore, 21 N. H. 336.]

(f) See *post*, 356-359, and exceptions there stated. [It is a familiar rule of pleading that, when the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money, then the amount due may be recovered under a general count. It is only necessary to declare specially, where the agreement remains executory. Thus, when the contract of sale is complete, and the vendee does not take away the goods purchased, the vendor may recover the price in *indebitatus assumpsit*. Colt J. in Morse v. Sherman, 106 Mass. 432; Hubbard J. in Hunne-man v. Grafton, 10 Met. 458; Read v. Smith, 1 Allen, 519, 520; Felton v. Dickinson, 10 Mass. 287; Holbrook v. Dow, 1 Allen, 397; Knight v. New England Worsted Co. 2 Cush. 289; Baker v. Corey, 19 Pick. 496; Morse v. Potter, 4 Gray, 292, 293; Colburn v. Pomeroy, 44 N. H. 23; Cummings v.

Nichols, 13 N. H. 427; Streeter v. Sumner, 19 N. H. 518; N. H. Mut. Fire Ins. Co. v. Hunt, 30 N. H. 219; Hale v. Handy, 26 N. H. 210; Mitchell v. Gile, 12 N. H. 390; Perkins v. Hart, 11 Wheat. 237; Wright v. Morris, 15 Ark. 444; Adlard v. Muldoon, 45 Ill. 193; Dukes v. Leowie, 13 Ala. 457; Bayard v. McLane, 3 Harr. (Del.) 139; Hancock v. Ross, 18 Geo. 364; Coursey v. Covington, 5 Harr. & J. 45; Ingram v. Ashmore, 12 Missou. 574; Bank of Columbia v. Patterson, 7 Cranch, 299; Ridgeley v. Crandall, 4 Md. 435; Bomeiser v. Dobson, 5 Whart. 398; Mattocks v. Lyman, 16 Vt. 113; Felton v. Dickinson, 10 Mass. 287; Hunter v. Waldron, 7 Ala. 753; Miles v. Moody, 3 Serg. & R. 211; Way v. Wakefield, 7 Vt. 228; Hyde v. Liverse, 1 Cranch C. C. 408; Tunnison v. Field, 21 Ill. 108; Pickard v. Bates, 38 Ill. 40; Elder v. Hood, 38 Ill. 533; Jewell v. Schroeppe, 4 Cowen, 564; Causten v. Burke, 2 H. & Gill, 295; Snyder v. Castor, 4 Yeates, 353; Feeter v. Heath, 12 Wend. 477; Bertrand v. Byrd, 5 Pike, 651; Brown v. Ralston, 9 Leigh, 532; Carson v. Allen, 6 Dana, 395; Sykes v. Summerel, 2 Browne, 227; Ames v. Le Rue, 2 McLean, 216; Wood v. Gee, 3 McCord, 421. So if the special agreement is waived by the parties; Munroe v. Perkins, 9 Pick. 298; or mutually departed from. Goodrich v. Loffin, 1 Pick. 57. So if the defendant prevents the plaintiff from fulfilling the special contract; Moulton v. Trask, 9 Met. 577; or the plaintiff is prevented by inevitable accident. Willington v. Boylston, 4 Pick. 101. So if the defendant incapacitate himself from fulfilling the special contract on his part. Canada v. Canada, 6 Cush. 15.]

according to an agreement, if he failed to prove that he had built it pursuant to the agreement, he might still in some cases recover on the common count for the work and labor actually done. (g) And where a bill of exchange, or promissory note, upon an improper stamp, had been taken in payment of a debt, the plaintiff was at liberty to resort to the common counts appropriate to the original debt, (h) and which additional counts is now expressly permitted to be added in an action on a bill or note. He may also ground his claim upon such counts, if applicable to the original consideration, in cases where the bill or note has been dishonored, and the defendant, when necessary, has had due notice. (i) But where the demand is founded upon a written agree-

(g) See *post*, 358, 359. [Where a party declares on a special contract, seeking to recover thereon, but fails in his right to so do altogether, he may recover on a general count, if the case be such that, supposing there had been no special contract, he might have recovered for money paid, or for work and labor done. *Cook v. Munstone*, 1 N. R. 355; *Tuttle v. Mayo*, 7 John. 132; *Linningdale v. Livingston*, 10 John. 136; *Keyes v. Stone*, 5 Mass. 391. And although the plaintiff may resort to the general counts without having attempted to prove the special agreement, yet in no case can he recover on the general counts where the special agreement continues in force. *Linningdale v. Livingston*, 10 John. 37; *Raymond v. Bearnard*, 12 John. 274; *Wilt v. Ogden*, 13 John. 56; *Jennings v. Camp*, 13 John. 94; *Felton v. Dickinson*, 10 Mass. 287; *Shepard v. Palmer*, 6 Conn. 100; *Speake v. Sheppard*, 6 Harr. & J. 81; *Arnold v. Paxton*, 6 J. J. Marsh. 505; *Stevens v. Cushing*, 1 N. H. 17; *Blair v. Asbury*, 4 Porter, 435; *Cranmer v. Graham*, 1 Blackf. 406; *Outwater v. Dodge*, 7 Cowen, 85; *Porter v. Beltzhoover*, 2 Harring. 484; *Ames v. Le Rue*, 2 McLean, 216; *Londregon v. Crowley*, 12 Conn. 558; *Fowler v. Austin*, 1 How. (Miss.) 156; *Morrison v. Ives*, 4 Sm. & M. 652; *Stollings v. Sappington*, 8 Missou. 118; *Christy v. Price*, 7 Missou. 430; *Charles v. Dana*, 14 Maine, 383; *Ames v. Sloat*, Wright, 577; *Chambers v. King*, 8 Missou. 517. But the rule that, if the plaintiff prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, applies to those cases in which the labor has been performed in good faith, and not to those where the plaintiff has intentionally, and without necessity or sufficient reason, failed to comply with the terms of the contract. *Veazie v. Hosmer*, 11 Gray, 396; *Reed v. Scituate*, 5 Allen, 120, 123; *Morton J. in Olmstead v. Beale*, 19 Pick. 582; 2 Chitty Contr. (11th Am. ed.) 826-828, in note; *Andrews v. Portland*, 35 Maine, 475; *Walker v. Orange*, 16 Gray, 193; *Atkins v. Barnstable*, 97 Mass. 428. Where the plaintiff declares specially, he cannot recover on evidence applicable to the general counts only; such evidence being objected

to. *Davenport v. Wheeler*, 7 Cowen, 231; *Hollingshead v. Mactier*, 13 Wend. 276. So far as the work conforms to the special contract, the compensation should be according to the contract; but as to that part where the contract is abandoned, the recovery should be according to the work done as if there had been no contract. *Davenport v. Wheeler*, 7 Cowen, 231; *Dubois v. Delaware & C. Canal Co.* 4 Wend. 289; *Merrill v. Ithaca & C. R. R. Co.* 16 Wend. 586. But as to this and the general rule of damages in such cases, see 2 Chitty Contr. (11th Am. ed.) 827, and cases in note (k); *Veazie v. Hosmer*, 11 Gray, 396; *Gleason v. Smith*, 9 Cush. 484; *Snow v. Ware*, 13 Met. 42; *Rogers v. Humphrey*, 39 Maine, 382; *White v. Oliver*, 36 Maine, 92. Where damages are claimed for the breach of a special contract, the declaration must of course count on the contract. *Royalton v. R. & W. Turnpike Co.* 14 Vt. 311; *Mann v. Locke*, 11 N. H. 246.]

(h) *Farr v. Price*, 1 East, 58; *Chit on Bills*, 7th ed. 363-366; *Phillips on Ev.* 5th ed. vol. i. 509.

(i) See *post*, 357. [A promissory note is evidence under the money counts in an action by the indorsee against the maker. *New Jersey B. Co. v. Myers*, 7 Halst. 141. So in an action by indorsee against the indorser. *Ellsworth v. Brewer*, 11 Pick. 316; *State Bank v. Hurd*, 12 Mass. 172; *Hodges v. Holland*, 16 Pick. 395; *Goodwin v. Morse*, 9 Met. 278; *Moore v. Moore*, 9 Met. 417; *Remsey v. Duke*, 1 Morris, 385; *Knight v. Fox*, 1 Morris, 305; *King v. Wall*, 1 Morris, 187. [See *Wild v. Fisher*, 4 Pick. 421; *Ramsdell v. Soule*, 12 Pick. 126; *Webster v. Randall*, 19 Pick. 13; even though it was payable in foreign bills; *Young v. Adams*, 6 Mass. 181; or if the maker signed merely for the accommodation of the payee; *Cole v. Cushing*, 8 Pick. 48; and although it does not purport to be for value received. *Townsend v. Derby*, 3 Met. 363. So a check on a bank in which the drawer has no funds may be given in evidence under the money counts, in an action against the drawer, without showing presentment. *Cushing v. Gore*, 15 Mass. 69. See *Ellis v. Wheeler*, 3 Pick. 18; *Ball v. Allen*, 15 Mass. 433.]

ment, which ought to be, but is not, stamped, the plaintiff was not permitted to resort to an implied contract, in order to avoid the production of such express agreement; (k) and if there were no privity between the parties independently of the special contract, the common counts would be of no avail. (l) The entering of a *nolle prosequi* to a special count would not bar a recovery upon a common count for the same demand. (m)

Common counts in an action of assumpsit are founded on express or implied promises (n) to pay money in consideration of a precedent and existing debt. In general the consideration must have been executed, not executory, and the plaintiff must have been entitled to payment in money, not merely to the delivery of a bill of exchange or of goods, unless the time for payment of such bill has expired. (o)

The great variety of common counts.

It has been said that the common counts will not lie in any case in which debt is not sustainable. (p) This may be true as a general rule, but there are some exceptions. Thus debt on simple contract could not be maintained against an executor, to recover a debt which was due from the testator (q) (but which was altered by 3 & 4 W. 4, c. 42, s. 14); nor can debt be brought for the recovery of part of a debt payable by instalments, the whole of which have not accrued due; (r) but assumpsit may be maintained in both these cases. It has also been doubted whether debt lies on a *quantum meruit* count; (s) but certainly such count was sufficient when framed in assumpsit.

The common counts were of four descriptions. (s¹) 1st, The *indebitatus* count. 2dly, The *quantum meruit*. 3dly, The *quantum valebant*; and 4thly, The *account stated*. (s²)

(k) *White v. Wilson*, 2 B. & P. 118; *Brewer v. Palmer*, 3 Esp. Rep. 213; *Hodges v. Drakeford*, 1 New Rep. 273; *Guy v. Gower*, 2 Marsh. 273. If the plaintiff can make out his case without producing a written agreement, or disclosing that there is one, the defendant cannot produce it unless it be stamped. See *Fielder v. Ray*, 6 Bing. 332.

(l) *Arnfield v. Bate*, 3 M. & Sel. 173; *Thompson v. Morgan*, 3 Campb. 101; *Chitty on Bills*, 7th ed. 384; *Phillips on Ev.* 5th ed. vol. ii. 109.

(m) *Hayward v. Kain*, M. & M. 311.

(n) There is not, in pleading, any difference between an express and implied promise.

(o) *Post*, 357.

(p) *Hard's case*, Salk. 23; *Fowk v. Pinckne*, 2 Lev. 153; *Hibbert v. Courthope*, Carth. 276.

(q) *Ante*, 126.

(r) *Ib.*

(s) *Ante*, 121, note (q).

(s¹) [Under the Massachusetts practice act, the use of the common counts unitedly is ex-

pressly prohibited; but each one of those counts may be used in the form prescribed in that act when the natural import of its terms correctly describes the cause of action. See *Stearns v. Washburn*, 7 Gray, 187; Genl. Sts. c. 129, § 2, sixth clause.]

(s²) [Under the practice act of Massachusetts (Genl. Sts. c. 129), the count in an action upon an account annexed is one of the common counts. *Stearns v. Washburn*, 7 Gray, 187; *Gray J. in Snowling v. Plummer Granite Company*, 108 Mass. 100, 101; *Colt J. in Morse v. Sherman*, 106 Mass. 432. But under this act a count upon an account annexed is allowed to be used only when one at least of the items of the account would be correctly described by some one of the common counts, according to the natural import of its terms. "Common counts" is here understood to mean those which were formerly termed counts in *indebitatus assumpsit*. *Metcalfe J. in Stearns v. Washburn*, 7 Gray, 188; *Colt J. in Morse v. Sherman*, 106 Mass. 432; *Hoskiss v. Judd*, 12 Allen, 147; Genl. Sts. c. 129, § 2, div. 7; *Walan v. Kerby*, 99 Mass. 1; *Cardell v. Bridge*, 9

The *indebitatus assumpsit* count, (t) since the Reg. Gen. Hil. Term, 4 W. 4, states, that "the defendant, on, &c. (a named day before the issuing of the first process in the action), (u) was indebted to the plaintiff in a named sum of money, for, &c. (as for use and occupation, or for real property sold, (x) or goods sold, or for personal services, or for money lent, paid, or had and received, or for interest, or for some other preëxisting debt on simple contract, incurred at the defendant's request); and that being so indebted, the defendant, in consideration thereof, then promised the plaintiff to pay him the said sum of money on request." (x¹)

Indebitatus assumpsit count.

The *quantum meruit* count, instead of stating that the defendant

Allen, 355; Morse v. Potter, 4 Gray, 292; Nary v. Potter, 4 Gray, 293, note; Lowe v. Pimental, 115 Mass. 44; Johnson v. Trinity Church Soc. 11 Allen, 123. In New Hampshire, Bell J. in New Market Iron Foundry v. Harvey, 23 N. H. 406, speaking upon this point, said: "By ancient usage, the declaration upon an account annexed, has been sanctioned in this state, as it has been in Massachusetts; Hilton v. Burley, 2 N. H. 193; Rider v. Robbins, 13 Mass. 284, and the account annexed to the writ is allowed to supply the want of proper allegations in the body of the declaration. The account, when so annexed, is to be read and understood as it would be if separate; and the question here is, what is in fact the meaning of a charge in an account of the form of this: 'A. B. Dr. to C. D., To — lbs. of castings at — cts. \$ —.' It seems to us, that it is always understood to mean goods 'sold and delivered.' We understand that, by usage, the words supposed to be omitted are sold and delivered by the plaintiff to the defendant. The design of a declaration is to make known to the party and to the court, the claim made by the plaintiff; and to that claim and no other, the defendant is required to answer. The count upon a count annexed is holden to be good and sufficient, because by long usage the necessary words are understood; and our understanding is, that by that usage the words implied are 'sold and delivered.' The question is not, what this form of declaration might be understood to mean, but what it has been understood to mean, according to the general usage and understanding; and we have not understood that it has been considered applicable to any other cases than those of sales." Sargent J. in Gordon v. Norris, 49 N. H. 381; Warden v. Marshall, 99 Mass. 305, 307; Merrill v. Parker, 24 Maine, 89, 95. An account annexed to the writ should particularize the items of the account. Under an account annexed of a single item charging "amount due on account \$75," various smaller sums and items of book accounts cannot be proved. M'Quisten v. Young, 19 N. H. 307. But in an action upon an entire contract, the items may be specified in a bill of particulars, and

the plaintiff is not thereby estopped to show entirety. Hall v. Wood, 9 Gray, 60. See Jones v. Halsey, 1 Allen, 273. One who has been ready and offered to perform services according to the terms of a special contract may, if prevented by the adverse party from performing them, recover the amount due to him, under a declaration upon an account annexed. Johnson v. Trinity Church Society, 11 Allen, 123. Where an action is on an account in Indiana, the complaint must show that the account is filed. Wolf v. Schofield, 38 Ind. 175. An account annexed is a part of the declaration. As each item is, or may be, a separate contract in itself, no proof in regard to such contract is admissible unless the contract is alleged in the declaration. Bennett v. Davis, 62 Maine, 544. The Massachusetts practice act requires that, in an action of contract upon either of the common counts, a bill of particulars should be filed by the plaintiff, with the items numbered consecutively, and be deemed part of the record, and answered as such, and then the defendant should answer each item specifically. Genl. Sts. c. 129, §§ 10, 18; Snowling v. Plummer Granite Co. 108 Mass. 100, 101; Burgess v. Bugbee, 100 Mass. 152; Preston v. Neale, 12 Gray, 222; Dorr v. M'Kenney, 9 Allen, 359.]

(t) See the form, vol. ii.

(u) The exact time is not material in the common counts; but when there is a special count on a bill of exchange, &c. preceding the common counts, it is usual and proper in the first common count to lay the day after the bill was due, or other special cause of action was complete; and in the subsequent counts and in the breach to refer to the last mentioned day. Frampton v. Coulson, 1 Wils. 33. Venue is now to be omitted in the body of the count, but time is still to be repeated to every traversable allegation, or the defendant may demur specially.

(x) *Sed quare*, if it lies for real property, sold, &c. See post, 353.

(x¹) [A declaration in *indebitatus assumpsit*, though it aver neither time nor place, nor any request to pay, is good on demurrer Keyser v. Shafer, 2 Cowen, 437.]

was indebted to the plaintiff in a certain sum of money for work, &c. as in the *indebitatus* count, was in this form, "and whereas also, afterwards, to wit, on, &c. in consideration that the plaintiff, at the request of the defendant, had done work, &c. (stating the subject-matter of the debt according to the fact, and usually as in the *indebitatus* count), he the defendant promised the plaintiff to pay him so much money as he therefore reasonably deserved to have;" and the count then averred, "that the plaintiff therefore deserved to have a named sum, whereof the defendant afterwards, to wit, on, &c. aforesaid, had notice." Quantum meruit count.

The *quantum valebant* count was in general confined to the case of a claim for goods sold, and instead of the *quantum meruit*, stated that "the defendant promised to pay so much as the goods were reasonably worth;" and concluded with a corresponding averment that they were reasonably worth a named sum, and that the defendant had notice thereof. In other respects this count was similar to the *quantum meruit*. Although Sir William Blackstone mentions the **quantum meruit* and *valebant* as useful, and as then to have been supposed necessary variations to avoid the risk of the plaintiff's not being able to prove an agreement to pay a fixed price; the opinion of the profession has long been that such *quantum meruit* and *quantum valebant* counts are wholly unnecessary, and that under an *indebitatus* count in assumpsit or debt the plaintiff may recover, although there be no evidence of a fixed price, and Reg. Gen. Trin. T. 1 W. 4, prescribing forms of *indebitatus* counts may be considered as virtually abolishing the *quantum meruit* and *valebant* counts. Quantum valebant count.

The *account stated* still retains its original utility. It alleges, that "the defendant on a named day, month, and year was indebted to the plaintiff in £—— for money found to be due from the defendant to the plaintiff on an account then stated between them," and averring a promise as in the *indebitatus* count. (b) Account stated.

The *common breach* in assumpsit, as prescribed by Reg. Gen. T. T. 1 W. 4, is, "Yet the said defendant hath disregarded his promises and hath not paid any of the said moneys or any part thereof, to the plaintiff's damage of £—— (a named sum), and thereupon he brings his suit, &c." This breach is necessarily varied in actions by and against surviving partners, husband and wife, executors and assignees, &c. The common breach.

Formerly these general counts for work, goods sold, &c. were not

(b) See Reg. Gen. Trin. T. 1 W. 4; and *post*, vol. ii.

in use; and Lord Holt is stated to have said that he was a bold man who first ventured on them; but they are now much more frequent than the special counts, when the action is for a *common debt* or for any *money demand*. (c) It is not sufficient to state merely that the defendant "was indebted to the plaintiff in a certain sum, and promised payment; (c¹) it must be shown *what* was the *cause* or *subject-matter* or nature of the debt; as that it was for work done, or for goods sold, &c. (d) But it is not necessary to state the particular description of the work done, (d¹) or goods sold, &c.; for the only reason why the plaintiff is bound to show in what respect the defendant is indebted, is, that it may appear to the court that it is not a debt of record or specialty, (d²) recoverable in another form of action, but only on simple contract; and any general words by which that may appear are sufficient. (e) Unnecessary statements, such as the local situation of the premises, in a count for use and occupation, should be avoided, * as a variance might be fatal. (f) Several distinct debts due in respect of different contracts not under seal, of the same or a different nature, as demands for work, and debts for goods, moneys lent, &c. might always be included in one count of this description; and the plaintiff would succeed *pro tanto* though he only prove one of such contracts. (g) If one of the subject-matters be improperly stated, the defendant should not demur to the whole, but only to the *insufficient part* of the count or declaration. (h) Under an *indebitatus* count the plaintiff may recover what may be due to him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are in no case necessary, and should in many cases be omitted, to prevent unnecessary prolixity and expense. (i)

In each of these counts, upon an executed consideration, except that for money had and received, and the account stated, it is necessary to allege that the consideration of the debt was performed at the defendant's *request*, though such request might in some cases be

(c) *Hayes v. Warren*, 2 Stra. 933; 1 Saund. 269, note (2); 2 Saund. 122, note (2), 350, note (2), 374, note (1); Fitzg. 302; Com. Dig. Assumpsit, H. 3; *Andrews v. Whitehead*, 13 East, 107.

(c¹) [*Beauchamp v. Bosworth*, 3 Bibb, 115; *Chandler v. State*, 5 Harr. & J. 284; *Maury v. Olive*, 2 Stewart, 472.]

(d) 2 Saund. 350, note (2); *Rooke v. Rooke*, Cro. Jac. 245.

(d¹) [*Lewis v. Culbertson*, 11 Serg. & R. 49. See *Edwards v. Nichols*, 3 Day, 16.]

(d²) [*Lewis v. Culbertson*, 11 Serg. & R. 49.]

(e) *Ambrose v. Roe*, Skin. 217, 218; 2 Saund. 350, note (2), 373; *Fowk v. Pinsacke*, 2 Lev. 153; *Hibbert v. Courthope*, Carth. 276; *Anonymous*, 2 Wils. 20; *Russell v.*

Collins, 1 Mod. 8; 1 Sid. 425, S. C.; *Bac. Abr. Assumpsit*, F.; *Story v. Atkins*, 2 Id. Raym. 1429. By special custom even the cause of the debt need not be shown. *Story v. Atkins*, 2 Stra. 720; 1 Saund. 68, note (2).

(f) See *ante*, 288, 289.

(g) 2 Saund. 122, note (2); [*Bailey v. Freeman*, 4 John. 289. A demand for "certain lands sold and conveyed" is too general, and cannot be joined with the common counts. *Nelson v. Swan*, 13 John. 483.]

(h) *Ring v. Roxbrough*, 2 Cr. & Jer. 418; 2 Tyr. 468, S. C. See *post*, as to when a demurrer should be to the whole declaration or count, and when to a part only.

(i) 2 Saund. 122 a, note (2).

implied in evidence; (*k*) and it must also be stated that the defendant promised to pay a specific sum, or so much as the plaintiff reasonably deserved, averring in the latter case what sum is due. (*l*) As the common counts are so useful in practice, it may be advisable concisely to consider the *particular application of each*.

The common counts relating to *real* property most frequently occur where the action is brought, either for the recovery of a sum agreed to be paid as the *price* or value of an estate *sold* by the plaintiff to the defendant, or to recover the *rent* of premises holden by the defendant as the plaintiff's tenant.

Common counts as to *real property* in particular.

If in the deed by which a freehold or leasehold estate is conveyed, there be an express or even implied *covenant* by the defendant to pay the price, of course *assumpsit* cannot be maintained. (*m*) It has been doubted whether the *indebitatus* counts can be sustained for the price, although the estate has been conveyed, and there be no covenant to pay the money. (*n*) But these counts are sometimes adopted in practice, (*o*) and may probably be sustained; (*p*) although it may be judicious to insert a special count. (*p*¹) If the objection to the common counts be founded on the notion that the demand *savors of the realty*, (*q*) it might be better to declare in debt. (*q*¹)

*The common count for *use and occupation* is of very frequent occurrence. (*r*) It is founded on the statute, (*s*) which enacts, "that it shall be lawful for a landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the tenements held or occupied by the defendant, in an action on the case for the use and occupation of the premises;" and if in evidence on the trial, any parol demise or agreement, not by deed, whereon a certain rent is

(*k*) *Post*, 361; 1 Saund. 264, note (1); Darnford v. Messiter, 5 M. & Sel. 446; Fricke v. Poole, 9 B. & C. 543; 4 M. & R. 448, S. C.

(*l*) Blakey v. Dixon, 2 B. & P. 321.

(*m*) *Ante*, 115, 116.

(*n*) Per Lord Ellenborough, James v. Shore, Sittings at Westminster after Michaelmas Term, 1816; Stirling, attorney for the plaintiff; and see Hallen v. Runder, 3 Tyr. 963.

(*o*) See the forms, *post*, vol. ii. 249, and note (*d*).

(*p*) See observations in Hallen v. Runder, 3 Tyr. 963; 1 Cr., M. & R. 269, S. C.; [Siltzell v. Michael, 3 Watts & S. 329.]

(*p*¹) [But see Lewis v. Culbertson, 11 Serg. & R. 50; and see Weigley v. Weir, 7 Serg. & R. 311; Codman v. Jenkins, 14 Mass. 93.]

(*q*) See *ante*, 118.

(*q*¹) [Butler v. Lee, 11 Ala. 885.]

(*r*) See, in general, 1 Chitty, jr. on Contracts, [11th Am. ed. 510, 512;] Hall v. Burgess, 5 B. & C. 333; 8 D. & R. 67, S. C.;

[Sutton v. Mandeville, 1 Munf. 407; Gunn v. Scovil, 4 Day, 299; Jacks v. Smith, 1 Bay, 315; Smith v. Sheriff, 1 Bay, 443; Stockett v. Watkins, 2 Gill & J. 326; Eppes v. Cole, 4 Hen. & M. 171; Haldane v. Duche, 1 Yeates, 121; Shattuck v. Ransom, 2 Aiken, 352; Rogers v. Tracy, 1 Root, 233. As to cases, where the title to real estate is legally in issue, see Miller v. Miller, 7 Pick. 136; Bigelow v. Jones, 10 Miller, 161; Boston v. Binney, 11 Pick. 1; Codman v. Jenkins, 14 Mass. 93; Baker v. Howell, 6 Serg. & R. 481.] As to the stamp, if there be a written agreement, Brewer v. Palmer, 3 Esp. 213; Hodges v. Drakeford, 1 New Rep. 272. Parol agreement to take on terms of former written agreement, the latter must be stamped. Turner v. Power, 7 B. & C. 625. In general it suffices if plaintiff can make out his case without disclosing that there was a written agreement. In such case defendant cannot produce it unstamped. Fielder v. Ray, 6 Bing. 332.

(*s*) 11 Geo. 2, c. 19.

reserved, shall appear, the plaintiff shall not be nonsuited, but may use the same as an evidence of the *quantum* of the damages to be recovered.

The object of the statute was the removal of the difficulties experienced by landlords in declaring at common law for rent; the statute remedies this evil, but does not entitle a landlord to recover rent in cases in which he had not at common law a right to recover it. It affects only the mode of declaring. (t)

The effect of the statute is to render the common counts sufficient, although there be a formal written agreement in all cases in which there is not a demise by a lease or instrument *under seal*. In the latter event covenant or debt is the remedy. (u) These counts may be supported, if there has been a legal tenancy, although the defendant, to whom the premises were let, did not himself occupy them, but let them to another; (x) or allowed his servants only to inhabit them; (y) or although the premises were destroyed by fire, or otherwise rendered uninhabitable (z) before the rent accrued due. It suffices if there were a constructive legal possession, provided there were a holding or tenancy. (a) And it lies against a tenant who holds over after the expiration of a demise by deed, to recover rent accruing due after the end of the term. (b) But a husband cannot be sued alone * for use and occupation of premises by his wife *dum sola*; as it cannot be said that she occupied at *his* request. (c) The mode of describing the premises is pointed out in the second volume. (d)

The *indebitatus* count may also be brought to recover a remunera-

(t) *Hall v. Burgess*, 5 B. & C. 332, 333; 8 D. & R. 67, S. C.

(u) *Ante*, 115; [*Gage v. Smith*, 14 Maine, 466; *Blume v. McClurken*, 10 Watts, 380; *Codman v. Jenkins*, 14 Mass. 93; *Richards v. Killam*, 10 Mass. 243; *Warren v. Ferdinand*, 9 Allen, 357; *Burnham v. Roberts*, 103 Mass. 379.] Debt lies for use and occupation, though there be an express demise, if it be not by deed. *Gibson v. Kirk*, 1 G. & D. 252.

(x) *Bull v. Sibbs*, 8 T. R. 327.

(y) *Bertie v. Beaumont*, 16 East, 33.

(z) *Baker v. Holtzaffell*, 4 Taunt. 45; that is, if the landlord were not bound to render them habitable. See *Edwards v. Etherington*, R. & M. 268; *Salisbury v. Marshall*, 4 C. & P. 65. Where premises are burnt down, the tenant, if there be an express demise, is liable for the rent, notwithstanding the fire; but if there be not, he is liable for the period during which the premises are occupied. *Packer v. Gibbins*, 1 G. & D. 10; *Izon v. Gorton*, 5 Bing. N. C. 501; 7 Scott, 537, S. C.

(a) *Pinero v. Judson*, 6 Bing. 206; [*Beach v. Gay*, 2 Denio, 84.]

(b) *Davies v. Morgan*, 4 B. & C. 8; 6 D. & R. 42, S. C. And where a party is let into possession of land under a contract of pur-

chase, which afterwards goes off, he is liable to an action for use and occupation, at the suit of the vendor, for the period during which he continues in possession after the contract goes off. *Howard v. Shaw*, 8 M. & W. 118. As to the right of action by a mortgagee and assignees of a bankrupt, where the mortgagor let a furnished house, the furniture not being included in the mortgage, see *Salmon v. Matthews*, 8 M. & W. 827. See, generally, as to when the action can be supported, *Selwyn's N. P.* 10th ed. tit. "Use and Occupation." The tenant is liable for the holding over of an undertenant. *Idbs v. Richardson*, 1 P. & D. 618. See, also, *Waring v. King*, 8 M. & W. 571. One joint tenant is liable in this action for the holding over, with his consent, by the other tenant; but it seems doubtful whether, without such consent, he would be liable. *Christy v. Tancred*, 9 M. & W. 438. See *Nation v. Tozer*, 1 Cr., M. & R. 172, as to the liability of an executor for the occupation of a co-executor.

(c) *Richardson v. Hall*, 1 B. & B. 50.

(d) Page 39, notes (a) and (b). The situation of the premises need not be shown as to a variance in stating the parish, *Id. ante*, 288, 289.

tion for the use and occupation or enjoyment of a *fishery*, a *water-course*, (e) or a *pew*, and for tolls, &c. (f) or other incorporeal hereditament; although in strictness, as being *incorporeal* matters, there could not have been a sufficient demise or contract otherwise than by instrument under seal. (g) So *indebitatus assumpsit* lies for the antecedent use and occupation of a *messuage*, together with incorporeal hereditaments, or of the latter alone, although a special count, setting out a contract for letting the same, would be void, because not under seal, and therefore invalid at common law. (g)

The common *indebitatus* count, to recover the price or value of *goods sold* by the plaintiff to the defendant, states that the defendant was indebted to the plaintiff for goods, chattels, ^{Goods sold.} and effects, by the plaintiff *sold* and *delivered* to the defendant "at his request."

It seems that the price or value of *fixtures*, and perhaps *crops* sold, may be recovered under the common count, provided there be inserted therein, besides the word *goods*, the terms *fixtures*, *crops*, *chattels*, effects, &c. (h) It is, however, usual to frame the count differently where the price of *fixtures* (i) or *crops* (k) is sought to be recovered. If *cattle* were sold, that word should be introduced into the count, though the word *chattels*, which includes animate as well as inanimate things, would suffice. Where an agreement between an out-going and in-coming tenant was that the latter should buy the hay, &c. of the former upon the farm, allowing the expense of repairing the fences, &c. and that the value of the hay, &c. and of the repairs, should be ascertained by third persons, it was held that the balance settled to be due, that is, the value of the goods, allowing for the repairs, was recoverable upon the count for goods sold. (l) Upon * one count for goods sold in the common form, the prices of different goods sold at different times may be recovered. (m)

(e) *Davis v. Morgan*, 4 B. & C. 8; 6 D. & B. 42, S. C. It lies for mineral veins, &c. *Jones v. Reynolds*, 4 Ad. & El. 805; 6 N. & M. 441, S. C.

(f) [*Quincy Canal v. Newcomb*, 7 Met. 276.] See the forms and notes, *post*, vol. II. 248; and *ante*, 113.

(g) *Bird v. Higginson*, 4 N. & M. 505; 2 Ad. & El. 696; 1 Harr. Rep. 61, S. C.

(h) *Post*, vol. II. 117, 130. See *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495, S. C. The word "effects" includes fixtures; and see *Hallen v. Runder*, 1 Cr., M. & R. 266, as to goods and chattels, fixtures and effects, and import of those terms. As to how the declaration should be framed for the price of growing potatoes, see *Sainsbury v. Matthews*, 4 M. & W. 343. [The price of grass growing on the land of the vendor could not be declared for by either of the common counts. *Stearns v. Washburn*, 7 Gray, 187.] *Indebitatus as-*

sumpsit lies for stock in the public funds sold and transferred. *M'Callan v. Mortimer*, 7 M. & W. 20; 9 M. & W. 636, S. C. in error.

(i) 1 Cr., M. & R. 266.

(k) *Ib.* See *Poulter v. Killingbeck*, 1 B. & P. 397; *Mayfield v. Wadsley*, 3 B. & C. 357, 364; 4 M. & R. 455, S. C.; *Smith v. Surman*, 9 B. & C. 561; 4 M. & R. 224, S. C.; [*Lewis v. Culbertson*, 11 Serg. & R. 48.]

(l) *Leeds v. Burrows*, 12 East, 1. Where by a written agreement A. agreed with B. that the latter should have A.'s farm for his life at £20 a year rent and the whole of A.'s keep and maintenance, B. to take off the stock at £75 10s., and B. accordingly took the stock and had possession of the land for his life, it was held that his executor might be sued for the price of the stock as for goods sold and delivered. *Stone v. Rogers*, 2 M. & W. 448.

(m) 2 Saund. 121, 122, note.

In order to maintain a count of goods sold and *delivered*, it is essential that the goods should have been *delivered* to the defendant or his agent, or to a third person, (*m*¹) not credited by the plaintiff, at the request of the defendant, or that something equivalent to a delivery should have occurred, (*n*) and if *not delivered*, but still on the premises of the vendor, though packed in boxes furnished by the purchaser, the plaintiff would be nonsuited, for he should have declared for goods bargained and sold or specially. (*o*) Where a contract was made between A. and B., whereby A., having a quantity of apples, agreed to sell his cider to B. at a certain price per hogshead, to be delivered at T. at a future time, the cider to be manufactured by B. on A.'s premises; and A. delivered a quantity of the juice of the apple to B.'s servant; but before the time for the delivery of the cider it was seized and sold by the excise, in consequence of B.'s *default*; it was held, that as the delivery at T. thus became impossible, B. was liable on a count for goods sold and delivered. (*p*) This count may also, it seems, be maintained where goods have been delivered on the terms of sale or return, and have not been returned within the time agreed upon, or within a reasonable time. (*q*) But where A. sold

(*m*¹) [Porter v. McClure, 15 Wend. 189.]

(*n*) Smith & Chance, 2 B. & Ald. 755; [Stearns v. Washburn, 7 Gray, 187; Morse v. Sherman, 106 Mass. 430; Nichols v. Morse, 100 Mass. 523; Messer v. Woodman, 22 N. H. 172; Parker v. Mitchell, 5 N. H. 165; Spicera v. Harvey, 9 R. I. 582; Bagole v. McKenzie, 26 Mich. 470, and cases cited; Martin B. in Castle v. Swarder, 5 H. & N. 281, 284; Hart v. Tyler, 15 Pick. 171; Atwood v. Lucas, 53 Maine, 508; Merrill v. Parker, 24 Maine, 89, 96; Stern v. Filene, 14 Allen, 9; Barrett v. Goddard, 3 Mason, 107; Ross v. Welch, 11 Gray, 235; Ganson v. Madigan, 13 Wisc. 67; 1 Chitty Contr. (11th Am. ed.) 614, note (*n*); Edmunds v. Wiggin, 24 Maine, 505. Where the defendant had given an order for various articles to be supplied by the plaintiff; and the plaintiff sent the articles ordered, but sent with them other articles not included in the order, with an invoice making the defendant debtor for the whole; and the whole were delivered in one package, it was held that the defendant had a right to reject the whole; and that, having done so, the plaintiff could not recover on the count for goods sold and delivered. Levy v. Green, 1 Ad. & El. 969; 28 L. J. Q. B. 319.]

(*o*) Boulter v. Arnott, 3 Tyr. 267. See Dodsley v. Varley, 12 Ad. & El. 632; [Metcalf J. in Stearns v. Washburn, 7 Gray, 188, 189; Merrill v. Parker, 24 Maine, 89; Hague v. Porter, 3 Hill, 141. The price of goods bargained and sold may be recovered in an action on a common count. Morse v. Sherman, 106 Mass. 430; Turley v. Bates, 2 H. & C. 200; but see Atwood v. Lucas, 53 Maine, 508.]

(*p*) Studdy v. Sanders, 5 B. & C. 628; 8 D. & R. 603, S. C.

(*q*) Bailey v. Gouldsmith, Peake's Rep. 56; [Moss v. Sweet, 16 Q. B. 493; Schlesinger v. Stratton, 9 R. I. 578; Cannan v. Fowler, 14 C. B. 181.] See Studdy v. Sanders, 5 B. & C. 628; Harrison v. Allen, 2 Bing. 4. See, also, Beverley v. The Lincoln Gas Light Company, 6 Ad. & El. 836. Where the plaintiff agreed to let (or *lend*) the defendant a musical snuff box, on the understanding that if it was damaged the defendant was to have it and pay for it, and £3 10s. was to be taken as its value; the defendant received the box, and it was damaged. It was held that the plaintiff was entitled to maintain an action for goods sold and delivered to recover the £3 10s., and that it was not necessary to declare specially. Bianchi v. Nash, 1 M. & W. 545. [But it has been held, that where goods are sold on a condition, that if they are not paid for at a specified time, the owner may resell them, and that the vendor shall be answerable for any loss on such resale; the vendee, if he do not pay for them at the time, cannot be sued for goods bargained and sold, or for goods sold and delivered. Lamond v. Davall, 9 Q. B. 1030. In general, where the contract is of such a nature that the identical thing is to be restored, though in an altered state, the property is not changed, and there is no sale. Moore v. Holland, 39 Maine, 307, 310, 311; Mallory v. Wells, 4 Const. 76; Gregory v. Striker, 2 Denio, 628. So, where, upon a declaration in general *assumpsit* for goods sold and delivered, the evidence showed a consignment for the purpose of a sale, and a sale of a portion of the property

beer to B. in casks, giving him notice that unless he returned the casks in a fortnight, he would be considered as the purchaser, it was held by Lord Ellenborough that B. was not liable for the value of the casks retained by him, as for goods sold and delivered, but only upon a special count. (r) Where a defendant by fraud induced the plaintiff to sell goods to a third person, who was insolvent, and then got the goods into his own possession, it was held that he was liable upon the common count. (s) But not if by fraud a sale on credit was obtained, and which credit has not expired. (t)

The common counts for goods sold *cannot be maintained*, and it is necessary to declare *specialty* in the following cases.

1st. If the sale were not to the defendant, but to a third person, and the defendant were only liable collaterally, that is, in case the vendee *did not pay. (u) And in an action against a broker acting under a *del credere* commission, to recover the price of goods sold by the defendant for the plaintiff, the declaration should, it seems, be special. (x)

2dly. In general, these counts cannot be supported where the plaintiff was to be paid for his goods, not in money, but by the delivery of other goods. (y) But if the contract be for payment partly in money and partly in goods, and the latter are delivered, and the plaintiff seek to recover the money only, he may declare on the common count for goods sold. (z) And where the defendant agreed to

it was held that this was a special bailment, and the action did not lie. *Shepard v. Palmer*, 6 Conn. 95; *Reed v. Bertrand*, 4 Wash. C. C. 514; *Colman v. Price*, 1 Blackf. 303. Nor is the action in this form supported by evidence of the consignment of the goods to the defendant, upon his agreement to pay for and deliver them to the owners, when requested, and of his refusal so to pay for and deliver them. *Brown v. Holbrook*, 4 Gray, 102. The reasoning in this case stands upon the earlier decision in *Ayres v. Sleeper*, 7 Met. 45, in which Shaw C. J. gave the opinion. The declaration in the latter case contained the common money counts; also one on an account stated, and another for goods sold and delivered. The evidence showed a consignment of goods, but as there had been no sale the action was not maintained. The contract may be modified by the negligence of the party to account for the proceeds of the sale in a reasonable time. See *Eaton v. Welton*, 32 N. H. 352. In general, in declaring on contracts of bailment, or the consignment of goods for sale and return, there should be a special count, which should set out the promise and undertaking of the defendant, the consideration on which it was founded, the breach of that promise by the defendant, or his neglect or carelessness, and the loss occasioned to the plaintiff thereby. *Kinnard v. Jones*, 9 Grattan, 183. *Nesmith J. in Young v. Woodward*, 44 N. H. 252.]

(r) *Lyons v. Barnes*, 2 Stark. R. 39.

(s) *Hill v. Perrott*, 3 Taunt. 274; [*Allen v. Ford*, 19 Pick. 219.] See *Read v. Hutchinson*, 3 Campb. 352; *Brown v. Hodgson*, 4 Taunt. 189, that in general there must be a contract of sale. As to when an executor is liable upon an implied contract to pay funeral expenses in burying testator, see *Rogers v. Price*, 3 Y. & J. 28, and *Williams's Exors.* 3d ed.

(t) *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 Cr. M. & R. 312; [*Allen v. Ford*, 19 Pick. 218.]

(u) 1 Saund. 211, a, b; *Mines v. Sculthorpe*, 2 Campb. 215; [*Johnson v. Clark*, 5 Blackf. 564.]

(x) *Gall v. Comber*, 7 Taunt. 558; 1 Moore, 279, S. C.; [*Ayres v. Sleeper*, 7 Met. 45.] See the special count and note, *post*, vol. ii. An indebitatus count by the broker for his *del credere* commission is good at least after verdict. *Solly v. Weiss*, 8 Taunt. 371; 2 Moore, 420, S. C.

(y) *Barbe v. Parker*, 1 H. Bl. 287; *Talver v. West*, Holt N. P. R. 179; *Read v. Hutchinson*, 3 Campb. 352. See, also, *Collingbourne v. Mantel*, 5 M. & W. 289; [*Harrison v. Luke*, 14 M. & W. 139; *Strong v. Watson*, Wright, 373; *Spratt v. McKinnely*, 1 Bibb, 595; *Brookes v. Scott*, 2 Munf. 344; *Cochran v. Tatum*, 3 Munroe, 405; *Snedecor v. Leachman*, 10 Ala. 330; *Burrall v. Jacot*, 1 Barb. 165.]

(z) *Sheldon v. Cox*, 3 B. & C. 420; 5 D.

sell to the plaintiff three unfinished houses, and to finish them within a certain time, and the plaintiff agreed to pay for them by the delivery of cement at a fixed price, higher than the usual price, and the defendant did not complete the houses within the time, and afterwards said he had sold one of them to a third person, Lord Tenderden C. J. said, that the common count for cement sold and delivered was sufficient, the defendant having broken the contract and disabled himself from completing it; but he directed the jury to give only the ordinary price of cement. (a)

3dly. If the goods were to be paid for by a bill of exchange or promissory note, [or partly in money and partly by bill,] and the defendant has refused to give either; then, [unless the circumstances are such as to entitle the vendor to treat the vendee's refusal as a rescission of the contract, (a¹)] the declaration should be special, (b) [and neither the price of the goods, nor the amount of the stipulated cash payment, can be recovered on the common counts, until the period of credit has expired, (b¹)] but after the expiration of the credit, or time during which the instrument was to be current, the common count will be sufficient. (c) And this count is sustainable, although the bill had been given, and the plaintiff had indorsed it away and was not the holder at the time the action was commenced, provided the defendant dishonored the bill, and the plaintiff had it in his possession at the time of the trial. (d) If the bill be lost before or after it is due,

& R. 277, S. C.; *Bull v. Parker*, 2 Dowl. N. S. 345.

(a) *Baines v. Payne*, December, 1828, sittings at Westminster.

(a¹) [*Bartholomew v. Markwick*, 15 C. B. N. S. 711.]

(b) *Strutt v. Smith*, 1 Cr. M. & R. 312.

(b¹) [*Paul v. Dod*, 2 C. B. 800; *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 B. & P. 582; *Swancott v. Westgarth*, 4 East, 75; *Hull v. Odber*, 11 East, 118; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Hunneman v. Grafton*, 10 Met. 454, 458; *Appleton v. Parker*, 15 Gray, 173; *Ascutey Bank v. McOrmsby*, 28 Vt. 721; *Eddy v. Stafford*, 18 Vt. 235; *Martin v. Fuller*, 16 Vt. 108; *Loring v. Gurney*, 5 Pick. 15; *Rugg v. Weir*, 16 C. B. N. S. 471; *Yale v. Coddington*, 21 Wend. 175; *Hanna v. Mills*, 21 Wend. 93; *Bass v. White*, 7 Lansing, 171; *Allen v. Ford*, 19 Pick. 217. Where the purchaser agrees to give security for the price of goods sold upon credit, and takes away the goods purchased without giving it, the seller may maintain an action for the price before the term of credit has expired. *Rice v. Andrews*, 32 Vt. 691.]

(c) *Mussen v. Price*, 4 East, 147; *Hoskins v. Duperoy*, 9 East, 498; *Marshall v. Poole*, 13 East, 98; *Lee v. Riden*, 2 Marsh. 495; [*Bickman v. Irwin*, 3 Yates, 66; *Hanna v. Mills*, 21 Wend. 90; *Yale v. Coddington*, 21 Wend. 175; *Jonsson v. Smith*, An-

thon N. P. 60; *Manuf. & Mech. Bank v. Gore*, 15 Mass. 79; *Martin v. Fuller*, 16 Vt. 108.] And will also be sufficient to recover interest. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 8 M. & W. 399. Where goods were sold on the 5th of October, to be paid for in two months, it was held that an action for the price could not be supported until after the expiration of the 5th of December. *Webb v. Fairmauer*, 3 M. & W. 473. [But where goods were to be paid for by bill or in cash, and the purchaser paid part in cash, it was held that the residue might be recovered on the common count, before the time at which the bill would have become due. *Schneider v. Foster*, 2 H. & N. 4. And where goods were sold at "two and a half per cent. cash, or three months' bill," which terms were explained to mean, cash at the expiration of a certain time, deducting two and a half per cent. discount; or at the buyer's option, a bill at three months from the same time, and when that time arrived the buyer refused to give a bill, it was held that the seller might at once sue him for goods sold and delivered. *Rugg v. Weir*, 16 C. B. N. S. 471.]

(d) *Burden v. Halton*, 1 M. & P. 223; 4 Bing. 454, S. C.; [*Fry v. Hill*, 7 Taunt. 397; *Owenson v. Morse*, 7 T. R. 64.] Where the plaintiff received from the defendant a promissory note in payment for goods, indorsed by the defendant, but not made pay-

no action for the price of the goods sold can in general be maintained. (e)

4thly. If there have been no delivery of the goods, even the count for goods *bargained and sold* (not showing a delivery, cannot be *maintained, unless it appear that there has been a complete sale and the *property* in the goods had become *vested* in the defendant by virtue of such sale, and an actual *acceptance* of the commodity by the defendant. (f) The property is not vested in the defendant if the goods, being part of a larger quantity, are not separated therefrom, and something remains to be done to distinguish them and ascertain their quantity, or number, or the amount of the price. This rule has been already considered. (g) Nor is the property in goods vested in the defendant so as to render the common count for goods bargained and sold sufficient, unless the article has been finished, and specifically appropriated and set apart for the purchaser, and he has assented thereto. (h) In these cases the declaration should be framed specially on the contract for not accepting the goods, or for refusing to complete the bargain; (i) and in general, where the contract is not substantially for the sale of goods, but is rather for work and materials, the value even of the latter is not recoverable upon a count for goods sold; (k) and the plaintiff should declare for work and materials. Where the defendant refuses to receive goods which he has agreed to purchase, the special counts are not only necessary, if the property in some indetentical goods has not become vested in the defendant, but are at all events essential in order to recover any expenses which may have been incurred. (l) The counts for goods "bargained and sold" should also be added. (m) *Indebitatus* as-

able to order, the note having been dishonored by the maker, it was held that the plaintiff was entitled to recover the price of the goods on a common count, although he had not given the defendant due notice of the dishonor of the note. *Plimley v. Westley*, 2 Bing. N. C. 249; 2 Scott, 423, S. C.

(e) *Champion v. Terry*, 3 B. & B. 295; *Hansard v. Robinson*, 7 B. & C. 90; 9 D. & R. 260, S. C.

(f) *Simmons v. Swift*, 5 B. & C. 857, 865; 8 D. & R. 693, S. C.; *Rhode v. Thwaites*, 6 B. & C. 388; 9 D. & R. 298, S. C.; *Atkinson v. Bell*, 8 B. & C. 277; 2 M. & R. 292, S. C.; [*Stearns v. Washburn*, 7 Gray, 187, 189; 1 Chitty Contr. (11th Am. ed.) 614, and note (n), and cases there cited.] But a count for goods sold and delivered may in some cases be maintained, although the plaintiff retain a special interest in them in respect of an understood engagement not to remove them until paid for. *Dodsley v. Varley*, 12 Ad. & El. 632.

(g) *Ante*, 166.

(h) *Ib.* and *supra*, note (f); *Atkinson v. Bell*, 8 B. & C. 277; 2 M. & R. 292, S. C.; *Oldfield v. Lowe*, 9 B. & C. 73; [but see

ante, 166, note (h); *Goddard v. Binney*, 115 Mass. 450.]

(i) *Atkinson v. Bell*, 8 B. & C. 277, cited in *Laythorp v. Bryant*, 1 Bing. N. C. 430; [*Alexander v. Gardner*, 1 Scott, 630, 640; *Messer v. Woodman*, 22 N. H. 172; *Bailey v. Smith*, 43 N. H. 141; *Stearns v. Washburn*, 7 Gray, 187; *Gordon v. Norris*, 49 N. H. 376; *Hart v. Tyler*, 15 Pick. 171; *New Market Iron Foundry v. Harvey*, 23 N. H. 395; *Boswell v. Kilborn*, 15 Moore P. C. 309; *Coursey v. Covington*, 5 Harr. & J. 45; *Spratt v. M'Kinneys*, 1 Bibb, 595; *Brooks v. Scott*, 2 Munf. 344; *Cochran v. Tatum*, 3 Monroe, 405.]

(k) *Cotterill v. Apsey*, 1 Marsh. 581; 6 Taunt. 324, S. C.; *Oldfield v. Lowe*, 9 B. & C. 73.

(l) *Hazedom v. Laing*, 6 Taunt. 162; 1 Marsh. 162, S. C.; [*Outwater v. Dodge*, 7 Cowen, 85.]

(m) *Chaplin v. Rogers*, 1 East, 194. [A declaration for goods sold and delivered may be amended by adding a count for goods bargained and sold, without changing the form or the cause of action *Jenness v. Wendell*, 51 N. H. 63; *Spicers v. Harvey*, 9

sumpsit lies to recover "goods and chattels," naming the value, due "for tolls," &c. (n)

With respect to debts for *work and labor* or other personal services, and for *materials* used in performing the work, it is a rule that if *preceded* by the defendant's request, (n¹) then however special the agreement was, yet if it were not under seal, (o) and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, (p) it is not necessary to declare specially, and the common *indebitatus* count is sufficient. (q) Where the demand is for * wages, fees, or work and labor, in particular professions, &c. it is usual to insert a count stating concisely the nature of the service. (r) But the common count for work and labor is in general sufficient, without showing what sort or manner of work was performed. (s) An attorney, under the count for work and *materials*, may recover a bill for his fees, and for the price or value of parchment vellum. (t) A farrier, &c. may recover the attendance and medicine, &c. under the common counts for work and *materials*. (u) And these counts are sufficient though the demand be for building a house (x) under a special written agreement

R. I. 582. The rule of damages is the same under each of these counts, viz. the contract price. In either case it must be proved that the title to the property passed to the purchaser. That being proved, the price, of course, belongs to the seller, and he may recover it, under either of these counts which may be applicable to the facts. Sargent J. in *Gordon v. Norris*, 49 N. H. 382; *Bailey v. Smith*, 43 N. H. 143, 144; *Thompson v. Alger*, 12 Met. 428, 443, 444.]

(n) *Earl of Falmouth v. Penrose*, 6 B. & C. 385; 9 D. & R. 452, S. C.

(n¹) [*Goldsby v. Robertson*, 1 Blackf. 247.]

(o) *Ante*, 115.

(p) *Ante*, 357.

(q) *Gordon v. Martin*, Fitzg. 302; *Alcorn v. Westbrook*, 1 Wils. 117; *Bul. N. P.* 139; *Brooke v. White*, 1 New Rep. 331; *Clarke v. Gray*, 6 East, 569; *Guy v. Gower*, 2 Marsh. 273; *Robson v. Godfrey*, Holt's N. P. R. 236; *Delamanier v. Winteringham*, 4 Campb. 186; [*Lowe v. Pimental*, 115 Mass. 44; *Felton v. Dickinson*, 10 Mass. 287, 289; *Feeter v. Heath*, 11 Wend. 477.] An *indebitatus* count by a factor to recover a *del credere* commission has been held good after verdict. *Solly v. Weiss*, 2 Moore, 420; 8 Taunt. 371, S. C.; *Caruthers v. Graham*, 14 East, 578. Extra freight is recoverable under this count. *Hedley v. Lapage*, Holt's N. P. R. 392; and see *Robson v. Godfrey*, 1 Stark. 275; *Fletcher v. Gillespie*, 3 Bing. 635. But if there be an agreement in writing relating to the work and labor, which cannot be used in evidence for want of a

stamp, the plaintiff cannot recover the value of the work and labor. *Hughes v. Budd*, 8 Dowl. 478. As to when an action of *indebitatus assumpsit* will lie while a special contract remains open, see the numerous authorities collected and classified by Mr. Smith in his notes to the leading case on the subject, *Cutter v. Powell*, in 2 Smith's Leading Cases.

(r) See the forms, *post*, vol. ii. 264-267. As to contracts for work, or services in general, see *ib.*; *Sinclair v. Bowles*, 9 B. & C. 92. As to the recovery of wages *pro rata*, see *Turner v. Robinson*, 5 B. & Ad. 789; *Fawcett v. Gash*, 5 B. & Ad. 904; *Gandell v. Pontigny*, 4 Camp. 375; and the notes the form, *post*, vol. ii. 264. [As to recovery where part of the labor under an entire contract has been performed, and the time for completion enlarged by agreement, see *Newton v. Winchester*, 16 Gray, 208.]

(s) 2 Saund. 350, note (2).

(t) *Fisher v. Snow*, 3 Dowl. 26.

(u) *Clark v. Mumford*, 3 Campb. 37; 1 New Rep. 289; 2 Wils. 20. The value of materials cannot be recovered under a count for work and labor only. *Heath v. Freeland*, 5 Dowl. 166. Where a party agrees to do work at a specified sum under a fraudulent representation, he can only recover according to the terms of the contract, although when he discovered the fraud, he might have repudiated the contract and sued for deceit. *Selway v. Fogg*, 5 M. & W. 83.

(x) *Atkinson v. Bell*, 8 B. & C. 283; 9 M. & R. 300, S. C.

and specifications; although, as formerly remarked, (y) it might, in some cases, be advisable to insert a special count. The common count will suffice to support a claim for the services of the plaintiff's apprentice or servant whilst improperly harbored by the defendant. (z) But under a common count for work and labor and materials done at defendant's request, an out-going tenant cannot recover the usual remuneration payable to him as out-going tenant for work and materials on the farm, but must declare *specialty*. (a)

As before observed, where there is an entire contract for work and labor and materials, the value of the latter is not recoverable under a count for goods sold; (b) nor can the count for work and labor and materials be maintained, unless the article agreed for has been finished, and appropriated to the defendant by his consent, and he has acquired a property in the specific chattel. (c)

To support this count the plaintiff must in general have *completely performed* the work contracted for; (d) and if not, it is necessary to declare *specialty* if the defendant has wrongfully prevented the plaintiff from performing the work; as where a seaman, who was to have wages for his service during an entire voyage, but pending it was left *behind on shore, and prevented from serving the whole voyage, a special count was considered to be necessary. (e) And if a party be hired as a servant, or clerk, &c. for a specific period, and in part perform the service, and be ready to complete it, but be prevented from so doing by the employer, the wages or salary for the *whole* term cannot, it would seem, be recovered upon the *indebitatus* count for work done. (f) And in some cases, although the original agreement has not been strictly performed by the plaintiff, yet if the defendant avail himself of, and derive a benefit from, the work done, he will be liable upon a common count. (g) But where A. undertook for a specific sum to repair and make perfect a given article then in a damaged state, and did repair it in part, but did not make it perfect, it

(y) *Ante*, 348, 349.

(z) *Foster v. Stewart*, 3 M. & Sel. 191.

(a) *Leeds v. Burrows*, 12 East, 1.

(b) *Ante*, 358.

(c) *Ante*, 166, 358; but see *Hughes v. Lenny*, 5 M. & W. 183.

(d) 2 Saund. 350, note (2).

(e) *Halle v. Heightman*, 2 East, 145; *Appleby v. Dodds*, 8 East, 300; *Cutler v. Powell*, 6 T. R. 320. See *Collins v. Price*, 5 Bing. 135; *Davis v. Nichols*, 2 Chit. R. 320.

(f) *Archard v. Hornor*, 3 C. & P. 349; *Smith v. Hayward*, 7 Ad. & El. 544; 2 N. & P. 432, S. C.; [*Patteson & Erle JJ.* in *Goodman v. Pocock*, 15 Q. B. 576, 581, 583; *Crompton J.* in *Emmens v. Elderton*, 13 C. B. 495, 507; *Derby v. Johnson*, 21 Vt. 17; *Webster v. Enfield*, 5 Gilman, 298; *Hall v. Rapley*, 10 Barr, 231; *Moulton v. Traak*, 9

Met. 577; *Clark v. Marsiglia*, 1 Denio, 317.]

(g) See *Bul. N. P.* 139, per Sir J. Mansfield C. J. *Cook v. Munstone*, 1 N. R. 355; *Burn v. Miller*, 4 Taunt. 748; [2 Chitty Contr. (11th Am. ed.) 826 *et seq.* and notes.] So where the plaintiff contracted to build cottages by the 10th of October, but did not complete them until the 15th, it was held that the defendant having accepted the cottages, the plaintiff might recover for work and labor. *Lucas v. Godwin*, 3 Bing. N. C. 737; 4 Scott, 502, S. C. As to *extra* work where there is a special contract, see *Pepper v. Burland*, Peake's Rep. 103; *Robson v. Godfrey*, Holt N. P. Rep. 236; 1 Stark. R. 275, S. C.; *Ellis v. Hamlen*, 3 Taunt. 52; *Burn v. Miller*, 4 Taunt. 745, 748; *Fletcher v. Gillespie*, 3 Bing. 635.

was held that he could not recover for the work actually done and materials found, the contract being entire, and the defendant having never been discharged from his obligation to complete it. (*h*) And if a person hired for a period be guilty of misconduct which justifies his employer to discharging him at once, it seems that he cannot recover even for his antecedent services. (*i*)

Money lent to the defendant himself on his own credit, may be recovered under the common count for *money lent*, though delivered to another person at his request; (*k*) and sometimes the plaintiff may recover on the common count for money lent, though a special agreement has been entered into and rescinded; (*l*)

(*h*) *Sinclair v. Bowles*, 9 B. & C. 92; *Ellis v. Hamlen*, 3 Taunt. 52; [2 *Chitty Contr.* (11th Am. ed.) 831, and note (*n*); *McCarren v. McNulty*, 7 Gray, 139; *Cobb v. West*, 4 Duer, 38; *Clark v. Smith*, 14 John. 326; *Hill v. Milburne*, 17 Maine, 316; *Kettle v. Harvey*, 21 Vt. 301; *Young v. White*, 5 Watts, 460; *Morton J. in Olmstead v. Beale*, 19 Pick. 528; *Knox J. in Wade v. Haycock*, 25 Penn. St. 383; *Brown v. Vinal*, 3 Met. 533; *Jenkins v. Camp*, 13 John. 94; *Sloan v. Hayden*, 110 Mass. 141.]

(*i*) *Atkin v. Acton*, 4 C. & P. 208. See *Robinson v. Hindman*, 3 Esp. Rep. 235; *Spain v. Arnott*, 2 Stark. Rep. 256; *Gandell v. Pontigny*, 4 Campb. 375; *Turner v. Robinson*, 6 C. & P. 15; 1 *Chit. Gen. Prac.* 75-84; and see the notes to the form, *post*, vol. ii. [It seems to be now well established by a series of decisions both in England and in the United States that, if the contract of the servant to labor be for a specified period of time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master, improperly and without sufficient cause, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a *quantum meruit*. 2 *Chitty Contr.* (11th Am. ed.) 844, and cases cited. It has been held in England, that the dismissal of a servant for such misconduct as justifies his discharge, will deprive him of wages in the same cases, and to the same extent, as his wrongful desertion of his master's service will. But a different rule has been adopted in Maine and several other of the American states, and the servant has been allowed to recover, even after a dismissal for a good cause, at least so far as his services have been beneficial to his employer. 2 *Chitty Contr.* (11th Am. ed.) 848, and cases cited; *Lilley v. Elwin*, 11 Q. B. 742; *Ridgway v. Hungerford Musket Co.* 3 Ad. & El. 171; *Jones v. Jones*, 2 Swan, 605; *Eakin v. Harrison*, 4 McCord, 249; *Byrd v. Boyd*, 4 McCord, 246; *Lawrence v. Gullifer*, 38 Maine, 532; *Daggett C. J. in Champion v. Hartshorn*, 9 Conn. 574. If a party is prevented by sickness, or other similar inability

occasioned by a visitation of Providence, from laboring during the stipulated period, he may recover for his services actually performed upon a *quantum meruit*. *Fenton v. Clark*, 11 Vt. 557; *Fuller v. Brown*, 11 Met. 440; *Dickey v. Linscott*, 20 Maine, 453; *Hubbard v. Belden*, 27 Vt. 645; *McMullen v. Kelso*, 4 Texas, 235; *Ryan v. Dayton*, 25 Conn. 188; *Hunter v. Waldron*, 7 Ala. 753; *Nichols v. Coolahan*, 10 Met. 449; *Lakeman v. Pollard*, 43 Maine, 463; *Fahy v. North*, 19 Barb. 341; 2 *Chitty Contr.* (11th Am. ed.) 849, and note. The amount to be recovered will depend upon the extent of the benefit the employer has derived from the partial performance. *Patrick v. Putnam*, 27 Vt. 759. If the party recovers from his sickness and offers to resume his work during the agreed term, and the employer rejects the offer, the laborer may then treat the special agreement as rescinded, and may recover for the services already rendered, without waiting for the expiration of the time fixed in the agreement for its performance. 2 *Chitty Contr.* (11th Am. ed.) 849-851, and notes; *Ryan v. Dayton*, 25 Conn. 188.]

(*k*) As to evidence of loan, see 2 *Phil. on Evid.* (5th ed.) 127; *Sutton v. Toomer*, 7 B. & C. 416; 1 *M. & R.* 125, S. C. When this count lies by the assignee of a bankrupt, see *ante*, 28, 29; or an executor, *ante*, 23. Where the plaintiff lent the defendant money and received from the defendant shares in a company as security, and agreed to give twenty-one days' notice to the defendant before proceeding to compel the repayment of the loan or of any part thereof, and upon repayment of any part of the loan, to give back a proportionate amount of shares; it was held, that after twelve days the plaintiff was not bound to declare specially, averring a tender of the shares, but that he might declare in *indebitatus assumpsit* for money lent. *Scott v. Parker*, 1 G. & D. 258.

(*l*) *James v. Cotton*, 7 Bing. 266. It lies for money advanced upon a contract to repay it on demand, or to execute a mortgage, after refusal to execute the mortgage. *Bristowe v. Needham*, 9 M. & W. 729. [A person lending money on time, upon security or

but the transaction must have been substantially a loan by the *plaintiff*. (*l*) And if money be lent to a third person at the defendant's request, and both be liable to repay the money, the one on the loan, and the other *in respect of his collateral engagement, which must be in writing, the count against the latter must be special. (*m*) A declaration against a husband "for money lent to his *wife* at his request" is maintainable; (*n*) *aliter*, if it be alleged that the money was lent to her at *her* request, or was lent to *both* at their joint solicitation. (*o*)

In general there must have been a *loan of money* to support this count; but an advance of foreign coin is sufficient. (*p*) The transfer of *stock* into the defendant's name could not, it seems, be regarded as a loan of *money* to him. (*q*)

To sustain the common count for *money paid* by the plaintiff for the defendant's use and at his request, it is essential, *first*, that the plaintiff should have *paid money* for the defend- Money paid. ant, (*r*) and *secondly*, that such payment should have been made at the defendant's *request* express or implied. (*s*)

Where the sum which the plaintiff has paid is in the nature of *unliquidated damages or costs*, and cannot be considered as strictly paid in discharge of a *debt* due from the defendant; (*t*) or where the

a forged name, is entitled to recover back the money lent immediately. *Manuf. & Mech. Bank v. Gore*, 15 Mass. 75; *Boardman v. Gore*, 15 Mass. 331.]

(*l*) [See *Perkins v. Dunlap*, 5 Greenl. 268.]

(*m*) 1 Saund. 211 b; *Butcher v. Andrews*, 1 Salk. 23; 3 Salk. 15; *Carth*, 446, S. C.; *Marriot v. Lister*, 2 Wils. 141; *Stevenson v. Hardie*, 3 Wils. 388; 2 Bl. Rep. 872, S. C.; *Matson v. Wharam*, 2 T. R. 81; *Stone v. Macnair*, 1 Moore, 126; [*Marston v. Boynton*, 6 Met. 127.]

(*n*) *Marriot v. Lister*, 3 Wils. 388.

(*o*) *Stone v. Macnair*, 4 Price, 48.

(*p*) *Harrington v. Macmorris*, 1 Marsh. 33; 5 Taunt. 228, S. C.

(*q*) *Nightingale v. Devisme*, 5 Burr. 2589; *Jones v. Brinley*, 1 East, 1; *Maxwell v. Jameson*, 2 B. & Ald. 51. The exchange of securities, notes, &c. when is not a loan. *Glyn v. Hertel*, 8 Taunt. 208.

(*r*) *Power v. Butcher*, 10 B. & C. 346; *Maxwell v. James*, 2 B. & Ald. 51; and see *Blenden v. Charles*, 7 Bing. 246; *Pownall v. Ferrand*, 6 B. & C. 439; 9 D. & R. 603, S. C.; [*Hatten v. Robinson*, 4 Blackf. 479; *Wilson v. George*, 10 N. H. 445; *Murray v. Pate*, 6 Dana, 335; *Stone v. Porter*, 4 Dana, 207; *Driver v. Burton*, 17 Q. B. 989.] As to the remedy for *contribution*, see *Davies v. Humphreys*, 6 M. & W. 153. Where three parties are *jointly and severally* liable to the holders of a note, one party who has paid the note may bring an action for money

paid, against his co-surety for *contribution*, without showing that he paid it by compulsion. *Pitt v. Purssord*, 8 M. & W. 538; [2 Chitty Contr. (11th Am. ed.) 888, and note (*u*¹), 891 *et seq.* and notes.] Where several persons jointly contract for a chattel to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law would imply a contract on the part of the deceased contractor, that his executors should pay his proportion of the price of the article to be furnished, and he will be liable for *contribution*. *Prior v. Hembrow*, 8 M. & W. 873.

(*s*) 1 Saund. 264, note (1). See judgment of *Tindal C. J.* in *Grissel v. Robinson*, 3 Bing. N. C. 15; 3 Scott, 329, S. C.; [2 Chitty Contr. (11th Am. ed.) 879 *et seq.*, 881 *et seq.*; *Taylor v. Cotten*, 6 Ired. 69; *Wharton v. Franks*, 9 Porter, 232; *Stephens v. Brodnax*, 5 Ala. 258; *Rumney v. Ellsworth*, 4 N. H. 138; *Winsor v. Savage*, 9 Met. 346; *Benson v. Thompson*, 27 Maine, 471; *Baltimore v. Hughes*, 1 Gill & J. 497; *Rensselaer Glass Factory v. Reid*, 5 Cowen, 603; *Weakly v. Brahan*, 2 Stewart, 500; *Willis v. Hobson*, 37 Maine, 403; *Beach v. Vandenburg*, 10 John. 361; *Little v. Gibbs*, 1 South. 213.]

(*t*) *Spurrier v. Elderton*, 5 Esp. Rep. 3; *Camfield v. Gilbert*, 4 Esp. Rep. 223; *Child v. Morley*, 8 T. R. 610; *Smith v. Nissen*, 1

plaintiff has not actually made a payment in money, but has merely been obliged to give security, (*t*¹) or his goods have been sold under a distress for the defendant's debt, (*t*²) the declaration must be special for not indemnifying, &c.; (*u*) and where an accommodation acceptor * has been obliged to pay *costs* as well as a principal sum, he must, to recover the former, declare specially. (*v*) Nor is there any ground for supporting the count for money paid unless the payment were made at the express or implied request of the defendant, and the request must be always averred. (*x*) It is clear, however, that if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him by himself paying the amount, a *request* will be *implied* (*x*¹) Thus an executor who has paid the legacy duty may sue the legatee for the amount, as money paid for his use at his request. (*y*)

T. R. 269; *Chater v. Beckett*, 7 T. R. 204; *Cowley v. Dunlop*, 7 T. R. 576; *Simmonds v. Parminter*, 1 Wils. 188; *Sills v. Laing*, 4 Campb. 81; *Jones v. Farney*, 1 M'Clel. 25; but see *Brown v. Hodgson*, 4 Taunt. 189. Where the plaintiff purchased stock, which the defendant agreed to transfer on a given day, and in consequence of a rise the loss on the sale amounted to £45, which the defendant refused to pay; and the plaintiff afterwards paid that sum to another broker, by whom the transfer was made; it was held, the plaintiff could not recover in an action for money paid, but that he should have declared specially on the contract with the defendant, as his claim was in the nature of unliquidated damages. *Lightfoot v. Creed*, 2 Moore, 255; but see *Sutton v. Tatham*, 2 P. & D. 308; *Young v. Cole*, 3 Bing. N. C. 724; 4 Scott, 489, S. C. A debt paid by a sheriff's officer on an attachment against the sheriff by defendant's default is recoverable by the former under the common count. *White v. Leroux*, M. & M. 347.

(*t*¹) [See *Pearson v. Parker*, 3 N. H. 366; *Cornwall v. Gould*, 4 Pick. 444; *Chandler v. Brainard*, 14 Pick. 285; *Doolittle v. Dwight*, 2 Met. 561; *Ingalls v. Dennett*, 6 Greenl. 79; *Gibson C. J. in Craig v. Craig*, 5 Rawle, 91; *Powell v. Smith*, 8 John. 249; *Cumming v. Hackley*, 8 John. 206; *Wetherby v. Mann*, 11 John. 518; *Neale v. Newland*, 4 Pike, 506; *Kearney v. Tanner*, 17 Serg. & R. 94.]

(*t*²) [See *Randall v. Rich*, 11 Mass. 494; *Lord v. Staples*, 23 N. H. 448; *Morrison v. Berkley*, 7 Serg. & R. 238; *Miller v. Miller*, 7 Pick. 133; *Rogers v. Maw*, 15 M. & W. 444, 448.]

(*u*) *Taylor v. Higgins*, 3 East, 169; *Moore v. Pyrke*, 11 East, 52; *Maxwell v. Jameson*, 2 B. & Ald. 51; *Pinkerton v. Adams*, 2 Esp. 611. See *Williamson v. Henley*, 6 Bing. 299, 305; [2 Chitty Contr. (11th Am. ed.) 879, note (*f*¹), and cases cited; *Bonney v. Seeley*, 2 Wend. 481; *Crozier v. Grayson*, 4 J. J. Marsh.

517; *Ainslie v. Wilson*, 7 Cowen, 662; *Garnsey v. Allen*, 27 Maine, 336; *Baltimore & Susq. R. R. Co. v. Faunce*, 6 Gill, 68.] When parties who have paid money for another should join or sever in suing the latter, *ante*, 9, 10; *Jones v. Fleeming*, 7 B. & C. 217. [In *Clapp v. Rice*, 15 Gray, 559, Hoar J. said: "We are of opinion that where three persons, each of whom is responsible for an entire sum due from another, join in making the payment of that sum by a contribution agreed on among themselves for that purpose, they may join in an action to recover it from the person for whose benefit the payment has been made." *Hadsell v. Hancock*, 3 Gray, 526.]

(*v*) *Seaver v. Seaver*, 6 C. & P. 673. See form, *post*, vol. ii. 152.

(*x*) *Stokes v. Lewis*, 1 T. R. 20; *Exall v. Partridge*, 8 T. R. 10; 1 Saund. 264, note (1); [Brittain v. Lloyd, 14 M. & W. 762, 773; *Hassinger v. Solms*, 5 Serg. & R. 4; *Packard v. Lienow*, 12 Mass. 11; *Ott v. Chapline*, 3 Harr. & M'H. 323; *Smith v. Sayward*, 5 Greenl. 504.] The request must have been stated even in an affidavit to hold to bail for money paid. *Fricke v. Poole*, 9 B. & C. 543. When the request will be implied. *Hales v. Freeman*, 1 B. & B. 391; *Pownall v. Ferrand*, 6 B. & C. 439; *Spragg v. Hammond*, 2 B. & B. 59.

(*x*¹) [2 Chitty Contr. (11th Am. ed.) 883; *Hale v. Huse*, 10 Gray, 99; *Sargent v. Carrier*, 48 N. H. 310; *Ticonic Bank v. Smiley*, 27 Maine, 225; *Swasey v. Little*, 7 Pick. 296.]

(*y*) *Foster v. Ley*, 2 Bing. N. C. 269; 2 Scott, 438, S. C. See *Alexander v. Vane*, 1 M. & W. 511. Where the plaintiff was originally liable for taxes, but by an agreement the defendant was to pay them, and on the latter making default the plaintiff was obliged to pay them, and thereupon sued the defendant on the common count, it was held that he could not recover, and should have

The form of this count is extremely simple, it is merely stating that the defendant is indebted to the plaintiff in a certain sum Money had and received. (z) "for money had and received by the defendant to and for the use of the plaintiff." (y¹)

It must in general appear that the defendant has received money and not merely money's worth, (y²) as stock, (a) or goods; (b) but if

declared specially. *Spencer v. Parry*, 3 Ad. & El. 331; 4 N. & M. 770. See, also, *Lubbock v. Tribe*, 3 M. & W. 607.

(y¹) [The subject of this action is discussed at length in 2 Chitty Contr. (11th Am. ed.) 898 et seq. and notes.]

(y²) [*Beardsley v. Root*, 11 John. 464; *Locket v. Bohannon*, 3 Bibb. 378; *Madison v. Wallace*, 7 J. J. Marsh. 100; *Johnson v. Haggin*, 6 J. J. Marsh. 581; *Ralston v. Bell*, 2 Dall. 242; *Hantz v. Sealy*, 6 Binn. 405. Bank-notes, and any other property received as money, will support the action, the same as if money itself had been received. *Mason v. Waite*, 17 Mass. 560; *Ainalie v. Wilson*, 7 Cowen, 562; *Arms v. Ashley*, 4 Pick. 74; *Miller v. Miller*, 7 Pick. 136; *Morrill v. Brown*, 15 Pick. 177; *Payson v. Whitcomb*, 15 Pick. 212, 216; *Emerson v. Baylies*, 19 Pick. 55, 57; *Shepard v. Palmer*, 6 Conn. 95; *Bullard v. Hascall*, 25 Mich. 132. Negotiable notes received by the defendant are often regarded as money. *Beardsley v. Root*, 11 John. 464, and other cases cited 2 Chitty Contr. (11th Am. ed.) 902, note (e). Real estate may be so regarded for the purposes of this action; *Miller v. Miller*, 7 Pick. 136; or money constructively received. *Emerson v. Baylies*, 19 Pick. 55. Where a party has made himself liable to the plaintiff for money, whether he has actually received it or not, the action for money had and received will lie. *Floyd v. Day*, 3 Mass. 403; *Appleton v. Bancroft*, 10 Met. 237, and other cases cited 2 Chitty Contr. (11th Am. ed.) 903, note (o); *Thompson v. Babcock*, *Brayt*. 24; *Dean v. Mason*, 4 Conn. 428.]

(z) As to this action in general, and the various instances in which it is maintainable, see *Marsh v. Keating*, 1 Bing. N. C. 198. It is an action in which the plaintiff should show a just as well as legal right to the money. See *Moses v. Macfarlen*, 2 Burr. 1012; *Longchamp v. Kenny*, *Dougl.* 188; *Straton v. Rastall*, 2 T. R. 370; *Boyer v. Dodsworth*, 6 T. R. 681; *Johnson v. Johnson*, 3 B. & P. 169; [*Lockwood v. Kelsea*, 41 N. H. 185, 187, 188.] It lies for the recovery of money paid under a mistake of facts; or obtained by fraud or compulsion; or extorted by unjust and oppressive proceedings; or deposited upon an illegal wager, or an illegal contract, not executed; or paid upon a con-

sideration which has wholly failed, &c. See *Ib.*; [2 Chitty Contr. (11th Am. ed.) 898 et seq. and notes.] But it does not lie to recover back money recovered by a judgment. *Marriott v. Hampton*, 7 T. R. 269; *Kist v. Atkinson*, 2 Campb. 63; *Malcolm v. Fullarton*, 2 T. R. 645; *Habberton v. Wakefield*, 4 Campb. 58; [*Walker v. Ames*, 2 Cowen, 428; *Cobb v. Curtis*, 8 John. 470. It lies to recover back money paid on a judgment subsequently reversed. *Sturgess v. Allis*, 10 Wend. 354; *Clark v. Pinney*, 6 Cowen, 287; *Maghee v. Kellogg*, 24 Wend. 36; *Stevens v. Fitch*, 11 Met. 248. So, to recover back money paid on an execution issued on a satisfied judgment. *Wisner v. Bulkley*, 15 Wend. 321.] In *Smith v. Jones*, 1 Dowl. N. S. 526, the court adopted the principle of *Lord Mansfield*, that where money is due *ex æquo et bono*, it may be recovered in an action for money had and received. [*Tindal C. J.* in *Smith v. Jones*, 6 Jur. 283, 284; *Eddy v. Smith*, 13 Wend. 588; *Knapp v. Hobbs*, 50 N. H. 478; *Murphy v. Barron*, 1 H. & Gill, 258; *Guthrie v. Hyatt*, 1 Harring. 447; *Irvine v. Hanlon*, 10 Serg. & R. 219; *Bogart v. Nevins*, 6 Serg. & R. 369; *Allen v. M'Keen*, 1 Sumner, 317; *Hatten v. Robinson*, 4 Blackf. 480; *Wilson v. Sargent*, 12 Ala. 778; *Buell v. Boughton*, 2 Denio, 91; *Hall v. Marston*, 17 Mass. 575, 579; *Claffin v. Godfrey*, 21 Pick. 1, 6; *Hawley v. Sage*, 15 Conn. 52.] In *Calland v. Lloyd*, 6 M. & W. 26, A. having received a sum of money bequeathed to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in the bank in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest, and it was held that the bankers were liable to A. for the amount in an action for money had and received. See, further, as to this action in general, *Selw. N. P.* 10th ed. [The action for money had and received, in its spirit and objects, has been correctly likened to a bill in equity; and it may in general be maintained whenever the evidence shows that the defendant has received or obtained possession of money belonging to the plaintiff, which, in equity and good conscience, he ought to refund to him. It lies only for money which, *ex æquo et bono*, the defendant ought to re-

(a) *Nightingale v. Devisme*, 5 Burr. 2589; *Jones v. Brinley*, 1 East, 1. An administrator is liable to an action for money had and received by the intestate for coal tortiously taken by him from the plaintiff's land, and

sold by the intestate, if he received the money. *Powell v. Rees*, 7 Ad. & El. 426; 2 N. & P. 571.

(b) *Moore v. Pyrke*, 11 East, 52.

the defendant received *foreign* money he would be chargeable upon this count. (c) The common count will also suffice against a party who received country bank-notes expressly as money. (d) Where *goods* or other property improperly received by the defendant are salable, *it may, under circumstances, and after a lapse of time, be *presumed* against him that he has sold the property and received money in return, (e) provided there be reasonable evidence that the defendant converted the same into *money*, (e) but not otherwise. (f) And the assignees of a bankrupt may maintain an action for money had and received against a party who took the *goods* of the bankrupt in execution after a fiat, and then purchased the goods from the sheriff under a bill of sale, although no money actually passed. (g) So, where an insurance broker received credit in account with an underwriter for a loss upon a policy, it was held that his principal might maintain money *had and received* against him, to recover the amount, although he had not actually received it. (h)

This count is sustainable in some cases where *money* has been received *tortiously* or even by the intervention of *forgery*, (i) without any color of contract, (i¹) or under pretence of a contract not performed by the defendant, although, in general, a party is not at liberty to declare in an action in form *ex contractu*, where there has been no contract express or implied. (k) Thus, assignees of a bankrupt may, unless the execution be protected by the 2 & 3 Vict. c. 29,

fund, as for money paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition, express or implied, or an undue advantage taken of the plaintiff's situation. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money. One great benefit which arises to suitors from the nature of the action is, that the plaintiff need not state the special circumstances from which he concludes that, *ex æquo et bono*, the money received by the defendant ought to be deemed as equitably and rightfully belonging to him; he may declare, generally, that the money was received to his use, and make out his case at the trial. This is equally beneficial to the defendant. It is the most favorable way in which he can be sued. He can be liable no further than for the money he has received, and against that he may go into any equitable defence upon the general issue. *Fowler J. in Lockwood v. Kelsea*, 41 N. H. 185, 187, 188.]

(c) *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33, S. C.; but see *M'Lachlan v. Evans*, 1 Young & Jer. 380.

(d) *Pickard v. Bankes*, 13 East, 20; *Spratt v. Hobhouse*, 4 Bing. 178.

(e) *Longchamp v. Kenney*, Dougl. 138; *Leery v. Goodson*, 4 T. R. 687; *Whitwell v.*

Bennett, 3 B. & P. 559; *Israel v. Douglas*, 1 H. Bl. 239; [*Shaw C. J. in Ayers v. Sleeper*, 7 Met. 46; *Burnap v. Partridge*, 3 Vt. 144; *Larrabee v. Ovit*, 4 Vt. 47; *Withers v. Hill*, 9 Serg. & R. 11; *Hess v. Fox*, 10 Wend. 437. So, after the lapse of a reasonable time from the receipt of goods by factors abroad, and a neglect to account for them, the fair presumption is, that the goods have been sold and the money received for them, and an action for money had and received may be maintained. *Eaton v. Welton*, 32 N. H. 352; *Langley v. Sturtevant*, 7 Pick. 214.]

(f) *M'Lachlan v. Evans*, 1 Young & Jer. 380.

(g) *Reed v. James*, 1 Stark. 134.

(h) *Wilkinson v. Clay*, 6 Taunt. 110; *Andrew v. Robinson*, 3 Campb. 199.

(i) *Marsh v. Keating*, 1 Bing. N. C. 198; held that a stockholder, whose stock has been sold without his knowledge under a forged power of attorney, may sustain an action for money had and received against the innocent partners of the forger, who received the proceeds of the sale.

(i¹) [*Ripley v. Gelston*, 9 John. 201; *Clin-ton v. Strong*, 9 John. 370; *Beardslee v. Richardson*, 11 Wend. 25.]

(k) *Ante*, 120; [112, note (s), and cases cited; 2 Chitty Contr. (11th Am. ed.) 905, 906, and notes (d) and (f);] *Snowdon v. Davis*, 1 Taunt. 359.

declare for money had and received against a creditor who has levied his debt by *fi. fa.* after the act of bankruptcy; (*l*) and they may declare in assumpsit for money received from the bankrupt by way of fraudulent preference anterior to the act of bankruptcy. (*m*) And where the defendant having fraudulently induced the plaintiff to sell goods to A., who could not pay for them, and on the nominal resale of those goods by A., in which the defendant was really concerned, having obtained himself the money paid on such resale, it was held that the plaintiff might, in an action for money had and received, recover of the defendant the value of the goods unpaid for by A. (*n*) And where a landlord refused to allow property-tax and distrained and sold for the whole of the rent, and the tenant did not forego his right to deduct the tax, the tenant recovered the amount of the tax in assumpsit * for money had and received. (*o*) But this rule is so far qualified, that the courts will not allow a colorable title to land, &c. to be tried under this form of action, but the plaintiff must declare in tort, (*p*) even though the parties agree to waive the objection to the form of action; (*q*) and where there was no title, and a tenant having paid rent to A., was ejected at the suit of a third person, who afterwards recovered from him mesne profits for the period in respect of which he had paid rent to A., it was held, in an action for money had and received, that the tenant might recover back that rent from A., he not having set up any title to the premises on the trial. (*r*) But assumpsit for money had and received does not lie against a sheriff by a landlord, for neglecting to pay a year's rent before the removal of goods of the tenant taken in execution, according to the statute 8 Ann. c. 14, s. 1. (*s*)

It seems that in general under *this count* the plaintiff must substantiate a claim to some particular or specific sum; (*t*) but if he be legally

(*l*) *Hitchin v. Campbell*, 2 Bl. Rep. 827; 3 Wils. 304, S. C.; *King v. Leith*, 2 T. R. 144; Bul. N. P. 131; *Parker v. Norton*, 6 T. R. 695; *Boyer v. Dodsworth*, 6 T. R. 683; and see *Kidmeads v. Newman*, 1 B. & C. 418.

(*m*) *Thomason v. Frere*, 10 East, 418. See *Hunter v. Prinsep*, 10 East, 378; *ante*, 112. Trover has been thought to be the proper remedy. *Smith v. Hodson*, 4 T. R. 211; *Foxcraft v. Devonshire*, 2 Burr. 932; 1 Bl. Rep. 194, S. C. As to when the defendant's admission, upon his examination before the commissioners, that he had received money from the bankrupt, is insufficient to fix him, see *Tucker v. Barrow*, 7 B. & C. 623; 1 M. & Ry. 518, S. C.

(*n*) *Abbotts v. Barry*, 2 B. & B. 369; *Hills v. Street*, 5 Bing. 37.

(*o*) *Graham v. Tate*, 1 M. & Sel. 609; *Spragg v. Hammond*, 3 B. & B. 59.

(*p*) *Lindon v. Hooper*, Cowp. 419; *Ship-*

wick v. Blanchard, 6 T. R. 298; *Astley v. Reneyolds*, Str. 915; *Phillips v. Hunter*, 2 H. Bl. 408.

(*q*) *Ker v. Osborne*, 9 East, 378, 381; [*Baker v. Howell*, 6 Serg. & R. 181; *Clark v. Smith*, 14 John. 326; *Jennings v. Camp*, 13 John. 96; *Haven v. Foster*, 9 Pick. 112; *Codman v. Jenkins*, 14 Mass. 95; *Boston v. Binney*, 11 Pick. 1; *Kilby v. Chitwood*, 2 Monroe, 104; *Joyce v. Ryan*, 4 Greenl. 101.]

(*r*) *Newsome v. Graham*, 10 B. & C. 234.

(*s*) *Green v. Austin*, 3 Campb. 260; note to *Stuart v. Whitaker*, 3 C. & P. 103.

(*t*) *Harvey v. Archbold*, 3 B. & C. 626; 5 D. & R. 500, S. C.; [*Bates v. Curtis*, 21 Pick. 247; 2 Chitty Contr. (11th Am. ed.) 908.] But where a party, in order to obtain possession of his goods, pays a carrier a larger sum than he is entitled to, and pays it under protest, he may recover the difference in an action for money had and re-

and justly entitled to a certain sum received by the defendant, it is not material that the latter received it in an indirect and circuitous manner; thus, where the holder of a bill of exchange, who held it in trust for the plaintiff, sued the drawer, and pending that suit became bankrupt, and his assignees afterwards brought an action against the drawer in the bankrupt's name, in which action the sheriff having been guilty of an escape on mesne process, the assignees recovered against the sheriff the amount of the bill as damages, it was held that such amount was recoverable by the plaintiff against the assignees as money had and received for the plaintiff's use. (*u*)

In order to maintain money had and received, either the *money* or the *goods* for which the plaintiff claims the proceeds must originally, or at the time of the action brought, *have belonged to the plaintiff*. (*x*) Therefore, if the sheriff, after having seized goods under a *fiery facias* at the suit of A., sell them, though irregularly under another process at the suit and for the benefit of B., an action for money had and received cannot be supported by A. against the sheriff. (*y*) *Mere possession* * of the property, for the proceeds of which wrongfully taken by the defendant plaintiff proceeds, is sufficient against a wrongdoer; (*a*) though a mere *seizure* is not sufficient to render the sheriff liable for money had and received. (*b*) But if the *sale* be under the *plaintiff's* process he may maintain the common count against the sheriff, (*c*) even it seems before the return of the process, (*d*) but the action should not be brought until after a demand of the money has been made. (*e*) In the case of bankruptcy, money had and received lies against the sheriff without actual notice. (*f*)

In general, if money be delivered to a *servant* or clerk, or agent, to be paid over to a third person, being his principal, no action for money had and received, to recover it back, can be sustained against the former, (*f*¹) although he still have the money in his hands, but the principal only, though insolvent, can be sued (unless indeed the prin-

ceived. *Ashmole v. Wainwright*, 2 G. & D. 217.

(*u*) *Randoll v. Bell*, 1 M. & Sel. 714.

(*x*) Per Lord Ellenborough C. J. *Thurston v. Mills*, 16 East, 274; 3 B. & P. 465. If A. remits money to B. to pay C., and B. promises C. to pay it, C. can maintain an action against B. for money had and received, as the money belongs to him. *Lilly v. Hays*, 1 N. & P. 26; 5 Ad. & El. 548, S. C.; *Walker v. Rostron*, 9 M. & W. 411. A sequestrator of a living has not such an interest in the profits as enables him to maintain this action. *Harding v. Hall*, 10 M. & W. 42.

(*y*) *Thurston v. Mills*, 16 East, 254.

(*a*) *Oughton v. Seppings*, 1 B. & Ad. 241.

(*b*) *Thurston v. Mills*, 16 East, 274. See, also, *Atlee v. Backhouse*, 3 M. & W. 633.

(*c*) *Dale v. Birch*, 3 Campb. 347; *Swain v. Morland*, 1 B. & B. 370. See, further, as to this action against the sheriff, *Cook v. Palmer*, 6 B. & C. 739; 9 D. & R. 723, S. C.; *Notley v. Buck*, 8 B. & C. 160; 2 M. & R. 68, S. C.; *Morland v. Pellatt*, 8 B. & C. 722; 3 M. & R. 411, S. C.; *Nelstrop v. Scarisbrick*, 8 Dowl. 746; *Harris v. Lloyd*, 5 M. & W. 432; *Scarfe v. Halifax*, 7 M. & W. 238.

(*d*) *Morland v. Pellatt*, 8 B. & C. 727; 3 M. & R. 418, S. C.

(*e*) *Jefferies v. Sheppard*, 3 B. & Ald. 696; *Swain v. Morland*, 1 B. & B. 380.

(*f*) 8 Bing. 43; but see 2 & 3 Vict. c. 29.

(*f*¹) [*Frye v. Lockwood*, 4 Cowen, 454.]

cipal were a lunatic), (*g*) and there should be a privity of at least implied contract between the plaintiff and the defendant. (*g*) But it lies against an agent of the plaintiff who has received money for a particular purpose, and who by want of due care lost it; and a special count for the negligence is not necessary. (*h*)

In general the *defendant*, or his *agent* or *partner*, (*i*) must have received the money for the *plaintiff's use*, (*i*¹) and if by mutual consent the money has been paid to a stakeholder in trust for the party entitled, the latter, if liable at all, should be made the defendant. (*j*) And if * a party receive money for a principal, and be merely the collector or bearer of the money, and *bond fide pay it over before* notice of the claim of the true owner, the action should be brought against the principal, not the servant. (*k*) As a *chose in action* is not at law assignable, (*l*) if A. receive money for B.'s use, the latter cannot assign the demand to C. so as to enable him in his own name to sue A.: but if in such case A. assent to the transfer, and promise C. to pay him the money, the action may be brought in the name of the latter against A. (*m*) Where A. remitted to B. a bank bill,

(*g*) *Stephens v. Badcock*, 3 B. & Ad. 354, and *Stead v. Thornton*, there cited. See *Calland v. Lloyd*, 6 M. & W. 26, and *infra*, note (*k*).

(*h*) *Barry v. Roberts*, 1 Harr. & Woll. 242. So this is the proper form of action against a party who was authorized by the plaintiff to get a bill discounted and did so, but misapplied a part of the proceeds. *Palmer v. Jarman*, 2 M. & W. 282. But where a party who received a bill payable to order, for the purpose of getting it indorsed for another person, procured the indorsement, and paid in the bill to his own account at his bankers with intent to appropriate the proceeds, and before the bill was due drew on such account, and his draft was honored, it was held that an action for money had and received, brought before the bill became due, could not be supported, the proper remedy being trover. *Atkins v. Owen*, 4 Ad. & El. 819; 4 M. & M. 309, S. C.

(*i*) *Hudson v. Robinson*, 4 M. & Sel. 475; *Marah v. Keating*, 1 Bing. N. C. 198.

(*i*¹) [*Judson v. Esalava*, Minor, 2; *Duchess v. Sisson*, 24 Wend. 387.]

(*j*) *Ker v. Osborne*, 9 East, 378; *Baird v. Robertson*, 1 M. & Gr. 981. Where a horse which the rules of the race excluded from running was entered for a sweepstakes and ran, although objected to, and came in first, it was held that the owner could not recover the subscription he had paid, as money received to his use. *Goldsmith v. Martin*, 4 Scott N. R. 620; *Marryatt v. Broderick*, 2 M. & W. 369. Where money is placed in the hands of a person to be paid over to a third person upon a certain event, that event must have happened and the defendant must

have had notice of it, before this action can be supported. *Wilkinson v. Godefroy*, 3 P. & D. 411; 9 Ad. & El. 538, S. C.; *Sewell v. Raby*, 6 M. & W. 22. But express notice is not required if it was the duty of the defendant to ascertain the facts. *Duncan v. Cafe*, 2 M. & W. 244. Where the defendant assigns to the plaintiff a sum due to the former from a third person, but afterwards receives the amount himself, he may be sued by the plaintiff for money had and received to his use. *Pooley v. Goodwin*, 4 Ad. & El. 94. See, also, *Noy v. Reynolds*, 1 Ad. & El. 159.

(*k*) See the cases Chit. jr. Contr. 3d ed.; *Tope v. Hocking*, 7 B. & C. 101; 9 D. & R. 881, S. C.; *Coles v. Wright*, 4 Taunt. 198; [2 Chitty Contr. (11th Am. ed.) 911, 912; *Garland v. Salem Bank*, 9 Mass. 408; *Fowler v. Shearer*, 7 Mass. 14; *Mowatt v. M'Lellan*, 1 Wend. 173; *Frye v. Lockwood*, 4 Cowen, 454; *Hearsey v. Pruyn*, 7 John. 179; *Dickens v. Jones*, 6 Yerger, 483; *Wharton v. Hudson*, 3 Rawle, 390; *Elliott v. Swartwout*, 10 Peters, 137; *Pool v. Adkisson*, 1 Dana, 117; *Law v. Nunn*, 3 Kelly, 90; *La Farge v. Kneeland*, 7 Cowen, 456.] A solicitor for a vendor who receives a deposit from the purchaser as *agent* for the vendor, is not liable to the purchaser for the amount received if the purchase be not completed. *Bamford v. Shuttleworth*, 11 Ad. & El. 926; *ante*, 40, note (*d*).

(*l*) See *ante*, 17.

(*m*) See *ante*, 54; *Tatlock v. Harris*, 3 T. R. 180; *Fairlie v. Denton*, 8 B. & C. 395; *Williams v. Everett*, 14 East, 587, note (*a*); *Clarke v. Dignam*, 3 M. & W. 478; [2 Chitty Contr. (11th Am. ed.) 912, *et seq.* and notes, 1371 *et seq.* and notes.] Where the defend-

indorsed "pay to the order of B., under provision for my note in favor of C., payable at B.'s house, on &c." and B. received the proceeds of the bill, and refused to pay them over to C., it was decided that B. was not liable to C., as for money had and received, as B. had never assented to hold the bill or money to C.'s use. (n)

This action is frequently brought to recover back a deposit, or money paid upon an agreement, which the defendant omits or refuses to perform. (n¹) As a general rule, it lies to recover a deposit paid on the purchase of an estate, if the title be defective; (o) or the vendor be not prepared to show his title on the day fixed for that purpose between the parties by their agreement; (p) or if neither party be ready, and each make default in performing his part of the agreement. (q) So money paid on account of the purchase of shares in an undertaking which has been abandoned, may be recovered back in this form of action. (r) In these cases there is an entire failure of consideration. So, where some act is to be done by each party under a *special agreement, and the defendant by his neglect prevents the plaintiff from carrying the contract into execution, the latter may recover back money he has paid upon it, as money had and received to his use. (s) As where the plaintiff bought cordwood of the defendant, to be paid for on a certain day, and it was incumbent on the defendant to cut off the boughs and trunks, and then cord it, and for the plaintiff to re-cord it, but the defendant neglected to cut and cord the whole of it in time, it was held that the plaintiff not having

ant, an attorney, received the proceeds of stock, the property of the plaintiff's wife, which he was instructed to secure by settlement, the interest to be paid to the plaintiff's wife for life, with remainder to the plaintiff if he survived her, it was held that the plaintiff had not such an interest in the principal as to entitle him to sue the defendant for money had and received. *Mileham v. Eicke*, 3 M. & W. 407. As to the effect of an order on an agent holding money to pay the plaintiff a debt due to him from the principal, see *Williams v. Everett*, 14 East, 582; *Stewart v. Fry*, 7 Taunt. 339; *Gibson v. Minet*, 1 R. & M. 68; *Fisher v. Miller*, 1 Bing. 150; 8 Moore, 527, S. C.; *Robertson v. Fauntleroy*, 6 Moore, 10; *Chit. jr. Contr.* 3d ed.; *Grant v. Austin*, 3 Price, 58; *Hodgson v. Anderson*, 3 B. & C. 842; 5 D. & R. 735, S. C.; *Williamson v. Thomason*, 16 Ves. 443. As to the power of a party to maintain this action where, having given orders to the defendant to appropriate moneys received on his account in a particular manner, he afterwards countermanded such order, but the defendant, notwithstanding, acted upon the first instructions, see *M'Carthy v. Colvin*, 9 Ad. & El. 607; 1 P. & D. 429, S. C.; *Hutchinson v. Heyworth*, 1 P. & D. 266.

(n) *Wedlake v. Harley*, Cr. & Jerv. 83; *supra*, note (m).

(n¹) [Where a contract is rescinded, this action will lie to recover back any money that has been paid under it. *Moyer v. Shoemaker*, 5 Barb. 319; *Raymond v. Bearnard*, 12 John. 275; *Gillet v. Maynard*, 5 John. 85; *Feay v. De Camp*, 15 Serg. & R. 237; *Danforth v. Dewey*, 3 N. H. 79; *Manahan v. Noyes*, 52 N. H. 232; *Stevens v. Lyford*, 7 N. H. 360; *Luey v. Bundy*, 9 N. H. 298; *Davis v. Marsten*, 5 Mass. 199; *Bradford v. Manly*, 13 Mass. 139; *Martin v. Howil*, 3 Brevard, 547; *Huckson v. Avant*, 2 Brevard, 264; *Richards v. Allen*, 17 Maine, 296. Where more money is realized from collateral security than the amount of the debt, the balance may be recovered as money had and received. *Randall v. Rich*, 11 Mass. 494; *Hant v. Nevers*, 15 Pick. 500.]

(o) *Flureau v. Thornhill*, 2 Bl. Rep. 1078; *Richards v. Barton*, 1 Esp. 268; *Farrer v. Nightingale*, 2 Esp. 639; *Camfield v. Gilbert*, 4 Esp. 221; *Cane v. Baldwin*, 1 Stark R. 65; *Corrall v. Cattell*, 4 M. & W. 734. See, also, *Palmer v. Temple*, 1 P. & D. 379.

(p) *Wilde v. Fort*, 4 Taunt. 334.

(q) *Clarke v. King*, 1 R. & M. 394.

(r) *Nockells v. Crosby*, 3 B. & C. 814; 5 D. & R. 751, S. C.; *Kempson v. Saunders*, 4 Bing. 5.

(s) *Giles v. Edwards*, 7 T. B. 181; *Reed v. Blandford*, 2 Y. & J. 284; and see *Fit v. Casanett*, 12 L. J. B. N. S. C. P. 70.

received any part of the wood might recover back the money he had paid. (t)

Assumpsit for money had and received lies for money paid under an *original ignorance* or a *subsequent forgetfulness* of facts, (u) but not if paid with knowledge of *fact* or means of knowledge readily accessible, (u¹) though under ignorance of *law*. (x)

But the count for money had and received is not maintainable if a *contract has been in part performed*, and the plaintiff has derived some benefit, and by recovering a verdict the parties cannot be placed in the exact situation in which they originally were when the contract was entered into. (y) Thus, where A. agreed, in consideration of a premium, to let a house to B., which A. was to repair and grant a lease of within ten days, but B. was to have immediate possession; and B. paid the premium and *took possession* and retained it after the ten days, although A. omitted to repair and grant the lease; it was held that B. could not by quitting on account of A.'s default, recover back the premium in a count for money had and received, but was bound to declare specially for the breach of the agreement. (z) So where a party sold a patent right, and the vendee paid the money

(t) *Giles v. Edwards*, 7 T. R. 181.

(u) *Lucas v. Worswick*, 1 Mood. & Rob. 293; [*Kelly v. Solari*, 9 M. & W. 54, 55; *Bank of Louisiana v. Ballard*, 7 How. (Miss.) 371; *Norton v. Marden*, 15 Maine, 45; 2 Chitty Contr. (11th Am. ed.) 928 *et seq.* and notes.] It will lie under some circumstances to recover the amount of over insurance of a vessel from the underwriters. *Fisk v. Masterman*, 8 M. & W. 165. So in some cases of illegal or fraudulent executory contracts, this action may be supported to recover back money so paid. *Chappel v. Poles*, 2 M. & W. 867; *Bradshaw v. Bradshaw*, 9 M. & W. 39; *Keable v. Payne*, 3 N. & P. 531. So where obtained by threat or coercion. *Unwin v. Leaper*, 1 M. & Gr. 747; *The Duke de Cadaval v. Collins*, 4 Ad. & El. 858; 6 N. & M. 324, 8 C.

(u¹) [2 Chitty Contr. (11th Am. ed.) 930 *et seq.* and notes; *Tindal C. J.* in *Bell v. Gardiner*, 4 M. & Gr. 11, 24; *Townsend v. Crowdy*, 8 C. B. N. S. 477; *McKinney J.* in *Guild v. Baldridge*, 2 Swan (Tenn.), 295; *Waite v. Leggett*, 8 Cowen, 195; *Boyer v. Pack*, 2 Denio, 107; *Rutherford v. McIlvion*, 21 Ala. 750; *Wheaton v. Olds*, 20 Wend. 174; *Metcalf J.* in *Benson v. Monroe*, 7 Cush. 132; *West v. Houston*, 4 Harring. 170; *Peterborough v. Lancaster*, 14 N. H. 382; *Gooding v. Morgan*, 37 Maine, 419; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Barr v. Vedder*, 3 Wend. 412; *Franklin Bank v. Raymond*, 3 Wend. 69; *Potter v. Everett*, 2 Hill, 252.]

(z) *Bilbie v. Lumley*, 2 East, 469; *Milnes v. Duncan*, 6 B. & C. 677; 9 D. & R. 735,

S. C. per Bayley J.; [2 Chitty Contr. (11th Am. ed.) 934, and cases cited in note (u); *Norton v. Marden*, 15 Maine, 45; *Elliott v. Swartwout*, 10 Peters, 137; *Lee v. Stuart*, 2 Leigh, 76; *Abell v. Douglass*, 4 Denio, 305; *Colwell v. Peden*, 3 Watts, 327; *Ege v. Koontz*, 3 Barr, 109; *Hubbard v. Martin*, 8 Yerger, 498; *Bean v. Jones*, 8 N. H. 149; *Silliman v. Wing*, 7 Hill, 159; *Gooding v. Morgan*, 37 Maine, 419; *Haven v. Foster*, 9 Pick. 112; *Clark v. Dutcher*, 9 Cowen, 674; *Jones v. Watkins*, 1 Stewart, 81; *Dickens v. Jones*, 5 Yerger, 583; *Mayor v. Judah*, 5 Leigh, 305.] This action cannot be supported where a *voluntary* payment has been made with *full knowledge* of the facts. *Wilson v. Ray*, 10 Ad. & El. 82; 2 P. & D. 253, S. C.; [2 Chitty Contr. (11th Am. ed.) 933, *et seq.* and notes; *Benson v. Monroe*, 7 Cush. 125; *Cunningham v. Boston*, 15 Gray, 468; *Gooding v. Morgan*, 37 Maine, 419, 422; *Sprague v. Birdsall*, 2 Cowen, 419.] But it is not necessary that there should be an absence of the *means of knowledge*. *Kelly v. Solari*, 9 M. & W. 54; *Bell v. Gardiner*, 1 Dowl. N. S. 683. See, also, *Pope v. Wray*, 4 M. & W. 451. [There is no conclusive rule of law, that because a party has the means of knowledge he has the knowledge itself. 2 Chitty Contr. (11th Am. ed.) 930; *Tindal C. J.* in *Bell v. Gardiner*, 4 M. & Gr. 11, 24.]

(y) *Hunt v. Silk*, 5 East, 449; *Reed v. Blandford*, 2 Y. & J. 278; [2 Chitty Contr. (11th Am. ed.) 923, 924; *Winchup v. Hughes*, L. R. 6 Q. B. 78.]

(z) *Hunt v. Silk*, 5 East, 449.

and *used the patent right* and enjoyed some benefit *therefrom*, but it afterwards appeared that the patent was invalid, it was held that money had and received could not be sustained, a partial benefit having been received by the defendant. (a) And upon the same principle, where the master and part-owner of a vessel agreed to purchase the moiety of his partner, and having paid the purchase-money * and *received the title-deeds*, which he *deposited* as a security with a third person, and had the *entire possession* of the vessel given up to him, but his partner afterwards refused to execute a bill of sale or refund the money, it was decided that an action for money had and received was not sustainable. (b) Where a special contract is still *open*, and has not been rescinded *by mutual consent*, it is necessary to declare specially: as if a horse, &c. be sold with a warranty of soundness, although it be unsound, and the purchaser *immediately* offer to return it, he cannot recover back the price on the count for money had and received, (b¹) if the vendor refuse to receive back the horse; for the warranty can only be tried upon a special count, (c) unless there was an express stipulation to take back, or unless there was actual fraud; (d) and in such case the count for money had and received is not maintainable, although upon the horse being tendered to the seller he stated that if the horse be unsound he will take it back and return the money; provided he denies the unsoundness, and does not take back the horse. (e) If, however, either by virtue of an *express* stipulation in the original contract, the plaintiff was in a certain event entitled to rescind it, or it has been put an end to by the agreement of both parties, the common count may be supported to recover money paid on the contract. (f)

(a) Taylor v. Hare, 1 New Rep. 260; [2 Chitty Contr. (11th Am. ed.) 924, and cases in note (j).]

(b) Beed v. Blandford, 2 Y. & J. 278.

(b¹) [Londregon v. Crowley, 12 Conn. 563.]

(c) Weston v. Downes, Dougl. 23; Payne v. Whale, 7 East, 274; Fortune v. Lingham, 2 Campb. 416; per Le Blanc J. Cox v. Prence, 3 M. & Sel. 349; [Thornton v. Wynn, 12 Wheat. 183; Ashley v. Reeves, 2 McCord, 432.] As to an action on a bill given for a horse warranted sound, see Lewis v. Cosgrave, 2 Taunt. 2; Moggridge v. Jones, 14 East, 486; Solomon v. Turner, 1 Stark. R. 51; Archer v. Bamford, 3 Stark. 175.

(d) Gompertz v. Denton, 1 Cr. & M. 207; [Kase v. John, 10 Watts, 109; Voorhees v. Earl, 2 Hill, 288; Lightburn v. Cooper, 1 Dana, 273; Cary v. Gruman, 4 Hill, 626; Thornton v. Wynn, 12 Wheat. 193; Allen v. Anderson, 3 Humph. 581; West v. Cutting, 19 Vt. 536; Lyon v. Bertram, 20 How. (U. S.) 149; Withers v. Greene, 9 How. (U. S.) 213; Comstock J. in Muller v. Eno, 4 Kernan, 601; Lattin v. Davis, Hill & Denio, 9, 16; Mayer v. Dwin-

ell, 29 Vt. 289; Day v. Pool, 52 N. Y. 416, 419; Rust v. Eckler, 41 N. Y. 488; Mat-son v. Holt, 45 Vt. 336; Hoadley v. House, 32 Vt. 180; Milton v. Rowland, 11 Ala. 732; Fuentes v. Caballero, 1 La. An. 27; Rogers v. Hanson, 35 Iowa, 284, 286, 287. But, in some states, it is held that a warranty may be treated as a condition subsequent, at the election of the purchaser, who may, upon a breach thereof, rescind the contract, and recover back the amount of the purchase-money, as in cases of fraud. Shaw C. J. in Dorr v. Fisher, 1 Cush. 271, 274; Foster J. in Morse v. Brackett, 98 Mass. 209, and in Boardman v. Spooner, 13 Allen, 361; Hyatt v. Boyle, 5 Gill & J. 121; Franklin v. Long, 7 Gill & J. 407, 419; Taymon v. Mitchell, 1 Md. Ch. 496; Rutter v. Blake, 2 Harr. & J. 353; Marston v. Knight, 29 Maine, 341; Cutler v. Gilbreth, 53 Maine, 176; Kent v. Bornstein, 12 Allen, 342; Perley v. Balch, 23 Pick. 283; Conner v. Henderson, 15 Mass. 319; Kimball v. Cunningham, 4 Mass. 502; Carter v. Walker, 2 Rich. 40; Benj. Sales (1st Am. ed.), § 888, note (a).]

(e) Payne v. Whale, 7 East, 274.

(f) Towers v. Barrett, 1 T. R. 133; Payne

On a single count for money had and received in the common form, various sums received at different times may be recovered. (*g*)

The count must describe the money to have been received to the use of the person or persons who at the time of receipt of the money by the defendant was legally entitled to it. And in an action by a solvent partner and the assignees of another, if the money was received after the bankruptcy, the count must be for money received to the use of the solvent partner and the assignees as such; (*h*) and in an action by an executor, if the money were not received until after the death of the testator, the plaintiff could not recover without a count for money received to his use *as executor*. (*i*) Under the count for money had and received, only the sum received for the plaintiff's use is recoverable, (*i*¹) and if the plaintiff seek to recover *interest or expenses incurred* (as in investigating a title to an estate in cases * where the claim is for the deposit, &c.), other counts must be inserted accordingly; (*j*) unless indeed as to *interest* since the 3 & 4 W. 4, c. 42, sect. 28. (*k*)

The *indebitatus* count "for *interest* due upon the forbearance of moneys due from the defendant to the plaintiff, and by the latter forborne to the former at his request, &c." is very fre-^{Interest.}quently inserted in a declaration in *assumpsit*, especially in actions on bills of exchange and promissory notes. (*k*¹) The rule was, that interest was not recoverable except on those instruments, and a very few other instances, (*l*) unless there has been an express agreement to that effect; or unless such agreement could be collected from the usual course of dealing between the parties in former and similar occa-

v. Whale, 7 East, 275, 276; *Davis v. Street*, 1 C. & P. 18; [*Gillett v. Maynard*, 5 John. 85; *Eames v. Savage*, 14 Mass. 425; *Lyon v. Annable*, 4 Conn. 340; *Hudson v. Swift*, 20 John. 21; *Bradford v. Manly*, 13 Mass. 139; *Conner v. Henderson*, 15 Mass. 319.] Where A. bought horses of B., paying £80, with liberty to return them within a month, allowing B. £10 out of the £80, and with a stipulation that if he kept them beyond the month, he should pay £10 above the £80, it was held that A. on returning the horses within a month, might recover the £70 in an action for money had and received. *Hurst v. Orbell*, 8 Ad. & El. 107.

(*g*) 2 Saund. 118, note (2).

(*h*) *Smith v. Goddard*, 3 B. & P. 465; *post*, vol. ii. 9, 34.

(*i*) *M'Lachlan v. Evans*, 1 You. & J. 380; and see form in 2 Saund. 207, 208. [An administrator, supposing an insolvent estate to be solvent, paid a creditor more than his share; after final settlement, he was held entitled to recover back the amount overpaid in an action for money had and received. Such action was properly brought in his individual character and not as administrator.

Rogers v. Weaner, 5 Ohio, 536; *Walker v. Hüll*, 17 Mass. 380; *Walker v. Bradley*, 3 Pick. 261; *Austin v. Henshaw*, 7 Pick. 46; *Bliss v. Lee*, 17 Pick. 83.]

(*i*¹) [*See Child v. Eureka Powder Works*, 44 N. H. 358; but see *Pease v. Barber*, 3 Caines, 266.]

(*j*) *Walker v. Constable*, 1 B. & P. 306; *Flureau v. Thornhill*, 2 Bl. Rep. 1078; *Camfield v. Gilbert*, 4 Esp. 223; *De Bernales v. Fuller*, 2 Campb. 426. See *Slack v. Lowell*, 3 Tannt. 157.

(*k*) *Post*, 370.

(*k*¹) [This whole subject of interest, how and in what cases allowed, is fully discussed and the cases cited in 2 Chitty Contr. (11th Am. ed.) 950 *et seq.*, and to this the reader is referred. A declaration on a note given out of the country, demanding interest, should aver the rate of interest where the note was given. *Surlott v. Pratt*, 3 A. K. Marsh. 175.]

(*l*) As bonds, *Farquhar v. Morris*, 7 T. R. 124; *Calton v. Bragg*, 15 East, 225; or money awarded to be paid on a named day, if demanded, &c. *Pinhorn v. Tuckington*, 3 Campb. 468.

sons; (*m*) even though the debt was due on a written agreement providing an express or contingent period for payment. (*n*) Thus, in the absence of an agreement to pay interest, it was not recoverable for goods sold, (*o*) work and labor, (*p*) money lent, (*q*) paid, (*r*) had and received, (*s*) or upon an account stated. (*t*) And it seems to have been a rule, that where the demand was of such a nature that the law did not imply a contract for interest, and none was agreed for, it should not be allowed merely because the debt had been wrongfully withheld after the creditor had repeatedly applied for payment. (*u*) This defect in the law encouraged the disposition to delay the payment of just debts and was therefore rectified by 3 & 4 W. 4, c. 42, sect. 28, which enacts, "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, *allow interest* to the creditor at a rate not exceeding the current rate of interest from the time when * such debts or sums certain were payable, (*v*) if such debts or sums be payable by virtue of some *written instrument* at a certain time, or if payable otherwise, then from the time when *demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment*; (*w*) provided that interest shall be payable in all cases in which it is now payable by law."

Sect. 29 enacts, "That the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of *trover or trespass*

(*m*) *De Haveland v. Bowerbank*, 1 Campb. 50; *De Bernales v. Fuller*, 2 Campb. 426; *Walker v. Constable*, 1 B. & P. 307; *Tapenden v. Randall*, 2 B. & P. 472; *Page v. Newman*, 9 B. & C. 381; 4 M. & R. 308, S. C.; *Newel v. Jones*, 4 C. & P. 124. Where a carriage has been sold and delivered by the plaintiff to the defendant, and the defendant wrote to the plaintiff as follows: "The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market, — just what I wished to avoid. The document I have wished to give you, was simply my promissory note, payable to yourself" &c. it was held that this was evidence to go to a jury of an agreement to pay for the goods by a bill or note, and therefore that the jury might give interest on the price as part of the damages. *Davis v. Smyth*, 8 M. & W. 399.

(*n*) *Page v. Newman*, 9 B. & C. 378; 4 M. & R. 305, S. C.

(*o*) *Charlie v. Duke of York*, 6 Esp. 45. Except where a bill was to have been given. *Marshall v. Poole*, 13 East, 98.

(*p*) *Trelawny v. Thomas*, 1 H. Bl. 305; *Blaney v. Hendrick*, 3 Wils. 205.

(*q*) *Page v. Newman*, 9 B. & C. 378; 4 M. & R. 305, S. C.

(*r*) *Carr v. Edwards*, 3 Stark. R. 132.

(*s*) *De Bernales v. Fuller*, 2 Campb. 426; *Walker v. Constable*, 1 B. & P. 307. Not even in action against an auctioneer to recover deposit. See *Lee v. Mann*, 8 Taunt. 45; *Curling v. Shuttleworth*, 6 Bing. 134.

(*t*) *Charlie v. Duke of York*, 6 Esp. 45.

(*u*) *Page v. Newman*, 9 B. & C. 380; 4 M. & R. 308, S. C.; *sed vide Arnott v. Redfern*, 3 Bing. 353; *Milsom v. Hayward*, 9 Price, 134; [*Riley v. Seymour*, 1 Wend. 143.]

(*v*) As to when compound interest is claimable and may be given by a jury, see *Attwood v. Taylor*, 1 M. & Gr. 279; 1 Scott N. R. 611, S. C.

(*w*) And yet in *Pierce v. Fothergill*, 1 Hodges R. 251, it was held that the issuing a writ of summons is a sufficient demand to entitle the plaintiff to interest from that day.

de bonis asportatis, and over and above the money recoverable in all actions on *policies of assurance* made after the passing of this act."

Sect. 80 enacts, "That if any person shall sue out any *writ of error* upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest *shall be allowed* (x) by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof."

In general it was considered that the declaration should be *special* where *damages* for the loss of the use of money are sought to be recovered, and the claim is not *eo nomine* for interest as a debt. Upon a contract for the sale of goods to be paid for by a bill at a certain date, it was holden the price might bear interest from the day when the bill, if it had been given, would have been due, and that the interest might be recovered as damages on a special count for the non-delivery or non-payment of the bill; and that if in such a case upon a general count for goods sold and delivered, the jury should give the price and interest as damages, the court would not on that account set aside the verdict. (y) So where the defendant, who had contracted for goods, was to return them in a year, or otherwise to pay for them *with interest*, and the declaration was only for goods sold, and interest on money forborne, the court would not set aside the verdict, or reduce the damages, although the jury gave interest, which, in strictness, should have been claimed upon a special count. (z) * In each of these cases there was a just claim to interest in the shape of *damages*. (a) The form of the count for interest will be found in the second volume. (b) It may be advisable to insert it where interest may be recoverable; but since the statute 3 & 4 W. 4, c. 42, sect. 28, it may be recoverable in many cases without *expressly* declaring for interest, provided the damages at the conclusion be sufficient to *cover* it.

It is advisable in all declarations in *assumpsit* for the recovery of a money demand (excepting against an infant, Account stated.

(x) The act is imperative. *Levy v. Langridge*, 4 M. & W. 357. By the 1 & 2 Vict. c. 110, s. 17, all judgments carry interest at £4 per cent.

(y) *Slack v. Lowell*, 3 Taunt. 157; *Farr v. Ward*, 3 M. & W. 25; 6 Dowl. 163, S. C. As to when interest on a bill of exchange may be recovered after the principal has been paid, see *Lumley v. Musgrove*, 4 Bing. N. C. 9, and *Same v. Hudson*, 4 Bing. N. C. 15; 5 Scott, 230, S. C.

(z) *Harrison v. Allen*, 2 Bing. 4. Where goods are sold to be paid for by bill, the purchaser not giving the bill is liable for the interest which the bill, if given, would have

carried. *Porter v. Palgrave*, 2 Campb. 472. And being in effect part of the consideration for the sale, this interest may be recovered in an action of debt, or of *indebitatus assumpsit*, for the price of the goods bought after the time when such bills would have become due. *Marshall v. Poole*, 13 East, 98. See, also, *Becher v. Jones*, 2 Campb. 428, note; *Edwards v. Vere*, 5 B. & Ad. 282; 2 Nev. & Man. 120; *Davis v. Smyth*, 8 M. & W. 399.

(a) See *Harrison v. Allen*, 2 Bing. 6, and *Gordon v. Swan*, 12 East, 419.

(b) *Post*, vol. ii. 34.

who cannot in law state an account), to insert *a count on an account stated*. (c) The acknowledgment by the defendant that a certain sum is due, creates an implied promise to pay the amount, and it is not necessary to set forth the *subject-matter* of the original debt; (d) nor is the amount of the sum alleged in the count to be due material; (e) nor is it necessary, in order to support this count, that the defendant's admission should relate to more than one item or transaction, or that there should have been cross dealings or accounts between the parties. (f) The present rule is, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence to support a count upon an account stated. (g) But an account stated is not proper to recover a *single sum* under an express contract, but lies only where an account has been stated with reference to *former* transactions. (h) An attorney's bill cannot be recovered under this count without due proof of delivery of a signed bill. (i) Where arbitrators award a sum of money to be due, it may be recovered * under this count, unless the submission was by bond. (j) But a party can only recover under this count when a certain and precise sum is admitted to be due; (k) and an ac-

(c) *Milward v. Ingram*, 2 Mod. 44; *Trueman v. Hurst*, 1 T. R. 42. An infant cannot state an account except before auditors appointed in a court of record. Per Newton, Sergt. *arguendo*, M. 10, H. 6, fo. 14, pl. 46; but this could only be where the infant was plaintiff, as an action of account does not lie against an infant, Co. Litt. 88 a, even though the items consist of necessities. *Bartlett v. Emery*, 1 T. R. 42, note; *Lugledon v. Douglas*, 2 Stark. N. P. C. 36; *Hedgeley v. Holt*, 4 C. & P. 104; *Harrison v. Fane*, 1 M. & Gr. 551, note. What is evidence of an account stated. See *Peacock v. Harris*, 10 East, 104; *Hall v. Odber*, 11 East, 118, 124; *Knowles v. Michel*, 13 East, 249; *Sinclair v. Charles Philippe Monsieur de France*, 2 B. & P. 363; *Jarret v. Leonard*, 2 M. & Sel. 265; *Leaper v. Tatton*, 16 East, 420; *Clark v. Glennie*, 3 Stark. R. 10; *Evans v. Verity*, 1 R. & M. 239; *Breckon v. Smith*, 1 Ad. & El. 488; *Lubbock v. Tribe*, 3 M. & W. 607; *Barker v. Birt*, 10 M. & W. 61; *Chisman v. Count*, 2 M. & Gr. 307; 2 Scott N. R. 569, S. C. An I O U is a *prima facie* evidence of an account stated. *Douglas v. Holme*, 4 P. & D. 685. Admission of the receipt of money before commissioners of bankrupt on a compulsory examination. *Tucker v. Barrow*, 7 B. & C. 623; 1 M. & Ry. 518, S. C. Not conclusive evidence when, *Trueman v. Hurst*, 1 T. R. 42; *Skyring v. Greenwood*, 4 B. & C. 281; *Shaw v. Picton*, 4 B. & C. 715; *Dawson v. Remnant*, 6 B. & C. 24; *French v. French*, 2 M. & Gr. 644; 3 Scott N. R. 121, S. C.; *Thomas v. Hawkes*, 8 M. & W. 140; 9 Dowl. 801, S. C. As to stamp, *Wellard v. Ross*, 1 Bing. 134; 7

Moore, 503, S. C.; *Wright v. Shawcross*, 2 B. & Ald. 501, note (a).

(d) *Milward v. Ingram*, 2 Mod. 44; *Foster v. Allanson*, 2 T. R. 480; [*Tassey v. Church*, 4 Watts & S. 141; *Fitch v. Leitch*, 11 Leigh, 471; 2 Chitty Contr. (11th Am. ed.) 961 *et seq.*; *Montgomery v. Ives*, 17 John. 38; *Hoyt v. Wilkinson*, 10 Pick. 31. Assumpsit lies for a balance struck and promised to be paid, although the account may embrace specialties with other securities. *Gilson v. Stewart*, 7 Watts. 100.]

(e) *Rolls v. Barnes*, 1 Bl. Rep. 65; *Roades v. Barnes*, 1 Burr. 9.

(f) *Knowles v. Michel*, 13 East, 249; *Highmore v. Primrose*, 5 M. & Sel. 65; 2 Saund. 122, note (b), 5th ed.; *Finch v. Chilcot*, 3 C. & P. 236.

(g) Per Parke B. and Alderson B. *Porter v. Cooper*, 4 Tyr. 264, 265; 1 Cr. M. & R. 387, S. C.

(h) *Clarke v. Webb*, 2 Dowl. 671; 1 Cr., M. & R. 29, S. C.; and see *Allen v. Crop*, 2 Dowl. 546; or when it lies, *Eicke v. Nokes*, 3 C. & P. 170; 1 Mod. & R. 359, S. C.

(i) See preceding note.

(j) *Keen v. Batshore*, 1 Esp. 195; *Tidd*, 9th ed. 834; *Kingston v. Phelps*, Peake N. P. R. 327; *Pearson v. Henry*, 5 T. R. 6; but see *Bailey v. Lechmere*, 1 Esp. 377; [*Bates v. Curtis*, 21 Pick. 247.]

(k) *Teal v. Anty*, 4 Moore, 542; *Knowles v. Michel*, 13 East, 249. In order to constitute an account stated, there must be a statement of some certain amount of money being due; and it must be made either to the party himself or to some agent of his. Per Parke B. in *Hughes v. Thorpe*, 5 M. & W.

knowledge of a debt, but without naming or referring to a sum certain, does not enable a plaintiff to recover on this count even nominal damages: (*l*) and where a debt is actually in existence, (*m*) and a *prior* transaction. (*n*) But it may be shown by other evidence than the defendant's admission, that the sum to which he referred was of a precise and stipulated amount. (*o*) An admission by the defendant in a conversation with a *third person* that he was indebted to the plaintiff in a named sum, is not evidence of an account stated, unless the third person was the plaintiff's agent. (*p*) In an action by an *executor*, evidence that the defendant, on being applied to for payment of interest, stated he would bring him some on a certain day, is insufficient to support an account stated; there being no acknowledgment of any precise debt of a given character, or anything to show in what capacity the plaintiff was entitled. (*q*) And it seems that the admission should be clear and unqualified. (*r*)

If an account be stated and agreed of what is due for *growing* crops not previously severed, it is a valid plea that there was no contract *in writing* signed, so as to take the case out of the statute against frauds, 29 Car. 2, c. 3, s. 4; but if the account were stated after the severance, that fact might be replied. (*s*)

In framing the pleading rules of Hil. Term, 4 W. 4, it was considered that in assumpsit and debt on simple contract it is just that the plaintiff should be at liberty to proceed as well for the original debt as also upon any admission that it is due, and therefore the rule expressly *provides*, "that a count for money due on an account stated *may be* joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts." But as Reg. Gen. Hil. T. 2 W. 4, subjects a plaintiff to the payment of costs upon every *issue* * which he does not establish in evidence, this count should not be added unless there be strong ground for expecting that it will be proved by evidence.

When a count upon an account stated should or not be added.

We have seen that in actions by or against executors, where six

667. In an action by payee against acceptor of a bill of exchange, drawn by a third person, the defendant paid £10 into court on the money counts; nothing more was due on the bill, and there had not been any other account or transaction between the plaintiff and the defendant; it was holden that the payment so made was an answer to the whole action, and that the plaintiff could not recover nominal damages on the special count on the bill. *Early v. Bowman*, 1 B. & Ad. 389.

(*l*) *Bernasconi v. Anderson, Mood. & Malk.* 183.

(*m*) *Whitehead v. Howard*, 5 Moore, 114—

116; or a moral obligation, *Seagoe v. Dean*, 3 C. & P. 170.

(*n*) *Clarke v. Webb*, 1 Cr., M. & R. 29.

(*o*) *Whitehead v. Howard*, 5 Moore, 114; *Dixon v. Deveridge*, 2 C. & P. 109.

(*p*) *Breckon v. Smith*, 1 Ad. & El. 488. See *Rugby v. Jeffreys*, 7 Dowl. 561.

(*q*) *Green v. Davies*, 4 B. & C. 235.

(*r*) *Evans v. Verity*, 1 R. & M. 239. See *Calvert v. Baker*, 4 M. & W. 417. An admission is evidence, although it refers to the matter of a written agreement. *Newhall v. Holl*, 6 M. & W. 662.

(*s*) *Earl Falmouth v. Thomas*, 3 Tyr. 26.

years have elapsed since the death of the testator, or if it other account material for the plaintiff to avail himself of a promise or acknowledgment by the defendant since it may be necessary to add all or one of the common counts on promises to or by the executor in that character, otherwise such promises or *acknowledgment* cannot be proved in evidence; (t) and this set of counts usually forms a common breach at the end of the first set of counts. (u) A necessity may arise in actions by the *assignees of a bankrupt* in an action against A., B. and C., the husband of B., in order to put in evidence a promise by A. and B. before the marriage of B. to take the case out of the statute, a count on such promise after marriage must be added. (x) In general, however, where there has been an absolute promise or acknowledgment to the original plaintiff within six years, so as to take the case out of the statute, the pleadings, it suffices to declare upon the original contract. (y) In an action brought at the suit of a surviving partner in *indebitatus*, every count should *technically* state the death of the deceased partner; (y¹) if the death be averred in the first count it will suffice, and a count in respect of an omission in a *subsequent count* has been held to be frivolous. (z)

Common counts in actions by and against persons suing or being sued in particular rights or characters.

The statement of a *breach of a special contract* stated in *assumpsit* has already been considered. (a) The Reg. Gen. Trin. T. 4, prescribed a more concise form of stating the *breach* than the more common *indebitatus* counts than had heretofore been adopted, and which should be pursued as an admirable mode. Even in assigning this breach by non-payment of the common counts it is advisable to admit in the aggregate all payments made by the defendant on account, so as to avoid the expense of a plea in abatement. (c) In an action by assignees in that character, a breach by the defendant did not pay the plaintiffs, without alleging as

The breach of the common counts.

(t) *Ante*, 226; *M'Lachlan v. Evans*, 1 Y. & J. 380; [*Bishop v. Harrison*, 2 Leigh, 532;] and see form, 2 Saund. 207, 208.

(u) See the forms, *post*, vol. ii. 27 *et seq.*; and see an old form, 2 Saund. 207, 208.

(x) *Pittam v. Foster*, 1 B. & C. 248; 2 D. & R. 363, S. C.

(y) *Ante*, 316; *Haydon v. Williams*, 7 Bing. 163; [*Oliver v. Gray*, 1 H. & Gill, 204; *Betton v. Cutts*, 11 N. H. 170, 179; *Ilsley v. Jewett*, 3 Met. 445; *Angell Limitations*, § 288; *Guy v. Tams*, 6 Gill, 82; 2 Chitty Contr. (11th Am. ed.) 1261 *et seq.* and notes; *Humphreys v. Jones*, 14 M. & W. 1. The declaration for the debt of a bankrupt or insolvent debtor, which has been renewed by a new promise, may be on the original demand. *Maxim v. Morse*, 8 Mass. 127; *Shippey v. Henderson*, 14 John. 178.]

(y¹) [*Collyer Partn.* § 674. It is not necessary in actions against partners. *Collyer Partn.* § 744. *Bank of Columbia*, 1 H. & Gill, 204; *v. M'Kinstry*, 1 John. Cas. 40; *Shurter*, 1 Wend. 151. Where a partner is in the name of one as surviving partner, it necessarily implies the death of the other partner, though not averred. *Chambers*, 7 B. Mon. 595.]

(z) *Undersell v. Fuller*, 5 Ty. M. & R. 900, S. C.

(a) *Ante*, 341.

(b) See form, *post*, vol. ii. 33. An averment of a request, and a refusal, is sufficient for any number of counts. *Rider v. Robbins*, 13 M. & W. 100.

(c) *Ante*, 348; and see form, *post*, vol. ii. 36, 37.

is sufficient on special demurrer, and indeed proper and preferable. (d)

* We have already considered *when* the action of *debt* may be supported. (e) In *framing* the declaration in this action, the *general* requisites and qualities of all declarations, which IN DEBT. have already been pointed out, must be observed. (f) The *particular* parts may be considered under the same arrangement as in *assumpsit*; (g) and most of the rules to be observed in framing declarations in that form of action equally govern in the action of *debt*, and therefore it will only be necessary to point out the distinctions.

The title of the *court*, and the *actual date* of the day of delivering or filing the declaration, and the *venue*, have already been considered. (h) The *commencement* of the declaration, preceding the statement of the cause of action, is similar to that in *assumpsit*, (i) except in the description of the form of action, when that is stated, and even that description may be omitted. (k) In an action on a specialty, the party should be declared against in the name by which he signed the deed. (l) The debt demanded, if unnecessarily stated in the commencement, should regularly be the aggregate of all the sums alleged to be due in the different counts; (l¹) but a mistake in this respect, whether more or less be stated, will not be a cause of demurrer; nor is it necessary to prove that the debt amounted precisely to the sum alleged to be due. (m) In general, the declaration should be in the *debet* and *detinet*; (n) but upon the principle that a man may complain of only a part of his grievance, and not of the whole, the plaintiff may abridge his demand and declare in the *detinet* only, instead of the *debet* and *detinet*. (o) And in an action by and against executors and administrators, the declaration should technically be in the *detinet* only; (o¹) except in an action upon a judgment recovered against an executor suggesting a *devastavit*, when the *debet* and *detinet* is proper; (p) and the defendant cannot in such action

Title of court, term, venue, and commencement.

(d) *Cobbett v. Cochrane*, 8 Bing. 17.

(e) *Ante*, 121-129.

(f) *Ante*, 264-276.

(g) *Ante*, 295-349.

(h) *Ante*, 278-291.

(i) *Ante*, 291, 292. See the form, *post*, vol. ii. 5.

(k) 11 East, 62; *Straghan v. Buckle*, 1 Harr. & Woll. 519.

(l) *Semble contra*, if described in the body of the instrument by a different name. See *ante*, 265.

(l¹) [*People v. Van Eps*, 4 Wend. 387.]

(m) *Ante*, 128. See the form *post*, vol. ii. 27; 11 East, 62; [*White v. Walker*, 1 Monroe, 34; *Hampton v. Barr*, 3 Dana, 578. The pleadings in debt must show a certain

sum due, with sufficient precision and consistency to enable the court to render judgment final thereon on demurrer. *M'Kenzie Conner*, 1 Stewart, 162.]

(n) Com. Dig. Pleader, 2 W. 8; Bac. Abr. Debt, F. [Omissions of the *debet* and *detinet* in a declaration in debt, is had on special demurrer. *Adams v. Campbell*, 4 Vt. 447. See *Waller v. Ellis*, 2 Munf. 88.]

(o) Per *Ld. Ellenborough C. J.* *Wilson v. Hobday*, 4 M. & Sel. 125; [*Bailey v. Beckwith*, 7 Leigh, 604.]

(o¹) [*Childress v. Emory*, 8 Wheat. 642, 671.]

(p) *Post*, vol. ii. 27, Obs.; Rol. Abr. 603, Bac. Abr. Debt, F.; *Hope v. Bagne*, 8

plead *plene administravit*. (q) But a declaration in the *detinet* against an executor is not subject to a special demurrer. The former will be rejected as surplusage. (r) An heir should be in the *debet* and *detinet*, but the omission of the *debet* will be no ground of verdict. (s)

The mode of stating the *cause of action* varies, as in a declaration according to the nature of the contract or matter declared upon. On simple contract, which, * we have seen, may be a simple contract, a special contract, a record, or a statute. (r) In debt on *simple contract*, expressed, to pay money in consideration of a precedent debt or of a *subject-matter* of the debt is to be described precisely as in the common counts in assumpsit; (s) but in point of *form* the *indebitatus* count in debt differs from those in assumpsit; for although the *indebitatus* count states that the defendant, on, &c. "was indebted to the plaintiff" in a named sum of money "for goods sold," precisely as in assumpsit; and it is not necessary to set forth the nature or particulars of the debt with more precision than in that action; (t) in this *indebitatus* count, no *promise* should be stated as in assumpsit, and although it has been usual to conclude each count with an allegation, that, "by reason of the said sum of money being due to the plaintiff, the action had accrued to the plaintiff to demand and have the same of the defendant, being parcel of the money above demanded," this allegation is unnecessary, and the usual breach at the end of the declaration will suffice; (v) and the distinction is stated to be made whenever the debt arises merely by the judgment or obligation, and not from anything *dehors*, a non-performance of the condition is to be laid, and the conclusion is to be with the breach *ad id* demanded; but that where the debt arises, not by the obligation alone, but by some matter *dehors* stated in the declaration, there the declaration should conclude *per quod actio accrevit*, &c. as in debt on a contract for rent. (x) The *quantum meruit* and *quantum valebant* counts were formerly adopted, but which always seemed to be unnecessary and injudicious, (y) resembled those in assumpsit, except that the words "agreed to pay" should be inserted, instead of "promised to pay," and that such counts in general conclude with the same as those in assumpsit.

East, 2; Com. Dig. Pleader, 2 W. 8; [Childress v. Emory, 8 Wheat. 642.]

(q) Skelton v. Hawling, 1 Wils. 258; [Spotswood v. Price, 3 Hen. & M. 123.]

(r) Gardner v. Bowman, 4 Tyr. 412.

(s) Com. Dig. Slander; Hope v. Bague, 3 East, 2; 2 Saund. 7, note (4).

(t) Ante, 121-125.

(u) See the cases, Com. Dig. Pleader, 2 W. 11.

(v) Emery v. Fell, 2 T. R. 28; post, vol. ii. 27, 33, 34.

(u) Ib.; Palmer v. Stavely, 12 B. & Ald. 208; Brill v. Neale, 3 B. & Ald. 208; Smith, 2 Smith's Rep. 618; Young, 2 B. & P. 78; [Metcalf v. McLean, 363.]

(v) Post, vol. ii. 27, Obs. Gill v. Gilb. Debt, 415.

(y) Ante, 121, note (q).

(z) Supra, note (u); [McGinnis v. Guerenne, 10 Ill. 101; Cruikshank v. Metcalf, 10 Ill. 75; Metcalf v. Robinson, 363.]

per quod actio accrevit, &c. as the *indebitatus* count. (a) And it has been held that the words "*undertook and agreed to pay*," in a *quantum meruit* count, do not necessarily import the form of action to be in *assumpsit*, but are good in *debt*. (b) The Reg. Gen. Trin. T. 1 W. 4, although it does not prescribe any form in *debt*, yet directs that declarations on bills and notes, and for common debts, shall be drawn *as concisely in debt as in assumpsit*, and that no costs for any extra length shall be allowed, and as the same rule impliedly abolishes a ** quantum meruit* or *valebant* count in *assumpsit*, so those forms are impliedly abolished in *debt*. (c)

The mode of framing a declaration in *debt* on *legal liabilities*, on *awards*, &c. is shown in the second volume. (d) *Debt* lies on a special contract to pay *money*, and if such contract be specially declared upon, and be not under seal, so that a consideration is necessary, the declaration should show such consideration, and may in general be framed like a declaration in *assumpsit*, with this exception, that it must be alleged that the defendant *agreed*, not that he *promised* to pay. (e)

In *debt* upon a *specialty*, the declaration usually proceeds at once to the statement of the *specialty*, without any inducement or statement of the consideration upon which the contract was founded; (f) for in general, the circumstances under which the deed was made are immaterial, and a consideration is seldom essential. (g) It is principally in this respect that the declaration on *debt* or covenant on a *specialty* differs from that in *assumpsit*. Thus in *debt* upon a bond, the declaration states, "that the defendant, on &c. by his certain writing obligatory, sealed with his seal, and now shown to the court here, acknowledged himself to be held and firmly bound to the plaintiff in the sum of £——, to be paid to the plaintiff," and

(a) *Post*, vol. ii. 33–35; *Gilb. Debt*, 414; [*Payne v. Smith*, 12 N. H. 34.]

(b) *Gardner v. Bowman*, 4 Tyr. 412, citing *Ninarn v. Bland*, 3 Smith, 114. So it has been held that a count by the payee against the acceptor of a bill of exchange, in the form given by the rule of T. T. 1 W. 4, may be joined with *indebitatus* counts in *debt*, the declaration concluding in the usual form in *debt*. *Compton v. Taylor*, 4 M. & W. 138. See, also, *Cloves v. Williams*, 3 Bing. N. C. 868.

(c) See the rule and prescribed form, *post*, vol. ii. 27, 33; and the forms in *debt*, *post*, vol. ii. 27, &c.

(d) *Post*, vol. ii. 965, &c. and notes; *ante*, 121. See, also, *Com. Dig. Pleading*, 2, W. 11. [See *Jacob v. United States*, 1 Brock. 520.]

(e) See *ante*, 128; but see note (b), *ante*, 375; and as to variances in stating the con-

sideration and contract, see *ante*, 299 and 312; [*Metcalf v. Robinson*, 2 McLean, 363. Where, in an action of *debt*, two several sums are demanded as due and owing in separate counts, *e. g.* six hundred dollars in each, the declaration should, in the commencement, demand the aggregate amount; the first count should demand six hundred dollars, &c. parcel, and the second count should be for six hundred dollars, the residue, &c. *People v. Van Epps*, 4 Wend. 387. See the second count, in *Seymour v. Harvey*, 8 Conn. 65.]

(f) See the cases, *Com. Dig. Pleading*, 2 W. 9.

(g) *Sharlington v. Strotton*, *Plowd.* 306; *Fallowes v. Taylor*, 7 T. R. 477; *Bunn v. Guy*, 4 East, 200; 1 *Fonbl.* 347; *post*, 380 [See *Vrooman v. Phelps*, 2 John. 177; *Dorlan v. Sammis*, 2 John. 177, note; *Dorr v. Munsell*, 13 John. 430.]

then states the breach by the non-payment of that sum. (*g*¹) debt, or covenant upon a lease by the *lessor against the lessee* it is not necessary to set forth the lessor's title to the lands demised in the declaration merely alleges "that the plaintiff, on &c. by the indenture made between him and the defendant, and under the defendant's seal, and of which the plaintiff makes a profert, &c. &c.;" (*h*) and in this case, if the title be unnecessarily set forth, an imperfect statement of it may not be fatal on error. (*i*)

Inducements, however, are sometimes necessary, and in the statement of them the preceding rules and observations apply. A statement of inducements in *assumpsit* will be here necessary. (*k*) In an action on a lease at the suit of the assignee of the reversion, or of the heir of the lessor, or by an executor or administrator, for rent which became due after the death of the testator, the declaration must state the title of the lessor to the demised premises in order that it may appear that he had *such* an estate in the premises as might be legally vested *in the plaintiff in the character of assignee, as he sues, and legally entitle him to recover the damages claimed in respect of the breaches of covenant; (*l*) and this even where the title of the plaintiff is derived from the queen or a corporation; such inducement is specially traversable. (*n*) Even if the omission to state the lessor's title in an action by a reversioner be not a ground of verdict, (*o*) yet after verdict, in covenant by a devisee in fee, it is material to mention that the testator, the lessor, was *seised* and died *seised* (showing of what *particular* estate in the premises), is sufficient. Such title is usually shown by way of *inducement* preceding the statement of the lease; as when the action is at the suit of an assignee alleging that the lessor was seised of the premises in his demised estate of fee; (*q*) or when the estate demised is copyhold, by showing the fact, and that the lessor was seised at the will of the lord, according to the custom of the manor; (*r*) or where the plaintiff is an assignee of a term, or as executor of the lessor for rent, &c. due at his death, by stating that the lessor, at the time of making the

(*g*¹) [See Genl. Sts. Mass. c. 129, § 2, pt. 10, Form, § 87.]

(*h*) *Aleberry v. Walby*, 1 Stra. 230, 231; 1 Saund. 233 *a*, note (2).

(*i*) *Aleberry v. Walby*, 1 Stra. 230, 231. *Quære*, if traversed by defendant, *vide infra*; [*Backus v. Taylor*, 6 Munf. 488.]

(*k*) *Ante*, 296-299.

(*l*) 1 Saund. 233, note (2); *Aleberry v. Walby*, 1 Stra. 230; *Parker v. Manning*, 7 T. R. 538; Com. Dig. Pleader, C. 36; Gilb. Debt, 410; Dyer, 365 *b*; *Carvick v. Blagrave*, 4 Moore, 303; 1 B. & B. 531, S. C.; *Doe v. Whitroe*, 1 D. & Ry. N. P. 1; *Harris v. Beavan*, 1 M. & P. 633. If the plaintiff in an action of debt alleges in his declaration that the whole of the interest of the lessee

came to the defendant by assignment, the defendant traverses the allegation, and it is a fatal variance if it appears in evidence that the defendant was assignee of the term. (*Curis v. Spitty*, 1 Bing. N. C. 75.)

(*m*) 1 Saund. 187, note (1).

(*n*) *Carvick v. Blagrave*, 4 Moore, B. & B. 531, S. C.

(*o*) See *Willot v. Boscomb*, 11 Vin. Abr. Title, D. 16; *Lewis v. Show*, 71; *Harris v. Beavan*, 1 M. & P. 642.

(*p*) *Harris v. Beavan*, 1 M. & P. 646, S. C.

(*q*) 2 Saund. 361, 416.

(*r*) *Post*, vol. ii. 276, 277.

was possessed of the demised premises for the residue of a certain term of years, &c. (s) As, however, the lessor's title in the action upon the lease by the owner of the reversion is only inducement, it is not necessary to show its *origin* or commencement, although the lessor had not a title in fee-simple; but had only a *particular* estate, that is, an estate less than a seisin in fee-simple, as an estate tail, or for life, or years, &c. Thus if the lessor held for a term of years, and the plaintiff sue as his executor or assignee of the reversion therein, it is not necessary to deduce the title thereto from the freeholder; it suffices to show the term which the lessor had, and to deduce the title from him. (t) This is an exception to the general rule, that the *commencement* of particular estates must be shown in pleading. (u) In these cases the lessee and his assignee, being estopped by the deed from denying the lessor's title *generally*, cannot plead *nil habuit*, or traverse the entire inducement; but admitting by his plea that the lessor had *some* legal interest in the premises, he may show that he was entitled to a *different* estate, and thereby in effect traverse the *derivative* title stated in the declaration. (y) * The form of declaring against an heir is pointed out in the second volume. (z)

The *time* of making the contract should be stated as in *assumpsit*, and it must appear and be expressly shown, when a specialty is the gist of the action, that such *contract* was by *deed*; except in debt for rent on a demise, which is perhaps almost the only instance where a deed may be adduced in evidence in support of a count not mentioning it. (a) It must also appear that the contract was under *seal*; (a¹) but there are some technical words, such as *indenture*, *deed*, or *writing obligatory*, which of themselves import that the instrument was sealed, and which will suffice; (b) and the omission of the statement that the instrument was under seal will be aided, if the defendant by his plea admit that the writing was sealed. (c) The *delivery* of the deed, though essential to its validity,

Time of making specialty and other requisite allegations.

(s) *Post*, vol. ii. 198; *Carvick v. Blagrove*, 4 Moore, 303; 1 B. & B. 531, S. C.; *Parker v. Manning*, 7 T. R. 538. See the various modes of stating different titles and the nature of the estate, and how acquired, *post*, vol. ii. 197 *et seq.*

(t) See *Com. Dig. Pleading*, E. 19, C. 43; *post*, vol. ii. 198; *Steph.* 5th ed. 346.

(u) *Ib.* *Ibid.*; *Co. Litt.* 303 b; 1 Saund. 186 d, note (1).

(y) *Parker v. Manning*, 7 T. R. 538, 539. See *Carvick v. Blagrove*, 4 Moore, 303; *Doe v. Whitroe*, 1 D. & Ry. N. P. C. 1; *Alchorn v. Gomme*, 2 Bing. 54; 9 Moore, 130, S. C.; *Pope v. Biggs*, 9 B. & C. 254; 4 M. & Ry. 301, S. C.; *Seymour v. Franco*, 7 Law Journal, 18, K. B.; and *Whitton v. Peacock*, in C. P. 3d June, 1835; *Shearman, attorney.*

(z) Page 144, and see *ante*, 60.

(a) *Atty v. Parish*, 1 New Rep. 104, 109; 1 Saund. 276 a, note (1), (2); 202, 211; 2 Saund. 297, note (1). See, however, *Tilsen v. The Warwick Gas Light Company*, 4 B. & C. 962, 968.

(a¹) [*Van Santwood v. Sandford*, 12 John. 197. As to the law respecting seals, see *Warren v. Lynch*, 5 John. 239, 247, note (b); *Commonwealth v. Griffith*, 2 Pick. (2d ed.) 17, 18, in note.]

(b) 1 Saund. 291, note (1), 320, note (3); *Com. Dig. Fait*; *Platt on Cov.* 6; [*Van Santwood v. Sandford*, 12 John. 197; *Lee v. Adkins, Minor*, 187.]

(c) *Ib.*; *Moore v. Jones*, 2 Lord Raym. 1536, 1541; *Courtney v. Greenville*, Cro. Car. 209.

need not be stated in pleading; (d) and though dated on a day, a deed may be stated in pleading to have been made on a day. (e)

It is a general rule that in all pleadings, whether by a plaintiff or defendant, if a deed be alleged, and the party claim the deed, or deny it, or *profert* under it, and is presumed to have the deed in his possession, he must make a *profert* of the deed, (e¹) that is, must declare that he brings it into court to be shown to the court and jury; the import and practical meaning of which is, that the deed itself is ready to give the opponent *oyer* thereof. (f)

The *profert in curiam* of the deed, or the excuse for the non-production, usually follows the statement of the time of making the deed.

(d) 1 Saund. 291, note (1).

(e) Hall v. Cazenove, 4 East, 477; Anonymous, 3 Salk. 120.

(e¹) [Bender v. Sampson, 11 Mass. 42; Scott v. Curd, Hardin, 64. It is not necessary to make *profert* of a writing not under seal. Mason v. Buckmaster, Breese, 9; Hinsdale v. Miles, 5 Conn. 381. *Profert* need not be made of a deed in the possession of the adverse party. Barbour v. Archer, 3 Bibb, 8; Francis v. Hazlerig, 1 A. K. Marsh. 93.]

(f) As to *proferts* in general, see Com. Dig. Pleader, O. P.; 1 Saund. 9, note (1); 10 Co. 92 b; Master v. Miller, 4 T. R. 338; Steph. 5th ed. 482; [Paddock v. Higgins, 2 Root, 482; Respublica v. Coates, 1 Yeates, 2; Kellogg v. Riggs, 2 Root, 126;] as to *oyer, post*, chap. v. s. 3; and as to compelling a party to give a copy of an instrument not under seal, Tidd, 9th ed. 590. A surety may plead a release to his principal without making *profert* of the deed; Bain v. Cooper, 1 Dowl. N. S. 11; 8 M. & W. 751, S. C.; and in an action on a money bond, where the defendant pleaded the bankruptcy of the plaintiff, and the plaintiff replied that he, by indenture before his bankruptcy, assigned the bond to G. and E. as a security for a larger debt, and that the action was prosecuted for their benefit, it was holden that no *profert* of the indenture was necessary. Dangerfield v. Thomas, 9 Ad. & El. 292; 1 P. & D. 287, S. C. [In Indiana, when a pleading is founded on a written instrument, the original, or a copy thereof, must be actually filed with the pleading; alleging it to be filed is not enough. Brown v. State, 44 Ind. 222, and cases cited; King v. Enterprise Ins. Co. 45 Ind. 43; Conwell v. Clifford, 45 Ind. 392; Nill v. Brooks, 21 Ind. 178; Reveal v. Conner, 21 Ind. 289; Peoria &c. v. Walser, 22 Ind. 73. A judgment is not a "written instrument" within the meaning of this provision. Wyant v. Wyant, 38 Ind. 48; Lytle v. Lytle, 37 Ind. 281. In Massachusetts all written instruments, except policies of insurance, shall be declared on, by setting out a copy, or such part as is relied on, or the legal effect thereof, with proper averments to

describe the cause of action. The contract is not set out, a copy or a copy of the legal effect thereof, as the court may direct, shall be set out, to the knowledge of the adverse party. When necessary the copy so filed shall be produced, so order, be part of the record, and shall be granted of a deed declared on, to the common law. No *profert* thereof need be inserted in the declaration. Genl. Sts. c. 129, § 2, div. 9. Thomas, 103 Mass. 44; Burnham v. Thomas, 103 Mass. 379; Lincoln v. Buttrick, 129; Osgood v. Pearsons, 4 Troy v. Greenfield R. R. Co. 1 Gray, 544. It is sufficient, under the requirement in Massachusetts, that the declaration sets forth the legal effect of the instrument with proper averments, without excuse for not setting out a copy. Bank v. Lowell Bank, 8 Allen 292. The above act does not require the production for malicious prosecution, of the whole or any part of the proceedings in the prosecution should be set forth, nor the legal effect thereof stated in the declaration. Bernard v. Cafferty, 129. If the instrument or document is lost or destroyed, or is not in the possession of the party who relies on it, he shall set out the substance of it as nearly as he can, and the reason why a copy is not given. Genl. Sts. c. 129, § 2, div. 9. In New York, when an action or defence is founded on a written instrument, a copy thereof shall be annexed and referred to as part of the pleading. Fairbanks v. Bloomfield, 129. In such case the recital of facts in the declaration becomes part of the complaint. Heath, 4 E. D. Smith, 95; Morgan, 5 N. Y. 422; S. C. 4; Kellogg v. Baker, 15 Abb. Pr. 292. A pleading upon an instrument in a foreign language is sufficient if it gives a translation of it would be better practice to do so. Nouray v. Dubosty, 12 Cal. 73; Iowa, Vannice v. Granger, 262.]

the parties thereto, and precedes the statement of the defendant's contract. Such proferit is usually in the following words: "Which said writing obligatory (or "indenture" or "articles of agreement"), sealed with the seal of the defendant, the plaintiff now *brings here* *into court, the date whereof is the day and year aforesaid." (g) The *excuse* for the omission of a proferit being traversable must be stated according to the fact; as, either that "the deed has been lost," or "destroyed," "by accident," or "that it is in the possession of the defendant," and that, "therefore the plaintiff cannot produce the same to the court." (h) But in declaring upon a bill of exchange or other *simple* contract, no proferit is to be made. (h¹) So, when a conveyance operates under the statute of uses, as a lease and release, or a covenant to stand seised to uses, it has been considered that a proferit is unnecessary; (i) the reason assigned is, that the party in such case obtains his title, not in virtue of the intrinsic effect of the deed itself, but by the operation of the statute, and is said to be *in by the law*; as tenant in dower by elegit, or statute staple, in which case a proferit need not be stated. (k) Nor is a proferit necessary where the party, though he relies on a deed, is not by the form of his pleading compelled to state or allude to it in his pleading, as in the case of a feoffment; and the statute against frauds, which requires that the delivery should be accompanied by some instrument in writing, has not altered the form of pleading. (l) So, when a deed is stated only as inducement; (m) or where the plaintiff has no right to the possession of it, or of the counterpart, (n) a proferit is unnecessary; and it has been

(g) *Post*, vol. ii. 47, note (h).

(h) *Read v. Brookman*, 3 T. R. 151; *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259; *post*, vol. ii. 47, note (h); *Hawley v. Peacock*, 2 Campb. 557; *Hendon v. Stephenson*, 10 East, 57; [*Cutts v. United States*, 1 Gall. 69; *Powers v. Ware*, 2 Pick. 451; *Smith v. Emery*, 7 Halst. 53; *Rees v. Overbaugh*, 6 Cowen, 748, 749]; as to the deed being in the hands of a third person, *Tidd*, 9th ed. 487, 587. It is no excuse for not making proferit, that the deed declared on is in the possession of a third party, who holds the same by agreement between the plaintiff and defendant; *Hill v. Marsden*, 8 Dowl. 756; 6 M. & W. 718, S. C.; and when the proferit of a deed is requisite, it is not sufficient to allege as an excuse that the deed was delivered to the opposite party. *Wallis v. Harrison*, 4 M. & W. 533. Where a declaration alleged in excuse of proferit, that the deed was in possession of the defendant, a plea that the indenture is not in the possession of the defendant in manner and form, &c. was holden bad on special demurrer. *Fisher v. Ford*, 12 Ad. & El. 654; 4 P. & D. 347.

(h¹) [*Regents of the University v. Detroit Young Men's Society*, 12 Mich. 138, 157; *Mason v. Buckmaster*, Breese, 9; *Anderson v. Barry*, 2 J. J. Marsh. 265.]

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(i) *Denman v. Bull*, 9 Moore, 593; *Tidd*, 9th ed. 587. See *Banfill v. Leigh*, 8 T. R. 573; 1 Saund. 9 a, note (1); *Whitfield v. Faussett*, 1 Ves. sen. 394; *Onslow v. Smith*, 2 B. & P. 387; *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 262; *Read v. Brookman*, 3 T. R. 156; *Reynell v. Long*, Carth. 315; *Dyer*, 277 a; *Earl of Huntingdon v. Mildmay*, Cro. Jac. 217; *Hilton v. Bembridge*, Cro. Car. 441; Co. Litt. 35 b, note (6); precedents stating it, *Johns v. Whitley*, 3 Wils. 134; *Edwards v. Morgan*, 3 Lev. 229. See 13 Vin. Ab. 76. It is now decided that in pleading a conveyance by lease and release, proferit must be made of the release. *Jenkins v. Peace*, 6 M. & W. 723; 8 Dowl. 758, S. C. It is not necessary to make proferit of the lease because it is the statute that gives effect to the bargain and sale for a year, and the deed does not intrinsically establish the title. *Steph.* 5th ed. 484.

(k) *Ib.*; 10 Co. 93; *Steph.* 5th ed. 484; 2 Stark. Evid. 483, 1st ed.

(l) *Ib.*; *Read v. Brookman*, 3 T. R. 156; *Banfill v. Leigh*, 8 T. R. 573; 1 Saund. 276, note (1), (2).

(m) *Banfill v. Leigh*, 8 T. R. 573; Com. Dig. Pleader, O. 15.

(n) 1 Saund. 9 and 9 a, note (1); *Whitfield v. Faussett*, 1 Ves. sen. 394.

held that the assignees of a bankrupt obligee need not make of the bond ; (o) and a sealed will, or an award, though not being a *deed* in the technical sense of the word, need not be pleaded with a profert. (p) But letters testamentary and administration must be pleaded with a profert, at least where the executor or the administrator is a plaintiff. (q)

* When a profert, or an excuse for the omission, was unnecessary, the statement of it will be considered as surplusage. (r) And oyer is not entitle the other party to oyer. (r) And oyer is not a private act of parliament, or of a record, as of letters patent, or of a roll in chancery, cannot be claimed, though pleaded with a profert. (s) But where a profert, or an excuse for the want of a profert, is necessary, if the plaintiff make a profert of and thereby profess to have the deed, when he is not prepared to do so, and the defence is *non est factum*, the plaintiff will be nonsuited on the trial, unless he can show that he was not in possession of the deed, or not be sufficient in such case to prove that the deed was lost, destroyed, or in the defendant's possession. (t) If, therefore, the plaintiff be not prepared to produce the deed on demand, or at the trial, and has inadvertently pleaded the deed with a profert, the declaration must be amended, (t¹) and the circumstance which excuse the omission to make a profert should be stated in the declaration. (u) However, the omission of a profert, when it can only be taken advantage of by special demurrer. (x)

In general, the declaration in debt upon a *specialty* proceeds immediately from the profert to the statement of the defence.

(o) *Gray v. Fielder*, Cro. Car. 209; *Callen*, 417, *sed quære*.

(p) 2 Saund. 62 b, note (5); [*Weed v. Ellis*, 3 Caines, 256.]

(q) Steph. 5th ed. 483; [*Brown v. Jones*, 10 Gill & J. 334.]

(r) *Morris's case*, 2 Salk. 497.

(s) *The King v. Amery*, 1 T. R. 149; 1 Saund. 9 b, note (1). It seems that in general profert of letters patent is necessary. See 5 Co. 74 b; *Rex v. Bishop of Chester*, 1 Ld. Raym. 299; *Doct. Plac.* 215; *Hill v. Bolton*, Lutw. 1172; *Leafield v. Helicar*, Cro. Jac. 317. See *The King v. Amery*, 1 T. R. 149, 150; 1 Lil. Ent. 154; *Com. Dig. Pleader*, O.

(t) *Smith v. Woodward*, 4 East, 485; *Beckford v. Jackson*, 1 Esp. Rep. 337; [*Moore v. Fenwick*, *Gilmer*, 214.]

(t¹) [*Powers v. Ware*, 2 Pick. 460. A party can demand oyer of a deed only once in the same suit. *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 564.]

(u) *Ib.*; 1 Saund. 9 a, note (1).

(x) 4 & 5 Ann. c. 16; *Com. Dig. Pleader*, s. 17; [*Bank of United States v. Sill*, 5 Conn. 111; *Brown v. Copp*, 5 N. H. 323; *Way v. Swift*, 12 Vt. 330; *Mallory v. Matlock*, 7

Ala. 757; *Tucker v. Real Estate*, Pike, 429; *Anderson v. Barry*, 265; *Briggs v. Greenlee*, Minn. 219; see, on this point, *Metcalf v. Bibb*, 618. A profert does not entitle the plaintiff to produce the original copy is sufficient; *Butler v. S. J.* 511; unless he has actually produced the original. *Carson v. H. Marsh*, 92. A writing proffered does not come part of the record unless it is a copy of the original. *Adams v. Macy*, 1 Bibb, 328; 1 Bibb, 571; *Wriston v. J. Marsh*, 219; *Palmer v. M'Gill*, 505; *Tuggle v. Adams*, 3 A. 1. A defendant craving oyer is entitled to a copy of the attestation and to the witnesses. *Smith v. Alw*, 445. To deny oyer where it is granted is error, but not a cause of action. *Hicks*, 2 Blackf. 336. See, also, *profert and oyer*, *Commonwealth v. 12 Pick.* 496; *Guild v. Richardson*, 364; *Story v. Kimball*, 6 Vt. 364; *States v. Sawyer*, 1 Gall. 8. *Yoder*, 2 A. K. Marsh. 264; *V. v. Poucher*, 24 Wend. 316; *Jarvis v. 2 Harring*, 162.]

tract, without disclosing the *consideration* upon which it was founded, because a consideration is not in general essential to the validity of a *deed*. (y) But in pleading a conveyance under the statute of uses, it is necessary to state that a *valuable* consideration was paid, (z) or that there was a *good* consideration, as in the instance of a covenant to stand seised to uses made in respect of relationship, &c.; (a) in which cases, if the statement of the consideration be omitted, the declaration will be bad on special demurrer. (b) Where a consideration is necessary to give validity to the deed, as where it operates in partial restraint of trade, the proper course is to show fully the consideration expressed in the deed; but an allegation in the declaration in setting out the deed, that it is witnessed that the defendant covenanted "for the consideration therein mentioned," is sufficient on *general demurrer*. (c) So when an act to be done by the plaintiff was the consideration of the defendant's covenant, and constituted a condition * precedent, it is necessary to show such consideration as well as the performance of it. (d) It is sufficient if the consideration or condition be stated according to its legal effect, (e) but a variance would be fatal; (f) and in stating the consideration, when necessary, the whole of it should be set forth. (g) The rules as to the statement of the consideration in an action of *assumpsit*, (h) have equal relevance to the action of debt in those instances in which it is essential in the latter form of action to show the existence of a consideration for the defendant's contract.

Statement of consideration in general unnecessary in a count on a specialty.

In stating the *contract* by *deed*, either in debt or covenant, the rules which we have considered in pointing out the mode of framing the declaration in *assumpsit* in general apply. The defendant's contract should in strictness be set forth in positive terms, and not with the *testatum existit*, viz. that "it was and is witnessed" by the deed, &c.; but this will suffice in a declaration, though it may be objectionable in a plea. (i)

The specialty contract itself.

In considering the mode of setting out a contract in *assumpsit*, we have fully explained the rule that an instrument should be stated according to its *legal operation and effect*; or may, as it seems, be set forth in *hæc verba*, and the expediency of adopting the latter course

(y) *Ante*, 376; [Grubb v. Willis, 11 Serg. & R. 107.]

(z) Vol. ii. Chitty Pl. 416, note (c).

(a) Vol. ii. Chitty Pl. 415.

(b) *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259, 261; 2 Saund. 12, note (20); *Sargent v. Reed*, 2 Stra. 1229; 2 Saund. on Uses, 53.

(c) *Homer v. Ashford*, 3 Bing. 322. As to its being necessary to show the consideration in a declaration where a bond is in restraint of trade, see *Michell v. Reynolds*, 1 P. Wms. 181; 10 Mod. 27; *Hitchcock v. Coker*, 6 Ad.

& El. 438; 1 Nev. & P. 796; *Hutton v. Parker*, 7 Dowl. 739.

(d) 2 Saund. 352 b; *Clarke v. Gray*, 6 East, 568; *Litteler v. Holland*, 3 T. R. 590; *ante*, 329-337.

(e) *Ante*, 312.

(f) As to variances, *ante*, 304, 313, 314.

(g) *Ante*, 305; *Swallow v. Beaumont*, 2 B. & Ald. 765; 1 Chit. Rep. 718, S. C.

(h) *Ante*, 299, 304.

(i) 1 Saund. 274, note (1); 2 Saund. 319, note (5); *ante*, 255, 309.

in some instances has also been suggested. (*k*) We have the same head pointed out the mode of pleading contracts, which are in the *alternative* or *conditional*, or *subject-tions*, *provisos*, and *qualifications*, and have fully considered the doctrine of *variances* in regard to a misstatement of the instrument in material or trivial respects. (*l*) As these principles equally apply to debt or covenant upon *specialties*, it is useless here to repeat them. The statutes, 9 Geo. 4, c. 4, & 4 W. 4, c. 42, s. 23, permitting mistakes in stating in to be amended even pending a trial, have also been alluded to. The impolicy of setting out unnecessary covenants and conditions, and the doctrine of surplusage, (*o*) have also undergone consideration in a preceding part of this volume.

In many cases it is necessary to introduce in the declaration an *avowment* of *performance* by the plaintiff of a *condition precedent* to the right to sue, or to show a legal *excuse* for the omission to perform; and in some instances it must be alleged that the defendant had *notice* of the plaintiff's completion of the matter he was to perform, and was *requested* to fulfil his, the defendant's obligation. Our observations upon these points in *assumpsit* (*p*) equally apply to actions upon specialties.

In actions on specialties, after stating the covenants, it is necessary to state, though *unnecessary*, to *refer* to the indenture by which the contract was made, "as by the said indenture fully appears;" and in actions on leases to state the *lessee's entry* on the demised premises; (*q*) and when the action is between the original parties to the contract, the declaration then proceeds immediately to the *allegation* of the plaintiff's performance of the conditions precedent, when necessary, and to the breach. But in actions on specialties the declaration is by or against a person who was not a party to the original contract, and particularly in actions upon *derivative title* of the plaintiff, the defendant's performance precedes the breach. And in action on a specialty by a party claiming from the lessor, there must be an *avowment* of the *lessor's title*, as before explained. (*r*) Thus, when an action is brought *by* the *heir* of the lessor, the title and death of his ancestor, and the descent to the plaintiff as heir, is shown; (*s*) and it must appear *how* he is heir, viz. whether as son or otherwise (*t*) and if the descent be by mediate, not immediate, descent, he must show the pedigree.

(*k*) *Ante*, 312, 314. A declaration setting out the *fac-simile* of a deed will be read so as to make it sense, however incorrect and illiteral the deed may be. *Smith v. Barnard*, E. T. 1818, K. B. M.S.

(*l*) *Ante*, 312, 314.

(*m*) *Ante*, 327, 328.

(*n*) *Ante*, 251.

(*o*) *Ante*, 252.

(*p*) *Ante*, 337-339.

(*q*) *Post*, vol. ii. 179.

(*r*) *Ante*, 376.

(*s*) *Post*, vol. ii. 179.

(*t*) *Denham v. Stephenson*, 1 Duke of Newcastle v. Wright, Reynolds v. Blake, 1 Ld. Ray.

example, if he claim, as nephew, he must show *how* nephew. (u) And when the plaintiff claims as assignee of the reversion by lease and release or other conveyance, the nature and operative part of the conveyance must be set forth. (v) In an action brought *by* the assignee of a term, all the mesne assignments of the term down to himself should be specifically stated; for he, being privy to them, shall not be allowed to plead generally "that the estate of the lessee of and in the demised premises came to him by assignment;" but when the action is brought *against* the assignee of a lessee, such general form of pleading is sufficient, because the plaintiff is a stranger to the defendant's title, and it is therefore reasonably supposed he cannot set it out particularly. (v¹) It is not, however, sufficient in the latter case to allege that the *tenements* came to the defendant by assignment; but it must be shown that he is assignee of the *term*, or *estate*, or *interest* therein; for otherwise it might be an assignment of another estate than the term of the lessee. The usual form is, "that all the said estate, right, title, and interest of the said E. F. (the lessee) of, in, and to the said demised premises, with the appurtenances, afterwards, to wit, on, &c. by assignment thereof then duly made, came to and vested in the defendant." (x) An heir may be sued either generally as heir, * without showing how he became so, or if he has held possession, or exercised acts of ownership over the property, he may be declared against as an assignee, upon a covenant running with the land. (y) And an executor who has entered, &c. may be sued in the *debet* and *detinet* as assignee for rent which became due after the death of his testator, who was the lessee. (z) The mode of declaring by and against persons suing or being sued in a *representative or derivative character*, is pointed out in the numerous precedents in the second volume. (a)

Sometimes it is *absolutely necessary* in *declaring* on a *bond* to set forth the condition and breach, as in an action on a *bail bond* or *replevin bond*, in order to show that the plaintiff is entitled to sue as assignee of the sheriff. (c)

As to setting forth condition of bond and assigning breaches in the declaration. (b)

In *other cases* where, under the 8 & 9 W. 3, c. 11, s. 8, it

(u) *Drucesday v. Hughes*, 3 B. & P. 453; *Blackborough v. Davis*, 12 Mod. 619; *Roe v. Lord*, 2 Bl. Rep. 1099.

(v) *Post*, vol. ii. 198; Com. Dig. Pleader, E. 23, 24.

(v¹) [*Folliard v. Wallace*, 2 John. 402; *Norton v. Vultee*, 1 Hall, 384, 389.]

(x) 1 Saund. 112 a, note (1); vol. ii. Chitty Pl. 398; [*Lansing v. Van Alstyne*, 2 Wend. 561.]

(y) *Denham v. Stephenson*, 1 Salk. 355; *Derisley v. Custance*, 4 T. R. 75.

(z) *Buckley v. Pirk*, 1 Salk. 317; *Derisley v. Custance*, 4 T. R. 75. The personal liability of an executor of a lessee in respect

of rent does not exceed what the demised property yields, but where the executor is sued as assignee on a covenant to *repair* he is liable as any other assignee. *Tremere v. Morison*, 1 Bing. N. S. 89; *Hornidge v. Wilson*, 3 P. & D. 641. As to the liability of an executor for use and occupation, see *Buckworth v. Simpson*, 1 Cr., M. & R. 834.

(a) On bonds by or against particular persons, *post*, vol. ii. 87 *et seq.*; against an heir or devisee, 14, 143; statements of various titles, 7 *et seq.*

(b) See *post*, vol. ii. 87-89; Chitty's Arch. Pr. 7th ed.

(c) See *De La Rue v. Stewart*, 2 New Rep.

is necessary *before execution* to ascertain in what respect condition has been broken, and to assess by a jury who have thereby been really sustained; (d) there has been tradition in the books as regards the *expediency* of setting condition and breaches in the *declaration*, or waiting till trial or other stage in the cause. (e)

* In *practice* it is now most usual not to state the conditions or breaches in the *declaration*; but there may be cases in which it may be advisable there to state them. The assigning of the conditions or breaches is affected by the same rules as those relating to

362. The assignment of a bail-bond may be stated in general terms, and it is not necessary to state that it was under the hand of the sheriff and executed in the presence of two witnesses. *Lewis v. Parkes*, 3 M. & W. 133; *Dawes v. Papworth*, Willes, 408.

(d) As to what bonds are not within that statute, see *post*, vol. ii. 88.

(e) See 1 Saund. 58 d; 2 Saund. 107 a, note (2), 187 a; *Ethersey v. Jackson*, 8 T. R. 255; *Barwise v. Russell*, 3 C. & P. 608. It seems from the language of the statute that only two classes of cases were contemplated, one where the party pleads to issue, where the plaintiff must assign breaches, the other where he does not plead to issue, as after judgment on demurrer, or by confession on *nil dicit*, in which cases he must suggest them. But the cases, the last of them being that of *Homfray v. Rigby*, 5 M. & Sel. 60; 2 Chit. 289, have put a different construction on the statute, and the result of them is thus stated in the 2d vol. of Wm. Saund. p. 187, by the last editors, and recognized as law in the late case of *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 44. They say some confusion appears to have arisen in the course of these cases, from the want of due attention to the difference between an *assignment* of breaches under the statute, and a suggestion of them. The result of the whole seems to be this: the plaintiff may, if he pleases, state the condition of the bond in his declaration and assign several breaches under the statute, whereas at common law he can only assign one; or the plaintiff may declare on the bond generally, in which case, if the defendant suffer judgment by confession, or *nil dicit*, or the plaintiff have judgment on a demurrer, either to his declaration or to any plea thereto, the plaintiff enters a suggestion in the mode detailed in the note to *Gainsford v. Griffith*. If the defendant plead any plea in which the plaintiff might at common law have taken an issue in his replication without assigning a breach of the condition of the bond, the plaintiff may still take issue, and may enter a distinct and separate suggestion of breaches under the statute, but he cannot incorporate such issue and such suggestion in one and the same replication. If the defendant plead any plea

which made it necessary at the trial for the plaintiff to assign a breach of the condition, as for instance general issue, the plaintiff must still assign a breach in his replication, with this difference, now he may assign several breaches under the statute, whereas at common law he can only assign one. If only one breach of the condition is pleaded in the replication it is not necessary to state in terms to be according to the statute. Before the statute of 1833 the plaintiff could assign in the declaration a breach of the condition, and more the declaration was defective for duplicity; 1 Saund. 58, note (2). It is expressly permitted by R. 1833, Term, 4 W. 4, reg. 5, altho' several counts are not permitted. It is, however, necessary in a declaration to state more than one breach to refer to the statute. 15 M. & W. 133, suffices to prove part of the breach. 1b. In a late case a question arose as to the proper form of proceeding under the statute where the declaration does not assign breaches, and where the plaintiff pleads to issue, does not plead to issue, or performance only, but performance or non-performance of the condition, and matter which is a cause for non-performance as well as a cause for performance, and after deliberation it was decided that the proper course to be adopted in such a case is to confine the assignment of breaches to that part of the condition on which performance is pleaded, and to suggest the breach as to the part of which performance is not pleaded. See *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36. Where the plaintiff assigns in the declaration or replication a breach of the condition, the jury may assess damages without a suggestion of non-performance. *Quin v. King*, 1 M. & W. 133; *v. Staley*, 4 Bing. N. C. 724. The condition, whether of obligation, contract, or grant, shall be deemed a breach of the condition, obligation, contract, or grant, if it is set forth; breaches relied on in the replication; and conditions pleaded of the party relying thereon shall be deemed to have been performed, or not performed, as the case may be. Sta. c. 129, § 2, div. 10.]

in *assumpsit* or *covenant*. If the breach of the condition be well assigned in other respects, it will not be vitiated by the superaddition of immaterial allegations. (*f*)

We have seen that debt is the proper remedy on *records*, as recognizances of bail, statutes merchant, recognizances in the nature of a statute staple, and on judgments. (*g*) The validity of these cannot in general *in pleading* be impeached or affected by any supposed defect or illegality in the consideration or transaction on which they were founded; nor can there be any allegation against the validity of a record, (*g*¹) except by a writ of error; (*h*) and consequently it is not necessary to state the circumstances or consideration on which the record was founded. (*h*¹) In debt upon a *recognizance of bail*, it must be stated with certainty, following the description in the entry of the recognizance, and should set forth in what court, at whose suit, and for what sum or cause the defendant became bail; (*i*) and in pleading a *statute staple*, it should be shown to have been by writing obligatory or under seal. (*k*) Formerly in an action upon a *judgment*, it was usual to set forth in the declaration the whole of the proceedings in the former suit; but this is no longer the practice; (*l*) and it *is sufficient to state the judgment concisely, even though it were recovered in an inferior court not of record; and although it was formerly supposed to be unnecessary to aver that the defendant became indebted within the jurisdiction of the court; (*n*) it has been subsequently held that it must be averred that the *original cause* of action arose within the jurisdiction of the inferior court. (*o*) It is unquestionably necessary in debt upon a judgment in the courts at Westminster to show with certainty the time and parties and the sum recovered. It is said that if the declaration be on a judgment in the common pleas, it should be stated before what judges by name it was recovered; (*p*) and that in debt on a judgment in an inferior

(*f*) *Stothert v. Goodfellow*, 1 Nev. & Man. 202, the form of declaration in which will assist as a precedent.

(*g*) *Ante*, 124.

(*g*¹) [*Green v. Ovington*, 16 John. 55; *Wright v. Mott*, Kirby, 152; *Bush v. Byranks*, 2 Root, 248; *Biddle v. Wilkins*, 1 Peters, 686; *Cardesa v. Humes*, 5 Serg. & R. 65.]

(*h*) *Heyward v. Ribbans*, 4 East, 311; *Horsely v. Daniel*, 2 Lev. 161; *Gilb. on Uses and Trusts*, 109; *Gilb. Debt*, 412; *Moses v. Macferlan*, 2 Burr. 1007; *Drake v. Mitchell*, 3 East, 258; *Erving v. Peters*, 3 T. R. 639; *Moore v. Bowmaker*, 2 Marsh. 392, 393.

(*h*¹) [*Denison v. Williams*, 4 Conn. 402.]

(*i*) *Park v. Yerbury*, 1 Wils. 284; *post*, vol. ii. 67, 230, 231; *Com. Dig. Pleader*, 2 W. 10. As to variance, see *Phillipson v. Mangles*, 11 East, 516; *Bevan v. Jones*, 4 B. & C. 403.

(*k*) *Goldsmith v. Sydnor*, Cro. Car. 363; *Com. Dig. Pleader*, 2 W. 10.

(*l*) *Murray v. Wilson*, 1 Wils. 318.

(*n*) *Murray v. Wilson*, 1 Wilson, 316; 1 Saund. 92, note (2); *Com. Dig. Pleader*, 2 W. 12; *Lewis v. Weeks*, Carth. 85, 86; *Thomp. Ent.* 118; *Bentley v. Donnelly*, 8 T. R. 127; [*Hubbard v. Davis*, 1 Aiken, 296. In declaring on a justice's judgment of a sister state, the statute giving jurisdiction to the justice must be pleaded. *Sheldon v. Hopkins*, 7 Wend. 435. As to the declaration on a justice's judgment rendered in the state where the action is brought, see *Stiles v. Stewart*, 12 Wend. 473.]

(*o*) *Read v. Pope*, 1 Cr. M. & R. 302; 4 Tyr. 403, overruling 1 Wm. Saund. 92, note (2). See *Dempster v. Purnell*, 3 M. & Gr. 375; 4 Scott N. R. 30, S. C.

(*p*) *Com. Dig. Pleader*, 2 W. 12; 3 L. 3. But see the usual form, *post*, vol. ii. 176-179.

court, the names of the suitors who were the judges should be stated, but the omission will at all events be aided by verdict. (*q*)

Care must be taken that there be no *variance* in the statement of the judgment, for such variance is in general

Variance. Thus, if there has been a judgment for 388*l.* 0*s.* 0*d.* the debt be brought on it as for 388*l.* recovered, omitting the *0s.* and *0d.* was a variance, (*r*¹) and could not be cured by a remittance of a penny. (*s*) In debt upon a judgment, or other matter of record, unless when it has been stated as inducement, it is necessary to show the matter of record, to refer to it by the *prout recordum*. (*t*) But the omission will be aided unless the defendant demurs specially; (*u*) and these words do not render the description in the allegation more material than it would have been. (*x*) It is usual also to allege that the judgment remains in full force and effect, and that the plaintiff has not obtained execution or satisfaction thereof; but this allegation is unnecessary. The statutes, (*z*) permitting the amendment at the trial of errors and other variances in stating a record, &c. have been stated. (*a*)

In debt on a *statute* at the suit of a party grieved, the informer, where the whole of the penalty is given by the *statute*, the commencement is the same as in debt on a contract, where a part of the penalty is given to the informer and the rest to the poor of the parish, &c. the commencement and other parts of the declaration usually state that the plaintiff sues *quod* although this is not necessary unless there has been a contempt

(*q*) *Ib.*; Lewis v. Weeks, Carth. 86; Jones v. Jones, 5 M. & W. 523; 7 Dowl. 841, S. C. In debt on replevin bond it is not necessary, in averring the holding of the county court, to state the names of the suitors. Draper v. Garratt, 2 B. & C. 2.

(*r*) *Ante*, 253, 311; Phillipson v. Mangles, 11 East, 516. The said court of the bench means C. P. Mill v. Pollon, 7 Taunt. 271; 1 Moore, 19, S. C.; [Hight v. White, 1 Morr. (Iowa) 45; Summers v. Mantz, Geo. Dec. part ii. 73; Boyden v. Hastings, 17 Pick. 200. In the name of the plaintiff. Boyden v. Hastings, 17 Pick. 200. In debt on a judgment recovered by one as administrator, it is no variance to describe it in the declaration as recovered by him personally. Allen v. Lyman, 27 Vt. 20.] An averment that judgment was recovered on promises, whereas it was recovered on one count only, was considered a fatal variance. Edwards v. Lucas, 5 B. & C. 339. See other instances in the notes, vol. ii. Chitty Pl. 337.

(*r*¹) [Bissell v. Kip, 5 John. 89; Bibbins v. Noxon, 4 Wend. 207; Keyes v. Throop, 2 Aiken, 276; White v. Walker, 1 Monroe, 34. In debt by "S. B. junior," on a judgment,

the declaration set forth a judgment of "S. B." but, on being produced in favor of "S. B. junior," this was a variance. Boyden v. Hastings, 17 Pick. 200.]

(*s*) Coy v. Hymas, 2 Stra. 11; v. Macnamara, 9 East, 157; Eamer, 1 Esp. Rep. 356; B. Wood, 4 Taunt. 13; Phillipson 11 East, 516; Bastall v. Stratford, 49.

(*t*) Gilb. Debt, 412; Morse v. Willes, 127, in which Waites Salk. 565, referred to in Com. D. 2 W. 12, is corrected; [Philbrickton, 43 N. H. 462, 464; Jarman Harring. 162.]

(*u*) 4 & 5 Anne, c. 16, s. 1; and dick v. Lyon, 11 East, 565.

(*x*) Bennett v. Isaac, 10 Price,

(*y*) 1 Saund. 330, note (4); see Dig. Pleader, 2 W. 12; [but see Bradbury, Tyler, 207.]

(*z*) 9 Geo. 4, c. 15; 3 & 4 W. 23.

(*a*) *Ante*, 327, 328.

queen. (b) In a declaration on a public statute, it is not necessary or advisable to state the title or year of the reign when the statute was passed, or to recite any part of the act; and if it be unnecessarily stated, any material variance will be fatal, particularly if the declaration conclude against the form of the statute *aforesaid*; (c) and it would be fatal to describe a statute as made in 2 and 3 years of the reign of W. 4, though if stated to have been made in a *sessions holden* in the 2 and 3 years of the reign, it would have sufficed. (d) It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant, appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged, (d¹) and the conclusion *contra formam statuti* will not aid the omission. (e) If, however, the necessary matter be stated in substance and effect it will suffice, although the precise words of the statute are not used; and therefore a declaration for *feloniously* setting fire to two stacks of oats is sufficient, though the words of the act are *unlawfully* and *maliciously*. (f) The instances in which in declaring upon a statute it is necessary to set out and negative an *exception* or *proviso*, which qualifies or discharges the liability in a certain event, have been already pointed out and explained. (g) In a declaration on the game laws it was not necessary to negative the particular qualifications, though it was holden otherwise in an information. (h) When an act of parliament, which has been *recently passed*, enacts that if a party commit an offence after a named day he shall be liable to a penalty, it is usual to

(b) Com. Dig. Action on Statute, E. 1; *The King v. Lovet*, 7 T. R. 152; 1 Saund. 136, note (1); 2 Saund. 374, note (1); [Nye v. Lamphere, 2 Gray, 275; *Levy v. Gowdy*, 2 Allen, 320, 323.] As to variance in stating the parish, *ante*, 288, 289; *Taylor v. Williams*, 3 Bing. 449. As to pleadings in general on statutes, see Com. Dig. Pleader, C. 76; Bac. Abr. Statute; 1 Saund. 135, note (3); 2 Saund. 377 b, note (12); 1 Chit. Crim. Law, 275, &c.

(c) *Ante*, 237; Com. Dig. Action on Statute, H. 1; 2 Saund. 374, note (2); *King v. Marsack*, 6 T. R. 776; *Lee v. Clarke*, 2 East, 341; 1 Saund. 135 a, note, 5th ed.; but see *Nixon v. Nanney*, 1 G. & D. 373.

(d) *Rex v. Biers*, 1 Ad. & El. 327; and see Com. Dig. Action on Statute; *Rann v. Green*, Corp. 474. See, also, *ante*, 237.

(d¹) [M'Keon v. Lane, 1 Hall, 318; *Burnham v. Webster*, 5 Mass. 270; *Bigelow v. Johnson*, 13 John. 428; *Hassenfratz v. Kelly*, 13 John. 468; *Ellis v. Hall*, 2 Aiken, 41; *Greer v. Bumpass*, *Martin & Y.* 94; *Prigmore v. Thompson*, Minor, 420; *Governor v. Horton*, 1 Murph. 212; *Drown v. Stimpson*, 2 Mass. 441, 444; *Williams v. Hingham Turmp.* 4 Pick. 341; *Soper v. Harvard College*, 1 Pick. 177; *Bath v. Freeport*, 5 Mass. 325; *Hall v. Bumstead*, 20 Pick. 2; *Berry v.*

Stimson, 23 Maine, 140; *Brown v. Harman*, 21 Barb. 508; *Hewett v. Harvey*, 46 Missou. 368. A declaration to recover damages given by statute should contain allegations embracing all the material elements of the statute. *Henniker v. Contoocook Valley R. R.* 29 N. H. 146. A pleading in a statutory proceeding, which pursues the language of the statute, is sufficient. *Gunter v. Dale County*, 44 Ala. 639.]

(e) 1 Saund. 135, note (3); *Bennet v. Talbot*, 1 Salk. 212; Com. Dig. Action, Statute. A. 3; Pleader, C. 76; *Daman v. Marrett*, 1 Taunt. 128; *Lee v. Cass*, 1 Taunt. 511; *Barnard v. Gostling*, 1 New Rep. 245; 1 Leach, Cro. Law, 4th ed. 493; *Beatson v. Rushforth*, 2 Marsh. 364, note (c); *The King v. Winter*, 13 East, 258.

(f) *Allan v. The Hundred of Kirton*, 5 Wils. 318; 2 Bl. Rep. 842, S. C.; *The King v. Stevens*, 5 East, 244; *Beatson v. Rushforth*, 2 Marsh. 364; but see 1 Leach Cro. Law, 4th ed. 493.

(g) *Ante*, 246.

(h) *Spieres v. Parker*, 1 T. R. 144, 145; *Whitiche v. Osbaston*, 1 Lev. 26; *The King v. Stone*, 1 East, 639; *Bluet v. Needs*, 2 Com. Rep. 524; Com. Dig. Action on Statute.

aver that the offence was committed after that day ; but w
has been long passed such averment is not necessary. (i)
also when the particular *statute limits the time within
action should be brought, to *aver that the offence was*
within such time ; but this also does not seem material. (k)

Where the act or omission, which is the foundation of th
not an offence at common law, it is necessary in
Contra for- conclude "against the form of the statute," or "sta
mam statuti. or to show at least that the declaration is founded on t
by introducing the words *de placito transgressionis et conte*
tra formam statuti ; (m) and this is necessary also in an a
cover back money won at play. (n) In debt for the rec
penalty given by statute for an offence thereby created,
arrested the judgment, on the ground that the declaration,
describing the offence, contained no averment that the offence
committed "contrary to the statute," although it was alleged
and by force of the statute in such case made and provid
defendant forfeited 100*l.*, and thereby and by force of the
action hath accrued," &c. (o) The words "whereby and
to the form of the statute" will not suffice, when the action
on two statutes ; (p) in this case the conclusion should b
the form of the statutes." (q) Where, however, a statute
former act, and adopts and continues the provisions of it, t
tion should conclude only against the form of the statute
where a statute has been wholly discontinued and is afterwar
there seem to have been some opinions that a prosecution c
to conclude against the form of the statutes. (s) So, wher
is prohibited by several statutes, if only one is the founda
action, and the others are explanatory or restrictive, it is

(i) Gilb. Cases, L. & E. 242 ; 1 Saund. 309, note (5) ; Bac. Abr. Usury, K. 209.

(k) Lee v. Clarke, 2 East, 340 ; Rex v. Steven-ton, 2 East, 362.

(l) Lee v. Clarke, 2 East, 339 ; 1 Saund. 134, note (3) ; The King v. Southerton, 6 East, 140 ; Earl of Clanricarde v. Stokes, 7 East, 516 ; 1 Chitty Crim. Law, 290 ; Wells v. Iggulden, 3 B. & C. 186.

(m) Lee v. Clarke, 2 East, 341. See Wells v. Iggulden, 3 B. & C. 189 ; [Barter v. Martin, 5 Greenl. 76 ; Peabody v. Hoyt, 10 Mass 36 ; Cross v. United States, 1 Gall. 26 ; Sears v. United States, 1 Gall. 257 ; Nichols v. Squire, 5 Pick. 168 ; Barkhamstead v. Parsons, 3 Conn. 1 ; Scroter v. Harrington, 1 Hawks. 192 ; Cockfield v. Singletary, 15 Rich. (S. Car.) Law, 240 ; Haskell v. Moody, 9 Pick. 162. This form of conclusion is not deemed necessary in Massachusetts since the practice act. Levy v. Gowdy, 2 Allen, 320.]

(n) Thistlewood v. Cracroft, 1 M. & Sel. 500 ; [M'Keon v. Caherty, 1 Hall, 300.]

(o) Wells v. Iggulden, 3 B. & C. 186 ; 5 D

& R. 186, S. C. ; *sed vide* Att. v. Rattenbury, 9 Price, 397, in the court held that an information for smuggling was good words "contrary to the statute" in describing the offence being laid minutely, so as to be the words of the act, and it was held that the forfeiture was accordingly. *Sed quare.*

(p) Lee v. Clarke, 2 East, 341 ; (q) *Ib.* ; Barnaby v. Nandike, 4 Hawk. 71 ; Com. Dig. Actions, H. ; [Haywood v. Sheldon, Kenwick v. United States, 1 G.

(r) Barnaby v. Nandike, 1 Saund. 135, note (3) ; 2 Saund. (12) ; Earl of Clanricarde v. Stokes, 516.

(s) 2 Hawk. c. 25, s. 117 ; see P. C. 599, 601 ; 2 Hale, 171 ; Moor, Cro. Eliz. 750 ; Rex v. Leach, 827.

conclude against the form of the statute in the singular number. (t) The omission of the words "against the form of the statute," or "statutes," when proper to be inserted, is fatal even after verdict. (u) In general, however, there is no difference as to the doctrine of amending at common law between penal and other actions; (x) and *the statute 4 Geo. 2, c. 26, extends the provisions of the statute of jeofails to penal actions; (y) and it had been before determined that the 32 Hen. 8, c. 30, extended to penal actions. (z)

It is usual, in addition to the statement *contra formam statuti*, and of the consequent forfeiture of the penalty, to allege that "by means of the premises, and by force of the statute in such ^{*Per quod actio accrevit.*} case made and provided, an action hath accrued to the plaintiff to demand and have the said sum, &c." but this appears unnecessary. (a) And even assuming it to be requisite, yet a count for a penalty on the statute 5 Ann. stating that the defendant kept a snare to kill game "against the form of the statute in such case made and provided, and by reason thereof and by force of the statute in such case made and provided, an action hath accrued," was holden sufficient; for the first-mentioned statute refers to the 5 Ann. c. 14, creating the offence and giving the penalty; and the last-mentioned statute refers to the 2 Geo. 3, c. 19, by which the whole penalty was given to the common informer, the half only of which had been given to him by an intervening statute. (b)

As the action of debt is only sustainable for the recovery of a *debt*, the *breach* is necessarily confined to a statement of the non-payment of the money previously alleged to be payable; and such breach is nearly similar, whether the action be in debt ^{*Statement of the breach in general in debt.*} on simple contract, or upon a specialty, record, or statute, and is usually as follows: "Yet the defendant, although often requested so to do, hath not as yet paid the said sum of £—— (c) above demanded, or any part thereof, to the plaintiff (or if *qui tam*, &c. to our said lady the queen, and to the plaintiff, who sues as aforesaid), but hath hitherto wholly neglected and refused so to do. To the damage of the plaintiff of £——, and thereupon he brings suit, &c." (c¹) In debt upon a *bond*, whether it be a common money bond, or be a special bond for

(t) Yelv. 11; 2 Saund. 377, note (12).

(u) Lee v. Clarke, 2 East, 333; Myddleton v. Wynne, Willes, 599; Thistlewood v. Cra-croft, 1 M. & Sel. 500; Wells v. Iggulden, 3 B. & C. 186.

(x) 1 Saund. 250 d; Phillips v. Smith, 1 Stra. 137; Wynne v. Middleton, 2 Stra. 1237; Anonymous, 1 Wils. 256; Rex v. Williams, 1 Burr. 402.

(y) Myddleton v. Wynne, Willes, 600.

(z) Sedgewick v. Richardson, 3 Lev. 375; Phillips v. Smith, 1 Stra. 136; Wynne v.

Myddleton, 2 Stra. 1237; Richards v. Brown, Dougl. 115.

(a) See Wells v. Iggulden, 3 B. & C. 189.

(b) Earl of Clanricarde v. Stokes, 7 East, 516; Lee v. Clarke, 2 East, 338.

(c) This is to be the sum named in the commencement of the declaration, being the aggregate of all the sums stated to be due in the different counts.

(c¹) [See Gale v. O'Brien, 12 John. 216; S. C. 13 John. 189.]

the performance of covenants, &c. within the statute, (*d*) is the debt at law, and the breach in non-payment thereof the above form. (*d*¹) If, however, the bond have a condition the statute, it is essential that there be upon the record an averment of the breaches of such condition. As these breaches may be set out in the replication as well as in the declaration, it is proper to give notice the rules upon this subject when we treat of the replication of the debt. (*d*²)

* The *damages* in an action for a debt are in general measured by the principal sum due, and not, as in *assumpsit*, the principal object of the action, and therefore a small sum, as 10*l.*, is usually inserted in the declaration, if the contract declared upon be limited to a particular sum, and the plaintiff proceed for a larger sum for interest or damages. If the plaintiff proceed for a larger sum for interest or damages, then the sum at the conclusion should be proportioned to the sum at the beginning, so as to cover the utmost interest or damages for the debt. If the debt may be claimable either by contract or damages under the statute, c. 42, s. 28. (*e*)

In an action by a common informer, as he is not entitled to damages, no claim for them should be inserted. (*f*)

As the action of *covenant* can in general only be supported by a *deed*, (*g*) there is less variety in the declaration in *covenant* than in *assumpsit* or debt, and therefore but few variations will here be necessary, as most of the rules to be observed in framing a declaration in *assumpsit* or debt equally apply to the declaration in this action. The *commencement* of the declaration in *covenant* is the same as in all other personal actions commenced in either of the superior courts.

The various points which we have already observed in regard to the *inducement* or statement of introductory matter in declaring upon a lease, &c.; (*h*) the *consideration* of the debt; (*i*) the mode of setting out the *deed*; (*k*) the *profert*; (*l*) the usual averment and statement of title, &c.; (*m*) and the statement of the debt in an action of *debt*; are equally applicable to the action of *covenant*.

(*d*) 8 & 9 Wm. 3, c. 11, s. 8.

(*d*¹) [And it makes no difference that the bond is for the payment of a sum of money by instalments. *Spaulding v. Millard*, 17 Wend. 331.]

(*d*²) [In an action of debt on a penal bond, the several breaches assigned are analogous to several counts in a declaration, and, if one count be good, a general demurrer will not be sustained. *Henrickson v. Reinback*, 33 Ill. 299.]

(*e*) *Watkins v. Morgan*, 3 Car. & P. 661. [It is not usual to claim interest in debt, but a declaration is not bad for including such a claim. *Dudley v. Lindsey*, 9 B. Mon. 486.]

(*f*) *Frederick v. Lookup*, 4 Burr. 2021;

Coming v. Sibley, 4 Burr. 129. Whether the statement might be as surplage.

(*g*) *Ante*, 129, 131. As to *covenant* in general, see *ante*, 129.

(*h*) *Ante*, 376.

(*i*) *Ante*, 380.

(*k*) *Ante*, 312, 314, 381. As to *profert*, see *ante*, 312, 315; amendment, 315.

(*l*) *Ante*, 378.

(*m*) *Ante*, 382.

(*n*) *Ante*, 388. And the rule in regard to a breach in *assumpsit* may be applied to *covenant*. See *ante*, 388, for the general assignment of breaches.

nant. (*n*¹) If the declaration profess to make profert of the indenture, it suffices for plaintiff to produce and prove the *counterpart*. (*o*) The plaintiff may assign in the same count a distinct breach of each separate covenant contained in the deed. (*p*) And the general pleading rules, Hil. T. 4 W. 4, reg. 5, although they prohibit several counts, expressly permit *several breaches*. It is usual, after stating the breaches of covenant, to *conclude* by alleging "And so the plaintiff in fact saith that the defendant (although often requested so to do) hath not kept his said covenant, but hath broken the same;" but this is mere form, and unnecessary. (*q*) *Damages* being the principal object *in this action, (*r*) there should be laid as such a sum sufficiently large to cover the utmost demand, and even a claim for interest, when claimable under 3 & 4 W. 4, c. 42, s. 28. (*s*)

IN ACTIONS FOR TORTS.

Actions in form *ex delicto* are *case*, *trover*, (*t*) *replevin*, *trespass* and *ejectment*. The applicability of these forms of action has already been fully considered; and in the second volume will be found a copious collection of the forms of declarations which are usually in requisition, with notes explanatory of the different allegations, &c. (*u*)

THE STATEMENT IN ACTIONS EX DELICTO OF THE CAUSES OF ACTION.

In actions for *wrongs*, the declaration should state, 1st, The *matter* or *thing* affected; 2dly, The plaintiff's *right* thereto; 3dly, The *injury*; and, 4thly, The *damage* sustained by the plaintiff. We will consider each of these as regards *general rules*; and then state the *particular rules* relating to declarations for *written* and *verbal slander*.

In actions brought for *injuries* to *real property*, (*v*) the *quality* of the realty, as whether it consists of houses, lands, or other *corporeal* hereditaments, should be shown. (*x*) If the declaration charge "*the breaking and entering into the plaintiff's dwelling-house*," the plaintiff will fail, if it appear that the defendant

1st. Statement of the matter or thing injured.

(*n*¹) [Implied covenants may be set forth in the declaration in the same manner as if they were expressed in the instrument. *Grannis v. Clark*, 8 Cowen, 36; *Barney v. Keith*, 4 Wend. 502.]

(*o*) *Pearce v. Morrice*, 3 B. & Ad. 396.

(*p*) 2 Co. 4 a; 1 Saund. 58 b.

(*q*) 1 Saund. 235 a, note (7); vol. ii. Chitty Pl. 371, note (g). See *Taylor v. Needham*, 2 Taunt. 278.

(*r*) *Harrison v. Wright*, 13 East, 343.

(*s*) *Watkins v. Morgan*, 6 C. & P. 661.

[See *Neary v. Bostwick*, 2 Hilton, 514.]

(*t*) As to detinue being an action *ex contractu*, see *ante*, 135, 222, note (y).

(*u*) The author would suggest to the student the perusal of the forms as the best mode of understanding the general rules here

attempted to be explained with regard to the construction of the pleading. See *post*, vol. ii. Declarations in Detinue, Case, Trover, Replevin, Trespass, and Ejectment.

(*v*) As to the rule in a real action for the recovery of realty itself, Steph. 5th ed. 332; Forms, vol. ii. Chitty Pl. If two abutments be set out, it is a sufficient compliance with the rule. *North v. Ingamells*, 9 M. & W. 249; 1 Dowl. N. S. 151, S. C. As to what is a variance in the proof, see *Webber v. Richards*, 1 G. & D. 114. Where the *locus in quo* had about two years previously to the trespass been added to a close called the *Hall* close, it was held that it was properly described by that name. *Brownlow v. Tomlinson*, 1 M. & Gr. 484.

(*x*) Steph. 347, 2d ed.

only broke an *external* rail fence, and trespassed on the *roof* of a counting-house, occupied by A. B. but used as an easement to the plaintiff's house. (*y*)

In trespass to *land*, the term "*close*" is proper, although it be not inclosed, as it imports the exclusive right of possession and *interest* in the soil. (*z*) In order to avoid the necessity of a particular assignment, the pleading rules, Hil. T. 4 W. 4, reg. 5, expressly require that the *name* of the close, or the *abuttal*, or *other description*, be used in the statement, (*z*¹) or that the defendant may demur specially, and *towards* instead of *upon* has been held to be *an improper description by abutments. (*a*) Where the declaration stated that the defendants, A., B. and C., broke a close off the plaintiff's abutting on a close of the *defendant*, in the singular, and in evidence that the plaintiff's close abutted on a close named defendant, it was held that this was an *ambiguous variance*. (*b*)

As trespass (*c*) and ejectment (*d*) do not lie in general for incorporeal hereditaments, the word "*tenement*" must be avoided in the *first* description of the premises, though it be used in them with sufficient certainty, "*said tenements*," by way of reference to the antecedent description, would not be objectionable, though it is necessary to show the *quantity* of the land, (except, perhaps, in the case of a *vineyard*). (*e*) A way ought not to be described as a "*passage*"

In *prescribing* for or otherwise stating a right of *common* for a right to *tolls*, &c. it is judicious to avoid claiming or stating more than constitutes the subject-matter of the particular dispute. A precaution a variance may be avoided; (*g*) but in general

(*y*) *Mudie v. Bell*, 3 C. & P. 331.
 (*z*) Doct. & Stud. 30; *Stammers v. Dixon*, 7 East, 207; Vin. Abr. Fences; *ante*, 194.
 (*z*¹) [The Massachusetts practice act contains a similar provision. Genl. Sts. c. 129, § 6; *Forbush v. Lombard*, 13 Met. 109; *Hall v. Mayo*, 97 Mass. 416, 419. See *ante*, 276.]
 (*a*) *Lempriere v. Humphrey*, 4 N. & Man. 638; 1 Harr. & Wol. 171; [S. C. 3 Ad. & El. 181; *Bank v. Angell*, 7 Ad. & El. 846;] and see form and note, vol. ii. 652.
 (*b*) *Walford v. Anthony*, 8 Bing. 75. [In this action it is necessary to prove the abutments of the close as stated in the declaration; but the abutments are not to be construed strictly. *Wheeler v. Rowell*, 6 N. H. 215; *Hogmire v. McCoy*, 2 Harr. & J. 341; *Hooker v. Hicock*, 2 Aiken, 172. Thus, where a close was described as abutting southerly on W.'s land, it was held that this did not imply that it was abutting all the way southerly on W.'s land. *Wheeler v. Rowell*, 6 N. H. 215; *Frear v. Cruikshanks*, 3 McCord, 84; *Rich v. Rich*, 16 Wend. 663; *Peaslee v. Wadleigh*, 5 N. H. 317; *Rice v. Hathaway*, Brayt. 331; *Austin*

v. Morse, 8 Wend. 476; *Ellis v. Halst.* 357; *White v. Moseley*. If the plaintiff proves his title to the close described, and a defendant upon that part, he is entitled to damages according to the nature of the trespass proved. *Griffin v. Mayo*, 97 Mass. 420; *Smith v. M. & W.* 381; *Peaslee v. Wadleigh*, 321, 322; *Rich v. Rich*, 16 Wend. 663; *Providence v. Adams*, 10 R. I. 100.
 (*c*) *Ante*, 194.
 (*d*) *Ante*, 210.
 (*e*) *Potten v. Bradley*, 2 M. & W. 100, stating the parish, *ante*, 288, 289.
 (*f*) *Alban v. Bromsall*, Y. & C. 100.
 (*g*) 2 Saund. 172, note (1). See also *&c. of Tewksbury v. Brick*, 4 T. R. 142; *Morewood v. Wood*, 4 T. R. 59; *Rogers v. Allen*, 1 M. & W. 189; *Brook v. Willet*, 2 H. & C. 189. See also *Abr. Prescriptions*, W.; *Herbert v. Wood*, Esp. Rep. 437; *Selw. N. P.* 207.

tort the plaintiff may succeed although he only prove a part of his complaint. (h) Where a declaration in *case* alleged that "the plaintiff was possessed of a house, *belonging* to and supporting which there were certain *foundations*, which the plaintiff had enjoyed, and ought to enjoy;" it was held that this was a sufficient description of the plaintiff's right to the enjoyment of the foundations as an *easement*. (i)

In actions for injuring or taking away *goods or chattels*, it is in general necessary that their *quality, quantity, or number*, and *value* or price, should be stated; (k) the assigned reason is, that a former recovery could not otherwise be pleaded in bar of a second action for the same goods, neither could the defendant properly defend himself. (l) Therefore, in all the forms of action for a tort to goods, it is in general insufficient, even after judgment by default or verdict, to allege that the defendant injured or took, &c. "divers goods and chattels" of the plaintiff, without giving any description of them. (m) And an averment *that the defendant took the plaintiff's "fish," not showing their number or nature; (n) or "divers, to wit, ten articles of household furniture," not stating their nature or quality; (o) is substantially defective. It must be confessed that as the description of goods or land must in general be exceedingly similar, there is but little practical utility in this rule except as regards the description of a close by *abuttals*.

In *trover*, *trespass*, and *case*, less particularity is required than in *detinue* and *replevin*, because it is only in the two latter forms of action that the plaintiff can claim or recover the goods themselves. (p) In *trover*, *trespass*, and *case*, *damages* only are recoverable, and the specification of quality and quantity in a general way is allowed; as "two *packs* of flax," "two *ricks* of hay," a "library of books." (q)

(h) *Ib.*; *post*, 400, 401.

(i) *Brown v. Windsor*, 1 Cr. & Jer. 20.

(k) See 11 Rep. 25, 26; 1 Saund. 333, note (7); 2 Saund. 74, note (1); *Bertie v. Pickering*, 4 Burr. 2455; Steph. 5th ed. 332; *Attorney General v. Jeffreys*, M'Clel. R. 277, 278; [*People v. Dunlap*, 18 John. 446.]

(l) M'Clel. R. 278; 11 East, 576.

(m) *Vide* last two notes; and *Pope v. Tillman*, 7 Taunt. 642; 1 Moore, 386, S. C.; *Holmes v. Hodgson*, 8 Moore, 379.

(n) 5 Rep. 34 b. See observations, 2 Saund. 74, note (1); Steph. 5th ed. 333.

(o) *Holmes v. Hodgson*, 8 Moore, 379. See, however, 2 Saund. 274 a, note.

(p) 2 Saund. 74, note (1).

(q) 2 Saund. 74, note (1); Steph. 5th ed. 335. Cattle may be described with a *videlicet* under the word "chattels." 17 Edw. 3, pl. 41. ["A black mare, of the value of

\$100," was held a sufficient description. *Heddy v. Fullen*, 1 Blackf. 51; *Vanauken v. Wickham*, 2 South. 509. So, "four horses, the property of the plaintiff." *Beaumont v. Yantz, Breeze*, 8. In *trover* to recover bank-bills, they must be particularly described. *Little v. Gibbs*, 1 South. 311. As to a promissory note, see *Taylor v. Morgan*, 3 Watts, 333; *Receivers v. Neilson*, 3 Green, 337. The declaration need not state the price or value of the thing converted. *Pearpoint v. Henry*, 2 Wash. 192; *Vandyke v. Dodd*, 1 Halst. 129. The description of property in *trover*, by reference to a schedule annexed to the declaration, is of very doubtful propriety. But the defect is one of form, and must be taken advantage of, if at all, by special demurrer. Seeley v. Gwillim, 40 Conn. 106; *Kinder v. Shaw*, 2 Mass. 398; *Rider v. Robins*, 13 Mass. 284; *ante*, 185, note (1).]

But in *detinue* the value of the goods, either of each article or of the aggregate value of the whole, should be stated. (*r*)

Perhaps less particularity may be required where the gist of the action is the breaking and injuring a house, &c. Injury to goods is laid chiefly as *aggravation*; as trespass for breaking &c. a house, and taking "several keys" belonging to the defendant, (*s*) or *damaging* "the goods and chattels therein," and breaking open and injuring the "doors thereof." (*t*)

With regard to the *quality* or *species* of the goods, the plaintiff is perhaps bound to prove the fact as laid; (*u*) but with regard to the *quantity* or *number*, and *value* of the goods, he may prove the fact as he charges in his declaration, but he cannot prove *more*, although the statement be under a *videlicet*; (*v*) as if the declaration be "that the defendant took to wit, ten horses," he may show an injury to or conversion of ten horse, but not of eleven horses. (*x*) Of course, therefore, it is sufficient to lay the quantity to an extent clearly adequate to cover the whole possible amount, but at the same time according to the facts.

The *plaintiff's right or interest* in or *title* to the matter affected may exist independently of any particular obligation or duty on the part of the defendant; (*y*) it may be a right to insist on the performance by the defendant of some *particular* duty, founded either on contract or on a *tort* between the parties, or an implied obligation of the defendant arising from the defendant's particular character or situation. Where the *law* gives a *general* or *public* right, as for all persons to fish in a public navigable river, it is improper, at least unnecessarily, to state such public right, and it will suffice to state in brief and brevity that there was a public right, as the instance just cited. Where such a particular place was a public navigable river, and the defendant prevented the plaintiff from fishing, &c. (*a*) And where the right of the plaintiff is *implied by law*, as the absolute right to personal security, it is unnecessary to state the same in detail. Thus, in actions for assault and battery, false imprisonment, libels, when actionable in themselves, and malicious prosecution, it is sufficient to allege the injury, without any *inducement* of the plaintiff's right to personal security, &c.; though it is usual in

(*r*) *Per cur.* Mayor of Reading v. Clarke, 4 B. & Ald. 271.

(*s*) Layton v. Grindall, Salk. 643; after verdict, 2 Saund. 74 b, note (1); Steph. 5th ed. 335.

(*t*) Chamberlain v. Greenfield, 3 Wils. 292.

(*u*) See Steph. 5th ed. 337.

(*v*) As to the *videlicet* in general, see ante, 325.

(*x*) See Crispin v. Williamson, 8 Taunt.

107; Attorney General v. Jeffries, 10 Rep. 270; Steph. 5th ed. 337, Mattaire, Rep. t. Hardw. 121; Gilb. Evid. 229.

(*y*) It seems that unless it is traversed by plea it now stands as in Dukes v. Gostling, 3 Dowl. 615.

(*z*) Ante, 392, note (*y*).

(*a*) Ward v. Creswell, Will. Abr. Prescription, U.; Tenants, 2 Ld. Raym. 1091.

for slander to begin the declaration with a statement of the plaintiff's good character. (b) But where the law does not imply the right to the matter or thing affected, it must be stated either *generally* or *specially*; (c) in other words, some *general* or *special* allegation of a title or right must be made in the declaration. Thus, in a declaration for slander, affecting a person in the way of his trade, his carrying on the particular trade must be shown by way of inducement. (d) And in an action for an injury to the relative rights of persons, the relation of husband, (e) or master, (f) in respect of which the plaintiff was injured, must be stated.

It is chiefly in actions for trespasses and torts, committed to and in respect of *personal* and *real* property, that it becomes material to consider to what extent the plaintiff must show his *title* or *interest*. It is hardly necessary to observe that if *no property or interest* in the subject-matter of the suit be stated in the declaration to have existed, or been vested in the plaintiff, at the time the wrong was committed, the omission will be fatal even after verdict; the objection being the total *omission*, not the *defective statement* of a title. (g) But the error in the declaration may be cured if the *plea* admit the plaintiff's property. (h)

The fundamental rule upon the subject of showing title in actions *ex delicto* is, that as against a mere *wrong-doer*, or persons apparently having no color of right, mere *possession* suffices, and a *special* statement of title is unnecessary. (i) In personal actions, therefore, title is *mere inducement, at least in a pleading point of view, as regards the declaration; although in real actions, (k) and as we shall hereafter observe, in many *pleas* in personal actions, a strict and *particular* statement of *title* is essential. In *personal* actions *damages* are the gist of the suit; in *real* actions *the right* or *title* forms the prominent subject of inquiry. (l)

It is proposed to defer the consideration of the rules affecting the statement of a *title specially*, and the mode of pleading a derivative title, a right by *custom*, *prescription* or *grant*, &c. until we examine

(b) *Post*, vol. ii. 538.

(c) *Com. Dig. Pleader*, C. 34.

(d) 1 *Saund.* 242 a, note (3); 2 *Saund.* 307, note (1); *Morris v. Langdale*, 2 B. & P. 284; *post*, vol. ii. 547-549. [So, in a declaration for the slander of an attorney, there must be a colloquium of his profession. *Gilbert v. Field*, 3 *Caines*, 329.]

(e) *Post*, vol. ii. 149.

(f) *Ib.* 207.

(g) 2 *Saund.* 379, note (13); *Com. Dig. Pleader*, 3 M. 9.

(h) *Brooke v. Brooke*, 1 *Sid.* 184.

(i) *Ante*, 71, 167, 189, 195; 10 *Co.* 59 b; *Com. Dig. Plead. C.* 39, 41; *Tidd*, 9th ed. 443; *Steph.* 5th ed. 355; *Taylor v. East-*

wood, 1 *East*, 212. For this purpose, and until the defendant has pleaded and shown a superior title, he must be taken to be a mere trespasser. *Steph.* 5th ed. 356, 357. Even in an action of ejectment, where the general rule is that the lessor of the plaintiff must recover upon the strength of his own title as proved by him, yet mere priority of possession will enable a plaintiff to recover against a third person, a trespasser, who intrudes. *Doe v. Cook*, 7 *Bing.* 346.

(k) *Com. Dig. Pleader*, 3 L 5; *Bul. N. P.* 122; *post*, vol. ii. 179.

(l) As to the distinction between actions that sound in damages and those that do not, *Steph.* 5th ed. 116, 117, 473.

the structure of *pleas*, in which title is in general to be particularity.

In trespass, trover, detinue, case or replevin, for an taking away, &c. goods, the plaintiff's right to or interest in either as absolute owner, or as having a limited right there no otherwise described in the declaration than by the aver they were the goods "of the plaintiff," or "that he was la sessed of them as of his own property." (n) When the p not a possessory right, and his interest in the chattel is re it must be expressly so described in the declaration, which before explained, must then be framed in case. (o)

Upon the principle just alluded to, in *trespass* for a wro to land, or other *real* property, a *special* or particular plaintiff need not be shown in the declaration. The aver scribing the trespass, that the close or house, &c. in referen it was committed, was the *close*, &c. "of the plaintiff," or c alent allegation, (p) is sufficient; (q) and under it may l evidence any title or interest in *possession*, which is adequ support of the form of action under the circumstances of th

In *other* personal actions for injuries to *real* property c incorporeal, it was formerly usual to state the plaintiff's tit as that he was *seised in his demesne as of fee* of a house, m was entitled by *prescription* or *grant*, &c. to the right way, watercourse, or other right affected; (r) but it is no tled that in a personal action against a *wrong-doer* for the damages, and not the land itself, it is sufficient at *common in the declaration* that the plaintiff, at the time the injur mitted, was *possessed* of a house or land, &c. and that by * *such possession* he was entitled to the common of pastu other right, in the exercise of which he has been disturbed though a distinction has been taken between a declaration wrong-doer and against the *owner of the soil*; (t) and it ha

(m) As to this distinction, and when such parties may sue, see *ante*, 71, 167, 189, 195.

(n) See 2 Saund. 379, note (13); Steph. 5th ed. 354; *post*, vol. ii. 615, 618, 620. As to the words, "as of his own property," *post*, vol. ii. 620; (Good v. Harnish, 1 Serg. & R. 99; Carlisle v. Weston, 1 Met. 26; Heath v. Conway, 1 Bibb, 398; Smith v. Hancock, 4 Bibb, 222; Donaghe v. Rondebush, 4 Munf. 251. A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being complied with, is bad. Bailey v. Troxell, 43 Ind. 432.]

(o) *Ante*, 165, 166, 170.

(p) Com. Dig. Pleader, 3 M. 9.

(q) *Ib.*; Watts v. Kempe, 2 Bulst. 288; *post*, vol. ii. 615, 616; Steph. 5th ed. 354, 355.

(q¹) [Hite v. Long, 6 Rand.

(r) See the cases in Com. C. 34 to C. 38; 2 Saund. 1 and precedents referred to, note (2).

(s) Com. Dig. Pleader, C. on the Case for Disturbance, 113 a, note (1), 172, note Smith, 3 T. R. 766; Blisset v. 508; Drake v. Wiglesworth, Saund. 346, note (2); The Tewkesbury v. Diston, 6 East See precedents, *post*, vol. ii. 6 Co. 59 b.

(t) See Strode v. Byrt, 4 M non v. Goodrich, 1 Stra. 5 Illey, Willes, 619; Waring Burr. 440; Grimstead v. Ma 718; Tidd, 9th ed 444; Sto T. R. 431.

sidered that in the latter case the plaintiff's title by grant, &c. must be specially stated, because it might be qualified by some condition precedent, the performance of which ought to be shown, &c.; (u) yet it appears sufficient in both cases to *declare* generally on the plaintiff's possession; though in a *plea* it was, before the statute 2 & 3 W. 4, c. 71, necessary to state the seisin in fee and prescriptive right or grant. (x) And in pleading a prescriptive right of common, &c. as a *justification*, the defendant must show a seisin in fee of the land in respect of which it is claimed, and prescribe in the *que* estate for the right; and if he claim as tenant of the freeholder, he must prescribe in the *latter*, not in himself. (y)

If the right of common, way, or watercourse, &c. be *not appurtenant* to the house, land, &c. and the plaintiff be entitled thereto by agreement or license, the allegation in the *declaration* that he was entitled, "*by reason of the possession, &c.*" would be improper. (z) And when a *reversioner* sues for an injury to houses, land, &c. in possession of his tenant, his interest must be described accordingly; though it is sufficient to allege generally that the lands were in possession of the third person, "as tenant thereof to the plaintiff," without stating a seisin in fee, &c. (a)

How to declare if right not appurtenant.

How to declare by a reversioner.

In an action on the case for obstructing *ancient (b) lights*, the *declaration* usually states that the plaintiff, at the time of committing the grievances complained of, was lawfully possessed of a messuage, situate, &c. wherein there of right were and ought to be certain windows, through which the light and air ought to have entered the messuage, and then states the injury; and this is sufficient without alleging that the windows were ancient. (c) So, if the declaration be for diverting a *water-course* from the plaintiff's mill, his possession of the mill should be concisely stated, and that *by reason thereof* he *ought to have had the use and benefit of the watercourse, without stating that it was an ancient mill, or disclosing the particular grounds upon which the right to the water is claimed. (d) And in an action for a

How to declare for obstruction to ancient lights;

or water-courses;

(u) *Waring v. Griffiths*, 1 Burr. 443, 444.

(z) *Rider v. Smith*, 3 T. R. 766, 768; 2 Saund. 113 a, note (1), and cases there collected; and see the precedents, *Blockley v. Slater*, Lutw. 119, 120; *Hunt v. Gouch*, 1 Bernard. 432; *The Bailiffs of Tewkesbury v. Diston*, 6 East, 438, note (a); 1 Rol. Rep. 394; *Cary v. Bacchus*, 1 Show. 18, 19; *Winford v. Wollaston*, 3 Lev. 266; *Grimstead v. Marlowe*, 4 T. R. 719; 1 Saund. 346, note (3).

(y) *Attorney General v. Gannett*, 3 Y. & J. 93.

(z) *Fentiman v. Smith*, 4 East, 107; *The Bailiffs of Tewkesbury v. Diston*, 6 East,

438; *post*, vol. ii. 627. See *Cowlam v. Slack*, 15 East, 108; *Morris v. Edgington*, 3 Taunt. 24.

(a) *Post*, vol. ii. 593. When not, see *Martin v. Goble*, 1 Campb. 320.

(b) As to the word *ancient* in this case, *Penwarden v. Ching*, M. & M. 400.

(c) *Post*, vol. ii. 479, 482; *Symonds v. Seabourne*, Cro. Car. 325; *Cary v. Bacchus*, 1 Show. 17, 18.

(d) *Post*, vol. ii. 624, 628; *Sly & Mordant's case*, 1 Leon. 247; *Countess of Rutland v. Bowler*, Palm. 290; *Nulmes v. Hobblethwayte*, 3 Lev. 133; *Fentiman v. Smith*, 4 East, 107. See *Williams v. Morland*, 2 B. & C. 910.

disturbance of a *right of common*, (e) or *way*, (f) or of a
 in a church, (g) the *declaration* states the poss
 house, or land, &c. and *that by reason thereof* t
 was entitled to the right, in the exercise of wh
 been disturbed. The same mode of *declaring* has
 considered to be sufficient in actions for disturban
chises, or subtraction of *tolls*, (h) *ferries*, (i) and
 The mode in which an *easement* may be claimed has be
 pointed out. (l) In case, upon a custom for not grind
 plaintiff's mill, the plaintiff may declare generally, witho
 the amount of toll or the consideration for it. (m) And w
 poration brings an action for any due, it is sufficient to
declaration, though it is otherwise in a plea, that it is
 borough, and that the burgesses thereof are, and for divers
 been, a body politic, in the name of the mayor, &c. with
 out the name of incorporation, or any title to the duty; i
 laration being founded upon their possession, there is no r
 state a title to the thing. (n) However, though it is not r
 these actions for damages to lay a title in the *declaration*
 prescription, &c. yet the title or consideration must be *pr*
 trial. (o) It suffices to aver, that the plaintiff had the ti
 when the wrong was committed; and an averment that
 possessed may be rejected as surplusage. (p)

or common,
or way, or
seat in a
pew, &c.

Disturb-
ance of
franchises.

In affirmance of this common law right of declaring g
 these cases, the 2 & 3 W. 4, c. 71, s. 5, enacts, "
 actions on the case and other pleadings, wherein
 claiming may now by law allege his right general
 averring the existence of such right from time in
 such general allegation *shall still be deemed suff*
 and if the same shall be denied, all and every the "

The com-
mon law
mode of de-
claring gen-
erally is ex-
pressly
sanctioned
by 2 & 3
W. 4, c. 71,
s. 5.

(e) See *post*, vol. ii. 496, 497; *Strode v.*
Byrt, 4 Mod. 418; 1 Saund. 346, note (2);
Burk v. Stroud, Comber, 370.

(f) *Post*, vol. ii. 631, 632.
(g) *Ib.* 589. *Quære*, if the plaintiff claim
against the ordinary. Tidd, 9th ed. 444.

(h) 2 Saund. 113 a, 172 a, note (1); The
Bailiffs of Tewkesbury v. Diston, 6 East,
438, note (a); *Drake v. Wiglesworth*, Willes,
654; *Escot v. Laureing*, Owen, 109; *Dent*
v. Oliver, Cro. Jac. 43; *post*, vol. ii. 248;
Corporation of Stamford v. Pawlett, 1 Cr.
& Jer. 57.

(i) *Peter v. Kendal*, 6 B. & C. 703; *Blis-*
sett v. Hart, Willes, 508; 2 Saund. 114, 172,
note (1); *Trotter v. Harris*, 2 Y. & J. 285;
title thereto, *Ib.*

(k) 10 Co. 59 b; *Ferrer v. Johnson*, Cro.
Eliz. 335; 8 Wentw. Index, 58; *Morg.*
Prec. 345, 347; *Strode v. Byrt*, 4 Mod. 422.

(l) *Ante*, 391.

(m) *Gard v. Callard*, 6 M. & C. 100.

(n) 1 Saund. 340; *Escot*
Owen, 109; *Dent v. Oliver*,
123; *Chapman v. Flexman*,
The Bailiffs of Tewkesbury
East, 438, note (a). What a
&c. of *Rochester v. Pierce*, 1
The Mayor of *Carlisle v. Bl*
487; *Croydon Hospital v. Fa*
467; 2 Marsh. 174, S. C.;
General v. The Mayor of R
546; 1 Moore, 267, S. C.

(o) 2 Saund. 114 c; *Stro*
Mod. 421, 424; 1 Saund. 346.

(p) *Vowles v. Miller*, 3 Ta

(p¹) [In an action on the
structing a private way, the de
not show the origin and histor
tiff's title to the way. *Smith*
N. H. 156.]

this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation."

With respect to *pleas and subsequent* pleadings, such a *general mode* of stating a right of common or other easement, &c. in a justification was not permitted, and every defendant was required in his plea to show a *seisin in fee* of the land in respect of which it was claimed, and to prescribe in the *que estate* for the right, and if he claimed as tenant of a freeholder, he must have prescribed in the latter, not in himself. (*r*) But the above statute now authorizes a more general plea, as will be shown when we examine the requisites of pleas. (*s*)

More general mode of stating rights in pleas, &c. under 2 & 3 W. 4, c. 71, s. 6.

When the plaintiff's right consists in an *obligation on the defendant to observe some particular duty*, the declaration must state the nature of *such duty*, which we have seen may be founded either on a *contract* between the parties, or on the obligation of law, arising out of the defendant's *particular* character or situation; and the plaintiff must prove such duty as laid, and a variance will, as in actions on contracts, be fatal. When the declaration is for the breach of an express or implied *contract*, and proceeds for *nonfeasance*, the *consideration* of the contract must be stated either in terms or in substance; (*t*) but when it is for a *misfeasance* or *malfeasance*, no consideration need be stated; (*u*) and when it is founded on the obligation of *law*, unconnected with any contract between the parties, it is sufficient to state very concisely the circumstances which gave rise to the defendant's particular duty or liability; as in actions against sheriffs, carriers, innkeepers, &c. (*x*) Where the defendant is *liable of common right*, as to repair a wall for preventing damage to his neighbor, according to the maxim *sic utere tuo ut alienum non lœdas*, it was always considered sufficient to state that the defendant was *possessed* of a certain close, &c. and that *by reason thereof* he was bound to repair, &c. without showing the particular ground of the defendant's liability. (*y*) But where a *charge* was imposed on another *against common right*, as owner of the soil or terre-tenant, it was formerly thought that the plaintiff ought

Modes of declaring where defendant is under any particular obligation or duty.

(*r*) Attorney General v. Gauntlett, 3 Y. & J. 93; and see forms of pleas, *post*, vol. ii.

(*s*) And see forms, *post*, vol. ii.

(*t*) Elsee v. Gatward, 5 T. R. 143; Mast v. Goodson, 3 Wils. 348; Max v. Roberts, 12 East, 92.

(*u*) Elsee v. Gatward, 5 T. R. 143; Mast v. Goodson, 3 Wils. 348; Govett v. Radcliffe, 3 East, 62; Samuel v. Judin, 6 East, 333; Coggs v. Bernard, 2 Ld. Raym. 909; Max v. Roberts, 12 East, 89.

(*x*) Elsee v. Gatward, 5 T. R. 149, 150; 1 Saund. 312 c, note (2); Max v. Roberts, 12 East, 89. [In an action on the case against a common carrier, it is not necessary that the declaration should allege that a compensation was paid or agreed to be paid, for carrying the goods. Hall v. Cheney, 36 N. H. 26.]

(*y*) Tenant v. Goldwin, 6 Mod. 311; 2 Ld. Raym. 1090; 1 Salk. 22, 360, S. C. *post*, vol. ii.; Rider v. Smith, 3 T. R. 766.

to disclose the particular grounds on which the defendant's claim is founded; (z) as in an action for not repairing a fence, or for keeping a bull or a boar, &c. (a) But it * is now settled that this is the foundation for this distinction; and in the case of *Rider* and *others*, where an action was brought for the defendant's not repairing a private road leading through his close, it was held sufficient that the defendant as occupier of the close ought to have repaired it; (b¹) and Mr. Justice Buller stated the distinction to be, that in the case where the plaintiff in his declaration lays a charge on the right of the defendant, and where the defendant in his plea denies the right in right of his own estate; in the former case the plaintiff is bound to be ignorant of the defendant's estate, and therefore need not state it, but in the latter the defendant, knowing his own estate, must set it forth. (c)

In an action on the case, founded on an express or implied contract, (d) as against an attorney, agent, carrier, innkeeper, or bailee, for negligence, &c. the declaration must correctly state the contract, or the particular duty or consideration from which the liability results, and on which it is founded; (e) and a variety of descriptions of a contract, though in an action *ex delicto*, as in an action in form *ex contractu*. (f) The declaration in such case usually begins with a statement of the particular contract, or situation of the defendant and his retainer, and consequently of the liability. (g) The declaration will be defective if it do not state the contract by express contract, or by implication of law in respect to the defendant's particular character or situation, &c. stated by the plaintiff. The defendant was bound to do or omit the act in reference to which the plaintiff is charged. (h) In an action for a breach of warranty the particular sale is stated; (i) and in a declaration by a landlord against a tenant for not cultivating according to good husbandry, or for waste, &c. the relation of landlord and tenant is precisely stated. (k) In a declaration on the case against a defendant for improper treatment of the plaintiff, whereby he was wronged,

(z) *Ante*, 394, 395.

(a) *Starr v. Rookesby*, 1 Salk. 335, 336; *Waples v. Basset*, 4 Mod. 241.

(b) 3 T. R. 766; *Blockley v. Slater*, Lutw. 119; *Grimstead v. Marlowe*, 4 T. R. 718; *Derisley v. Custance*, 4 T. R. 76, 77; 2 Saund. 114 a, b, c; Steph. 5th ed. 358, 359.

(b¹) [*Peters J. in Goshen Turnp. Co. v. Sears*, 7 Conn. 93.]

(c) 2 Saund. 113, note (1), 172 a, note (1); *ante*, 245, 256.

(d) In general, when sustainable in such instances, *ante*, 150.

(e) *Max v. Roberts*, 12 East, 89; *Boorman v. Brown*, 4 P. & D. 401; *ante*, 296; [*Newell v. Horn*, 47 N. H. 379.]

(f) *Ireland v. Johnson*, 1 Bing. N. C. 162; *Brotherton v. Wood*, 6 Moore, 34;

3 Brod. & Bing. 54; *Brother Price*, 408.

(g) See forms *post*, vol. ii. 47.

(h) *Max v. Roberts*, 12 East, 89; *man v. Brown*, 4 P. & D. 401; *King v. Everett*, 8 B. & C. 11; *Bennett*, 6 Bing. 235; [*Low v. N. H.* 271; *Hewison v. N. H.* 136; *Buckley v. Great Co.* 18 Mich. 121.]

(i) *Post*, vol. ii. 259. [*S. Landon*, 102 Mass. 58; *Mah*, 28 N. H. 128, 131; *ante*, 296.]

(v). The sale is stated, but the thing is entirely immaterial, and need not be stated. *Webster v. Hodgkins*, 128, 139.]

(k) *Post*, vol. ii. 185, 187, 189.

sufficient to aver that the defendant was a surgeon and "was retained and employed as such" (not stating by whom), "for reward to him," to treat and cure the plaintiff, and that the defendant *entered upon the treatment*, &c. without showing any undertaking by defendant, or averring in words that it "was defendant's duty to act skilfully, &c." (l) Care must be taken in declaring in case in actions of this nature that the count be not framed as in *assumpsit*, laying a promise, &c. (m)

Declarations for non-observance of the *general obligation* of law may be either for the consequences of the negligent driving of carriages, &c.; (n) or navigating ships; (o) or for not removing a nuisance from the defendant's lands; (p) or against the late rector or vicar, or his executor or administrator, on the custom of the realm, for dilapidations; (q) or against the occupier of land, for not repairing a fence or the bank of a river, &c.; (r) or for not repairing a way over his land; (s) or against the proprietor of tithes for not taking them away. (t) In these cases it is sufficient to state concisely the defendant's *possession* of the personal or real property, and his *consequent obligation* or duty, the non-observance of which is complained of. (u)

Declarations for the breach of *duty*, to which the defendant was subject in respect of his *particular character* or *situation*, are against carriers or innkeepers, for refusing to carry goods or to receive a guest, or for the loss of goods; or against sheriffs and other public officers for escapes on mesne (x) or final process; (y) or for not arresting a debtor when the defendant had an opportunity; (z) for false returns, &c. to mesne or final process; (a) for not taking a replevin bond; or for taking insufficient pledges; (b) or for not assigning a bail bond. (c) In these cases the particular situation of the defendant from which his duty and liability arise must be concisely stated. (d)

(l) See form, *post*, vol. ii. 607, and note (o).

(m) *Ante*, 152, 221. [In these cases, though the plaintiff declares as for a tort, still, so far as the tort rests upon contract, the same rules are to govern that would if the contract itself had been declared upon. *Wheeler J. in Wiley v. First National Bank of Brattleboro*, Sup. Court, Vt. Feb. Term, 1875, 2 *Central Law Journal*, 271; *Towne v. Wiley*, 23 Vt. 355; *Woodward v. Barnes*, 46 Vt. 332.]

(n) *Post*, vol. ii. 575.

(o) *Ib.* 603.

(p) *Ib.* 580.

(q) *Ib.* 591.

(r) *Ib.* 582, 584.

(s) *Rider v. Smith*, 3 T. R. 766; *Blockley v. Slater*, Lutw. 119. It is a common law duty of a company maintaining a navigable canal, open to the public on payment of tolls,

to take reasonable care to prevent danger to the navigation, and although a declaration mistake the effect of a clause of an act of parliament, and allege that it was the duty of the company to raise sunken vessels, &c. when no such duty existed, the declaration will nevertheless be sufficient if the duty at common law can be necessarily implied. *Lancaster Canal Company v. Parnaby*, 3 F. & D. 162.

(t) *Post*, vol. ii.

(u) *Ib.*; *ante*, 152, 296.

(x) *Ib.* 598.

(y) *Ib.* 599.

(z) *Ib.* 598.

(a) *Ib.* 596.

(b) *Ib.* 595.

(c) *Ib.* 595.

(d) *Max v. Roberts*, 12 East, 89; *ante*, 152, 296; *The King v. Everett*, 8 B. & C.

With regard to *variances* in stating the plaintiff's title to in personal or real property in actions *ex delicto*, it is important to bear in mind the general rule that in most cases that form the plaintiff is not bound to state in his declaration a *special* title; it suffices in general that he state a general title or mere possession; for his title or interest is regarded for the purposes of pleading in the light of the facts only. (*f*) But as the inducement in such case relates to the matter, there will be a fatal variance, if, instead of relying on a general statement of his title, interest, or * right, the plaintiff goes into a more particular and detailed statement thereof and contains a misdescription. *Mere* surplusage, which can be rejected without vitiate; (*g*) but where some statement upon the subject is made and it cannot be rejected *in toto*, the variance in the detail is not of nonsuit, although such minute description were not essential.

Having fully stated this principle already, and illustrated it by several instances, (*h*) it will be useless here to attempt further illustration. We may however add as an additional instance, the dicta of Mr. J. Lawrence, in an action for slander of a plaintiff, namely, "Even if it be not necessary in general for the plaintiff to state that he has regularly taken his degree, in this case it was necessary because the plaintiff alleged in his declaration that he had taken the degree of doctor of physic." And if the unnecessary detail of title disclose that the plaintiff had no claim, the declaration is defective. (*k*) It is also a rule, that if a necessary inducement states the plaintiff's right, &c. even in actions for torts, relate to another matter and be founded on a matter of *contract*, it is necessary to state the correct in stating such contract, it being matter of *description*. Thus, even in *case* against a carrier, if the *termini* of the contract which was to be undertaken be misstated, the variance is fatal. (*m*) Here the allegation in the inducement relates to the matter of description. As a *prescription* is founded on a supposed grant, it is therefore *entire*, for the subject-matter granted must necessarily be *descriptive* of the grant itself, it follows that *partial* prescription which is claimed by the prescription is insufficient, although

114; 2 M. & R. 35, S. C.; *Boorman v. Brown*, 4 P. & D. 401.

(*e*) As to the variances in stating the consideration and the promise in *assumpsit*, *ante*, 307.

(*f*) *Ante*, 393, and see the instances there.

(*g*) *Ante*, 252.

(*h*) *Ante*, 252-255. The same doctrine holds as to inducements in *assumpsit*; *ante*, 296. See 3 Stark. Evid. Variance, 1542, on the rule that descriptive allegations, though unnecessarily confined, cannot be rejected.

(*i*) *Moises v. Thornton*, 8 T. R. 308.

(*k*) *Ireland v. Johnson*, 1 Bing. N. C. 162,

and *ante*, 398, note (*f*); *ante*, 346 a, note.

(*l*) *Lopes v. De Tastet*, 1 Weall v. King, 12 East, 45; *Greenbank*, 2 Marsh. 485; *ante*, 311, and instances there. Variance in contracts, *ante*, 307.

(*m*) *Ditcham v. Chivis*, 1 M. & B. 706, S. C. The term prescribed according to common prescription to Blackheath will include Cross, or Saint George's Field, when, *ib.* See, also, *Booth*, 7 B. & B. C. 301.

fail only as to part which is not material in the particular case on the trial. (n) Therefore if a party, in stating a prescription, allege a prescriptive right to fish "in *four* specified places," but it extend to three of them only, the variance is fatal, although the tort were not committed in the excepted part. (o) So, if he lay a prescriptive right of common generally, and the proof be of a *limited, qualified, or conditional* right, as "paying 1d."; (p) or *allege it to be for "all commonable cattle," but the proof show that the right relates to certain particular cattle, either in number or species, (q) there is a fatal misdescription. These rules apply to the statement of a *prescription* by either party. But although the prescriptive right be general and absolute for all commonable cattle, yet if the tort relate to a particular description of cattle only, it may be simply alleged that the party had the right for such cattle; as if the prescription be laid "for two horses," proof that it *also* extended to "two cows" will not be considered a variance from the allegation; for it does not disprove it, or destroy the identity of the prescription; and the party need only show so much as applies to his case, provided he do not introduce an allegation *contradicting* the prescription. (r)

However, the broad and general distinctions between *contracts* and *torts* in this respect, viz. that the former are *entire* and matter of description, whereas the latter are divisible, and the allegations therein are in general matters of substance, should be here adverted to. (s) In torts the plaintiff may prove a part of his charge, if the averment be divisible, and there be enough proved to support his case. (s) Therefore, if in a declaration for slandering the plaintiff in two trades mentioned in the declaration, there be proof of one trade only, the proof will support the declaration if the words apply to the latter trade. (t) In case for disturbance of a right of common, the plaintiff stated that he was entitled by reason of his possession of a "messuage and land," and it was held sufficient to prove that he was pos-

(n) 3 Stark. Evid. 1548, Variance.

(o) Rogers v. Allen, 1 Campb. 309. See Benn v. Felton, Noy, 67; Conyers v. Jackson, Clay. 19. See Rotheram v. Green, Cro. Eliz. 593.

(p) Lovelace v. Reignolds, Cro. Eliz. 563; 5 Co. 78 b. In case for the disturbance of a right of common, the declaration alleged that the mayor, aldermen, and burgesses of the town and borough of Stamford had the right in question for every resident freeman paying scot and lot. The borough was enlarged by recent statutes, but the right claimed was an *ancient* right, and therefore not coextensive with the present borough, and it was accordingly held, that the declaration was not supported, as the right claimed was larger than that proved. Beadsworth v. Torkington, 1 G. & D. 482. See Paddock v. Forrester, 1 Dowl. N. S. 527.

(q) Bul. N. P. 59. See Manifold v. Pennington, 4 B. & C. 161; 6 D. & R. 291 S. C.

(r) Bushwood v. Pond, Cro. Eliz. 722; Bul. N. P. 29; Johnson v. Throughgood, Hob. 64; 3 Stark. Evid. 1560, Variance. See, also, Phillips on Evid. Variance and Prescription.

(s) Gilb. Evid. 229; Rep. t. Hardw. 121; 2 Saund. 74 b, 207, note (24); ante, 320, 324; [Cheetham v. Tillotson, 5 John. 430.] There is a distinction between allegations of matter of substance and allegations of matter of description; the latter only need be literally proved. Purcell v. Macnamara, 9 East, 160; Stoddart v. Palmer, 3 B. & C. 4; 4 D. & R. 624, S. C.; [Fisk v. Hicks, 31 N. H. 595.]

(t) Figgins v. Cogswell, 3 M. & Sel. 369; post, 407.

sessed of *land* only; (*u*) but Abbott C. J. said, that if the words of connection, such as "thereunto belonging," or of like import, to connect the messuage and land together, to entitle the plaintiff to recover the entire tenement, he should have thought the plaintiff was not to recover. (*x*)

Injuries ex delicto are either committed with or without force, and are immediate or *consequential*; (*z*) they may be committed from malfeasance, misfeasance, or nonfeasance. (*a*) In the declarations in *trespass*, which lies only for wrongs committed with * force, the injury is stated without inducement of the defendant's motive or intent, and the circumstances under which the injury was committed. (*b*) In *trespass* should be stated directly and positively, and not in the negative or recital; and therefore a declaration charging "for that *wherefore*," the defendant committed the trespass, is bad. (*c*) and was formerly holden to be so in arrest of judgment; but it was afterwards holden that it might be amended at any time before or after judgment by a right bill, the time of filing the bill in the court would not inquire into. (*d*) In the common plea the supposed writ was recited, the mistake was aided, and was not deemed a ground even of special demurrer. (*e*) In the statement of the *trespasses* the words "with force and arms" (*vi et armis*) may be adopted, (*f*) though the only mode of taking advantage of the omission is by special demurrer; (*g*) and in the common plea the words appeared in the recital of the supposed writ, and in the count part, it was sufficient; (*h*) and in one case Lord Holt held that these words might be omitted; (*i*) and there is an express provision to this effect in regard to indictments. (*k*) The

(*u*) *Ricketts v. Salwey*, 2 B. & Ald. 360.

(*z*) *Ib.* And *semble*, that a prescription for a right of common for a messuage and land, with the appurtenances, would not be supported by evidence of a prescriptive right appurtenant to the land only. See *Ib.*; *Yarley v. Turnock*, Palmer, 269; 7 Co. 5; *Hickman v. Thorney*, Freeman, 211; Bul. N. P. 59; 3 Stark. Evid. 1549; Selw. N. P. Replevin, vii. 6th ed. 1180.

(*y*) *Ante*, 140.

(*z*) *Ante*, 140, 141.

(*a*) *Ante*, 148.

(*b*) See the forms and notes, *post*, vol. ii. 609 *et seq.*

(*c*) *Hore v. Chapman*, 2 Salk. 636; *Ameyon v. Shore*, 1 Stra. 621; *Goodright v. Hodgson*, Andr. 282; [*Collier v. Moulton*, 7 John. 111; *Coffin v. Coffin*, 2 Mass. 264; *Syme v. Griffin*, 4 Hen. & M. 277.]

(*d*) *Wilder v. Handy*, 2 Stra. 1151; *Marshall v. Riggs*, 2 Stra. 1162. [See *Collier v. Moulton*, 7 John. 111; *Coffin v. Coffin*, 2 Mass. 358; *Hord v. Dishman*, 2 Hen. & M.

595; *Moore v. Downey*, 3 Hen. & M. 595; *Syme v. Griffin*, 4 Hen. & M. 277; *teller v. M'Clean*, 7 Cranch, 151.]

(*e*) *Douglas v. Hall*, 1 Wils. 452, S. C.; *White v. Shaw*, 1 Wils. 452; *Goodright v. Hodgson*, Andr. 282; *Dig. Pleader*, C. 86, S. P.; *rule* and *Ramsbottom*, in C. P. 1810, *Smith*, attorney, MS.

(*f*) *Com. Dig. Pleader*, 3 M. 81, 82, note (1), 140, note (4), 186; per *Parke B.* in *Stancwick*, 3 Dowl. 769.

(*g*) 4 & 5 Anne, c. 16, s. 1; *Bailey*, 4 D. & R. 215. [See *14 Serg. & R.* 399, 403; *Higginward*, 5 Vt. 73; *Buntin v. Duchwicke*, 3 Dowl. 769.]

(*h*) *Com. Dig. Pleader*, 3 M. 81, 82, note (1), 140, note (4), 186; per *Parke B.* in *Stancwick*, 3 Dowl. 769.

(*i*) *Ld. Raym.* 985; *Vin. A.* Q. a. 5.

(*k*) 37 Hen. 8, c. 8; *Crown*, 9th ed. (1820); 4 *Hawk. P. C.*

of the declaration in trespass or ejectment for these forcible injuries, should also be "*contra pacem reginæ*," though they are mere words of form, and not traversable; (l) the omission of that allegation will however be aided, if not specially demurred to. (m)

In actions on the case, when the act or nonfeasance complained of was not *prima facie* actionable, it is usual to state that the act complained of was *wrongfully* done. (n) In general it is necessary to state not only the *injury* complained of, but also the *motive*, that it was *wrongfully* or *maliciously* committed; as that the defendant, *well knowing* the mischievous propensity of his dog, or having been *requested* to remove a nuisance erected by another, *maliciously* or ** fraudulently* contriving and *intending*, &c. (stating a bad intent corresponding with the wrongful act complained of), *committed* or *permitted* the tort. (p)

In some actions the *scienter* being material must be *alleged* and *proved*; as in a declaration for keeping a dog used to bite mankind or sheep, (q) or for enticing away a servant or apprentice, (r) or for falsely representing a third person fit to be trusted, though in the latter case the word "*fraudulently*" might be sufficient. (s) In an action on the case for a malicious prosecution in an inferior court having no jurisdiction, a *scienter* in the defendant that the court had no jurisdiction should it seems be averred. (t) But in an action for debauching a wife or servant, it is not necessary to allege or prove that the defendant knew that the female was the wife or servant of the plaintiff. (u) And in an action upon an express warranty the *scienter* need not be alleged, nor if stated need it be proved. (x) In a declaration against the mere continuer of a nuisance, it is advisable to state that he was *requested* to remove it. (y) In an action against a sheriff for removing goods from a tenant's premises under a *fieri facias*, without paying the landlord's rent in arrear, it is necessary to

(l) *Rafael v. Verelst*, 2 Bl. Rep. 1058; *Day v. Muskett*, 2 Salk. 640, 641; Com. Dig. Pleader, 3 M. 8; Vin. Abr. *Contra pacem*, and Trespass, Q. a. 5; [Gardner v. Thomas, 14 John. 134.] Though there is no longer any judgment for the fine (see *Linsey v. Clerk*, 1 Salk. 54; 3 Bl. Com. 118, 119, 398, 399; 2 Sel. Prac. 641; *Day v. Muskett*, 2 Ld. Raym. 985; Vin. Abr. Trespass, Q. a. 5), yet Lord Holt, in *Day v. Muskett*, 2 Ld. Raym. 985, said the words must not be omitted; and see the above cases; and yet in some instances *cessante ratione cessat et ipsa lex*, as in the case of pledges. 3 T. R. 157; 2 H. Bl. 161.

(m) 4 & 5 Anne, c. 16.

(n) *Stancilffe v. Hardwicke*, 3 Dowl. 769. In an action for arresting without probable cause, an averment of *malice* is absolutely necessary, and the words "*wrongfully* and *injuriously*" are insufficient. *Saxon v. Castle*, 6 Ad. & El. 652.

(p) In trespass the injury must be described as having been committed *vi et armis*; in case that the act complained of was wrongfully done. Per Parke B. in *Stancilffe v. Hardwicke*, 3 Dowl. 769.

(q) *Ante*, 93, 145. See *post*, vol. ii. 561 *et seq.* and notes.

(r) *Post*, vol. ii. 560.

(s) *Post*, vol. ii. 525; *Winsmore v. Greenbank*, Willes, 584. The representation must be in writing. 9 Geo. 4, c. 14. *Scienter* not material in case for driving unruly horses. *Michael v. Alestree*, 2 Lev. 172.

(t) *Goslin v. Wilcox*, 2 Wils. 302.

(u) *Post*, vol. ii. 559.

(x) *Williamson v. Allison*, 2 East, 446; [but see contrary, *Mahurin v. Harding*, 28 N. H. 128, cited and considered *ante*, 153, 154.]

(y) *Winsmore v. Greenbank*, Willes, 583; *post*, vol. ii. 580.

aver in the declaration that the defendant had notice of the injury in arrears; but the usual averment in stating the injury, that the defendant, well knowing the premises," did, &c. will cure the defect of such an averment after verdict. (z)

We have already seen how far the defendant's *motives* affects the *form* of the action; and that in general when occasioning damage is in itself unlawful, without any other circumstance, the intent of the wrong-doer is immaterial in law, though it may enhance the damages. (a) As observed by Kenyon, there is a distinction between answering *civilliter et modeste* for acts injurious to others; in the latter case the maxim *actus non facit reum nisi mens sit rea*: but it is otherwise in actions, where the intent is in general immaterial, if the act is injurious to another. (b) Lord Ellenborough's observations in *The King v. Phillips*, (c) in regard to indictments, illustrate this doctrine: "If any particular bad intention accompany the act, it may be necessary to constitute it a crime, such intention should be averred in the indictment. In many cases the allegation of intent is a formal one; being no more than the result and inference which the law draws from the act itself, and which therefore requires no proof, but what the act itself supplies. But where the act is in itself innocent, the intent with which it was done then becomes material, and requires, as any other substantive matter of fact does, special averment, allegation and proof." In declarations for slander, the defendant's malicious intent must be alleged, but it may in evidence be proved. In an action for a malicious arrest, *malice* is a question of fact for the jury, who are at *liberty* but not absolutely *bound* to infer malice from want of probable cause. (e) In an action for the consequence of a public nuisance, it is not usual to state any undue intent on the part of the defendant. (f) So in an action on the case for the defendant's infringement of the plaintiff's copyright in a book, it is sufficient to state that the defendant published and sold the spurious copies, without averring or proving any intention on the part of the defendant to pirate the plaintiff's right or injure the sale of the plaintiff's book; (g) and in an action on a statute, it is sufficient to follow the words of the act; and in an action on the black act against the hundred, it was held

(z) *Lane v. Crockett*, 7 Price, 566; *post*, vol. ii. 599; *ante*, 260; *Adamson v. Jervis*, 4 Bing. 66.

(a) *Ante*, 145.

(b) Per Kenyon C. J. *Haycraft v. Creasy*, 2 East, 104. The other judges differed from his lordship, but only in the application of the principle to the particular case. As to the materiality of a bad intent, see the observations in *The Bailiffs &c. of Tewkesbury v. Diston*, 6 East, 438; and in *The King v. Phillips*, 6 East, 464. A servant when liable

in trover, &c. though acting without his employer, *ante*, 94.

(c) 6 East, 473, 474; and see *Comp.* 9th ed. (1820).

(d) *Anonymous*, Sir J. Moore v. Sparks, Owen, 51. S. C. La Breton, 4 Burr. 2423; *Smith v. Taunt*, 246.

(e) *Mitchell v. Jenkins*, 5 B.

(f) *Post*, vol. ii. 680.

(g) *Roworth v. Wilkes*, 1 C.

essary to state that the stack of oats and barn were unlawfully or wilfully and maliciously set on fire. (*h*) If, however, a malicious or wrongful intent be unnecessarily stated, it need not be proved; (*i*) and where there is evidence to prove the allegation, it may be advisable, in aggravation of the damages, to state the defendant's malicious intent. (*j*)

In stating the *defendant's intent or motive*, when necessary, the language, as in all other parts of pleading, should correspond with the real or probable facts of the particular case. In an action for a malicious arrest for a pretended debt, it is usual to state "that the defendant, wrongfully and unjustly contriving and intending to imprison, harass, oppress, and injure the plaintiff, falsely and maliciously *caused the writ to be issued* (the statement of which writ is essential), (*k*) and the arrest made, &c.;" (*l*) and in a declaration for a malicious prosecution of a criminal charge, injurious as well to the character as to the *liberty of the plaintiff, the intent to prejudice the character is also stated. (*m*) So, in actions for verbal or written slander, the malicious intent to injure the plaintiff in his character, and, if the words relate to his trade, in such trade, should be stated; (*n*) but where, from the nature of the injury, the defendant could hardly have been actuated by express malice toward the plaintiff, as in an action for debauching a daughter or servant, the imputation may be and often is omitted. (*o*) And where the injury is the breach of a contract, express or implied, as for a false warranty, or against a carrier, bailee, &c. the declaration frequently states the deceit or breach of contract, without any allegation of malice. (*p*) So, in actions against officers, &c. for the non-observance of a public duty, (unless malice be essential, as in an action against a returning officer of a borough for refusing a vote at an election, &c. (*q*)) the breach of duty and intention to deceive or injure the plaintiff are stated, without alleging any other undue intent, as in an action against the sheriff for an escape, &c. (*r*)

When it is material to show an undue motive or intent, it is seldom necessary in a civil action to state it in *terms*, it is sufficient if it be *substantially* shown. (*r*¹) Thus, in an action against a returning officer for refusing a vote at an election, though a bad intent is necessary to the support of the action, yet the word *wrongfully* intending

(*h*) *Allan v. The Hundred of Kirton*, 2 Bl. Rep. 842; Crown Circ. Comp. 9th ed. (1820). See, also, *Beatson v. Rushforth*, 2 Marsh. 362; but see 1 Leach C. L. 4th ed. 403; and *ante*, 386.

(*i*) *Williamson v. Allison*, 2 East, 446.

(*j*) On the same principle as stated in 4 Hawk. P. C. 56.

(*k*) *Gadd v. Bennett*, 5 Price, 540.

(*l*) *Post*, vol. ii. 551, 552.

(*m*) *Post*, vol. ii. 555.

(*n*) *Ib.* 538, 546.

(*o*) *Ib.* 559.

(*p*) *Ib.* 521.

(*q*) *Harman v. Tappenden*, 1 East, 555, 563, 568, note (*a*).

(*r*) *Post*, vol. ii. 598.

(*r*¹) [*Marshall v. Bussard*, Gilmer, 9, and the cases cited in the argument and opinion. *Savage v. Fuller*, Brayt. 223.]

to deprive the plaintiff, &c. is sufficiently indicative of intent. (s) So, in a declaration for slander, though it is u that the defendant *maliciously* published the scandal, yet *falsely* alone is sufficient; (t) so in an action for harboring tiff's wife, though the mere statement of the harboring n sufficient, because it is lawful in some instances for the w her husband, yet the words *unlawfully* and *unjustly* h will sufficiently designate the defendant's conduct to hav gal. (u)

With regard to the *statement* of the *tortious act* or *inj* is frequently sufficient to describe it generally, setting out the particulars of the defendant's Thus in an action on the case for inducing th wife to continue absent, it is sufficient to state fendant "unlawfully and unjustly *persuaded, procured,* the wife to continue absent," by means of which persuas continue absent, &c. whereby the plaintiff *lost her soci setting forth the means of persuasion used by the defenda in actions for diverting water from a stream, or for distu right of common, (z) way, &c. it is sufficient to allege or disturbance generally, without showing the partic adopted. (a) Care, however, must be observed in an ac case not to describe the injurious acts as *trespasses*, re actions of trespass, though, if shown to have been comm color of a warrant or other process *prima facie* regular, th otherwise the subjects only of an action of trespass, may joined in case; (b) and an informal count partly in case a trespass may be aided on a motion in arrest of judgment, an informal count in trover. (b) It will in general suffi tort is correctly laid in substance though the statement be true, provided there be no material misstatement. Thus

(s) Harman v. Tappenden, 1 East, 563, 567; but see Saxon v. Castle, 6 Ad. & El. 652. See the observations on the words *malitiose*, and *sine rationabili* or *probabili causa*, Gilb. Cas. Law and Evid. 199, &c.; and as to the word "fraudulently," see The Bailiffs &c. of Tewkesbury v. Diston, 6 East, 445, &c. [And so, in case for malicious prosecution, it is sufficient to state that the defendant *maliciously* caused, &c. the plaintiff to be indicted. Graham v. Noble, 13 Serg. & R. 233.]

(t) 1 Saund. 242 a, note (2); [Keesling v. McCall, 36 Ind. 321.] From the want of probable cause malice may be and most usually is implied. Johnstone v. Sutton, 1 T. R. 545.

(u) Winsmore v. Greenbank, Willes, 584.

(x) But a general and inde admitting of almost any pro able. Ante, 255; Jones v. St. 235.

(y) Winsmore v. Greenbank, The King v. Fuller, 1 B. & L. 235; 1 Ld. Raym. 452; Leon. 13.

(z) *Aliter*, in case against soil for a surcharge. 1 Saund. vol. ii. 496.

(a) Anonymous, 3 Leon. 1. 452; Com. Dig. Actions on th

(b) Hensworth v. Fawkes, 549; 1 Nev. & M. 321, S. Goodwin, 4 B. & Ad. 443. son v. Nicholson, 5 M. & W.

declaration charged that the defendant struck the plaintiff's cow, &c. whereof she died, it was held, after verdict, that there was not a fatal variance, although the proof was that the plaintiff was obliged to kill the cow to shorten her misery, in consequence of defendant's violence. (c) In an action on the case against a master for the negligence of his servant, it has been decided that the negligence may be stated according to its legal effect, namely, as that of the master, without noticing the servant; but as the object of pleading is to apprise the opposite party of the facts, it is more correct to state them truly. (d) If the plaintiff declare as reversioner for an injury done to his reversionary interest, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion. (e)

But if the plaintiff, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance, which will occasion a nonsuit. Thus, in an action for diverting, &c. a watercourse, a count for diverting and turning a stream of water will not be supported by proof of penning back and checking it, whereby the water was made to overflow the plaintiff's meadow; (f) and under a count for causing the water to rush impetuously against the plaintiff's land, he cannot prove that the water was at times *prevented from coming thereto. (g) But where in case for diverting a stream from the plaintiff's mills, the declaration alleged that the defendant placed and raised a certain dam across the stream, and thereby diverted and turned the water, and prevented it from running along its usual course to the mill, and from supplying the same with water for the necessary working thereof, as the same of right ought and otherwise would have done; it was held that such allegation was supported by proof that in consequence of the dam the water was prevented from being *regularly* supplied to the mill, although the stream was not diverted, as the dam was erected above the mill and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by the erection of the dam. (h)

Where the declaration stated that the defendant "wrongfully placed and continued a heap of earth, whereby a watercourse was obstructed," it was decided that the allegation was not supported by proof that

(c) *Hancock v. Southall*, 4 D. & R. 202; and per Bayley J. in *Bromage v. Prosser*, 4 B. & C. 255.

(d) *Bunker v. Fromont*, 6 T. R. 659; *M'Manus v. Crickett*, 1 East, 110.

(e) *Jackson v. Peaked*, 1 M. & Sel. 234; in general, *ante*, 71, 72, 157, 158.

(f) *Griffiths v. Marson*, 6 Price, 1.

(g) *Griffiths v. Marson*, 6 Price, 1; *Williams v. Morland*, 2 B. & C. 910; 4 D. & R. 583, S. C. In a declaration for preventing a stream from flowing to plaintiff's land, it must be averred that plaintiff was beneficially entitled to use the water. *Ib.*

(h) *Shears v. Wood*, 7 Moore, 345.

the heap was not originally placed so as to cause the obstruction that in time earth from the heap fell, and by changing occasioned the injury; the count should have been for such earth to fall down. (*i*)

In an action *ex delicto*, upon proof of *part only* of *charged*, or of *one* of several injuries laid in the same plaintiff will be entitled to recover *pro tanto*, provided the is proved afford *per se* a sufficient cause of action, for torts generally speaking, divisible; (*k*) and this even in a count for libel, for though the jury find that part of alleged libel and do not relate to the plaintiff, but that the rest does, he may *pro tanto*, though the defendant will be entitled to costs not negatived. (*l*) The same rule as to proving part of a breach in general *in assumpsit*, as we have already observed and exemplified. In case, charging a defendant with "composing and publishing" a libel, he may be found guilty of publishing only in declarations for injuries to land, trees, goods, &c. a tort of that kind thereof may be proved. (*o*)

The rule that a general averment, including several particulars, may be construed *reddendo singula singulis*, may be here noticed. An averment that lands are occupied by "A. and B." may be supported by showing that each occupies a part; (*p*) and an averment that lands are "in the parishes A. and B.," may be supported by proof that part is situate in each parish. (*q*) So, where a defendant returns for a false return to a *fi. fa.* against the goods of A. and B. that A. and B. had goods within the bailiwick, it was sufficient to prove that either of them had, the averment being true as to either. (*r*)

The statement of the *time* of committing injuries *ex delicto* is not material; (*r*¹) it may be proved to have been committed either on a day anterior or subsequent to that stated in the declaration. (*s*) And in an action on the case

Time in stating torts in general.

(*i*) *Fitzsimons v. Inglis*, 5 Taunt. 434.
(*k*) *Maitland v. Goldney*, 2 East, 438; *Compagnon v. Martin*, 2 Bl. Rep. 790; *Gwinnett v. Phillips*, 3 T. R. 645; *Bernard v. Duthy*, 5 Taunt. 27; *Jones v. Clayton*, 4 M. & Sel. 349; [*Fisk v. Hicks*, 31 N. H. 535, 540. It is generally true, in declarations for torts, that surplussage does not vitiate. A party proves such of the allegations of his writ as he can, and his failure to prove other statements does not prevent his recovery, if he proves any good ground of action. *Bell J. in Fisk v. Hicks, supra.*]

(*l*) *Prudhomme v. Fraser*, 1 Harr. 5.
(*n*) 3 Stark. Evid. 1536, 1541; *Rex v. Williams*, 2 Campb. 507. Proving part of

words spoken. *Maitland v. Goldney*, 2 East, 438; *post.*

(*o*) 3 Stark. Evid. 1538, 1539.

(*p*) 3 Stark. Evid. 1541.

(*q*) *Goodtitle v. Walter*, 4 Taunt. 700.

Pool v. Court, 4 Taunt. 700. 289.

(*r*) *Jones v. Clayton*, 4 M. & Sel. 349.

(*r*¹) [See *Glenn v. Garrison*, 10 Mass. 450.]

Under the Massachusetts practice, a declaration in tort for breaking and entering

close need not contain any averment of the breaking.

Knapp v. Slocumb, 9 Gray, 73.

(*s*) Co. Litt. 283 a; 1 Saund. 228.

2 Saund. 295, note (2). *Mias*, 10 Mass. 450.

the priority of two facts in a declaration.

cious prosecution, it is not necessary for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appear to have been before the action brought, and therefore a variance between the day laid and the day of trial mentioned in the record produced to prove the acquittal, is not material, the day not being laid in the declaration as part of the description of such record of acquittal; but if it had been so laid, or if the plaintiff affect to state the teste or return of process and misdescribe it, the mistake would be fatal. (t) Where the injury was capable of being committed on several days, as in trespass to land, &c. it may be described as having been committed on such a day, "and on divers other days and times between that day and the commencement of the suit;" (t¹) and in such case the first day should be laid anterior to the first injurious act, because the plaintiff would not be permitted to give in evidence repeated acts of trespass, unless committed during the space of time laid in his declaration; though he might recover as to a *single* trespass committed anterior to the first day. (u) Where a particular space of time is assigned by a *continuando* for the torts, it seems to become matter of *description*, and not a mere formal allegation of time; but the *continuando* may be waived, and one trespass even before the first day laid may be proved, for a *continuando* ought not to place the plaintiff in a worse situation than if one trespass only were laid. (v) But where the act complained of was single in its nature, as an assault, it *would be demurrable to state that "*an assault*" was committed "on divers days and times." (x) The defect of a declaration even in an action of trespass for mesne profits, in not stating any time when the injury was committed, is aided even after a judgment by default. (y)

not in general material; Peppin v. Solomons, 5 T. R. 496; Young v. Wright, 1 Campb. 139; when otherwise; Abitbol v. Bristow, 6 Taunt. 464; when time is material, see Hardy v. Cathcart, 5 Taunt. 2, 15; and when the plaintiff may vary in his replication from the time named in the declaration; Serle v. Darford, 1 Ld. Raym. 120; Hustler v. Raines, Lutw. 1415; 1 Selw. 45; post, "Departure;" variances in stating time, 3 Stark. Evid. 1568, Variance. In Steward v. Layton, 3 Dowl. 430, where the record stated the words to have been spoken on a day after the action commenced, it was holden no ground for arresting the judgment.

(t) Purcell v. Macnamara, 9 East, 157; Woodford v. Ashley, 11 East, 508; 2 Campb. 193, S. C.

(t¹) [See Burnham v. Webster, 5 Mass. 266, 269.]

(u) Post, vol. II. 616; Bul. N. P. 86;

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Webb v. Turner, 2 Stra. 1095; Brook v. Bishopp, Salk. 639; Hume v. Oldacre, 1 Stark. Rep. 351; Wilson v. Powell, Skin. 641; Co. Litt. 283; [Sanders v. Palmer, 1 McCord, 165.] But in The King v. Franklin, 5 Price, 614, it was held that a period thus limited in stating arrears of duties in an inquisition might be rejected as surplusage; and that a different space of time during which the moneys accrued due might be shown.

(v) Ib.

(x) Ib. Ibid.; English v. Purser, 6 East, 395; Macfadzen v. Olivant, 6 East, 391; as to laying that defendant on divers days assaulted, Ib.; [Benson v. Swift, 2 Mass. 50. But in some cases a series of assaults and batteries may be declared for in one count. Earl v. Tupper, 45 Vt. 275. See Newton v. Miller, 49 Missou. 298.]

(y) Higgins v. Highfield, 13 East, 407.

The *place* is only material in *local* actions, (z) or where *situation*, or rather *description* of the land, house, ^{Place where the injury was committed.} particularly stated, as in trespass and replevin. (z¹) pleading rule, Hil. T. 4 W. 4, reg. 8, it was necessary in civil as in criminal proceedings not only to state the count as venue, but to repeat the allegation throughout *material* and traversable fact there occurred; but that rule *place* should only be stated in the margin and not repeated by the body, except in *trespass quare clausum fregit*, when it is essential to give the name of the close or the abutments or other particulars, if given, subject to a special demurrer in case of omission. For the above pleading rule it was sufficient, at all events, in trespass actions, to state that the tort was committed in the parish or place therein; (b) and in actions for a nuisance to realty be local, yet a particular location of the nuisance or lands, &c. affected is unnecessary. In trespass to land, and in ejectment, even before the above rule, it was usual to state the parish or place where the premises were situated, and in replevin it was considered that the name or abutments, as well as the parish should be stated. (e) As a general rule it is judicious to give, when not necessary to do so, a particular description, as a variance will be fatal. (f)

Where the *place* of doing an act is precisely alleged in the declaration, the description be *wholly immaterial*, the ground of charge or count not being local, the description may perhaps be rejected. (g) as if in trespass for taking *goods*, the declaration allege that they were taken "in a house," it would seem sufficient to prove that they were taken elsewhere, unless in trespass as to the house be laid in the same count. (h)

In *real* actions, the object being the recovery of the land, ^{5thly. The statement of the damages in general in actions for torts.} * *damages* are unimportant and are not to be laid in the declaration in *personal* and *mixed* actions (i) the declaration should state *damages*. (k) In *personal* and *mixed* actions the difference, that in such actions as *sound in damages*

(z) As to the venue in general, *ante*, 279.
(z¹) [See *Renaudet v. Crocken*, 1 Caines, 167.]

(a) *Ante*, 279; [Hall v. Mayo, 97 Mass. 419.]

(b) 1 Saund. 8 a.

(c) *Mersey & Irwell Navigation Company v. Douglas*, 2 East, 497; *Jefferies v. Duncombe*, 11 East, 226.

(d) Co. Litt. 125 b, note (2); [Palmer v. Tuttle, 39 N. H. 488.]

(e) *Potten v. Bradley*, 2 M. & P. 78; *post*, vol. ii. 592, and note (f).

(f) See, as to variance *ante*, 388, 389.

(g) 3 Stark. Evid. 1571, Starkie instances indictments near a highway, and proof of house, &c.

(h) See *Ib.* and *Smith v. 475*; as to an allegation that spoken in a particular place.

(i) As to these distinctions in penal actions and *scire facit* are laid. See in general, *post*.

(k) Com. Dig. Pleading,

the legal phrase) as assumpsit, covenant, (*l*) trespass, case, &c. damages are the main object of the suit, and are therefore always laid high enough to cover the whole demand; but in actions that do not sound in damages, as debt, detinue, ejectment, &c. damages are not the gist of the action, and it is usual to lay only a nominal sum as damages. (*m*)

Damages are either general or special. *General* damages are such as the law *implies* or presumes to have accrued from the wrong complained of. *Special* damages are such as *really* took place and are *not implied* by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. (*n*) It has been held that the special damage must be a *legal* and *natural* consequence arising from the tort, and not a mere *wrongful* act of a third person; (*o*) as that in consequence of the slander certain persons threw the plaintiff into a horse-pond, or broke the windows of his house; (*p*) nor a *remote* consequence, as the loss of a lieutenancy by imprisonment; (*q*) and in an action against an insurance company for loss by fire, the plaintiff cannot recover damages for the loss of customers and trade occurring between the fire and the rebuilding the premises, provided they were restored to a proper state in a reasonable time. (*r*) It does not appear necessary to state the formal description of damages in the declaration, because *presumptions of law* are not in general to be pleaded or averred as facts. (*s*) Therefore, though it is usual, in an action on the case for calling the plaintiff "a thief," to state that by reason of the speaking of the words the plaintiff's character was injured, *yet that statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of

Rep. 116 b, 117 a, b; Steph. 5th ed. 473. [The omission to insert in the declaration the amount of damages claimed, is cured by the verdict. *Ward v. Stevenson*, 15 Penn. St. 21; *Stephens v. White*, 2 Wash. (Va.) 303; *Hoggland v. Cathern*, 25 Texas, 345.]

(*l*) As to damages in actions *ex contractu*, *ante*, 348.

(*m*) Steph. 5th ed. 473, 474.

(*n*) See instances, *Knight v. Gibbs*, 1 Ad. & El. 43.

(*o*) *Vicars v. Wilcocks*, 8 East, 1; *Morris v. Langdale*, 2 B. & P. 289; *Tassan v. Rogers*, Salk. 693; 1 Mod. Ent. 242; *Kelly v. Partington*, 5 B. & Ad. 645; *Ward v. Weeks*, 7 Bing. 210; [*Crain v. Petrie*, 6 Hill, 522; *Cate v. Cate*, 50 N. H. 145; *Lee v. Riley*, 34 L. J. R. N. S. C. P. 212; *Barnum v. Vandusen*, 16 Conn. 300.]

(*p*) See preceding note; *sed quare*.

(*q*) *Boyce v. Bayliffe*, 1 Campb. 58, 60;

Flower v. Adam, 2 Taunt. 314; *ante*, 348; *Fitzsimons v. Inglis*, 5 Taunt. 534; *Moore v. Adam*, 2 Chit. R. 198. In case for not repairing fence, *per quod* plaintiff's horse escaped and was killed by a hay-stack falling, it was decided that the damage was not too remote. *Powell v. Salisbury*, 2 Y. & J. 391; *sed quare*.

(*r*) *In re Wright & Pole*, 1 Ad. & El. 621. The damages may, however, be prospective in some cases. Thus, in an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for prospective damage, for the damage alone is not the cause of action, but the illegal act and the damage together, and the master could not bring a fresh action as often as fresh damage resulted. The prospective damage must be stated in the declaration. *Hodsoll v. Stallebrass*, 3 P. & D. 300; 8 Dowl. 482, S. C.

(*s*) *Ante*, 243; and *Tidd*, 9th ed. 441.

order to regain possession, such payment should be alleged as special damage. (c) So in an action for defamation, whether the words are actionable in themselves or not, yet the plaintiff will not be permitted to give evidence of any *particular* loss or injury, unless it be stated specially in his declaration. (d) If an action be brought for words not in themselves actionable, and the plaintiff do not prove the special damage laid in the declaration, he will be nonsuited, because the special damage is in such case the gist of the action; but where the words are of themselves actionable, the jury must find for the plaintiff, * though the special damage be not proved, (e) and if the plaintiff allege special damage to have ensued from words spoken by the *defendant*, he cannot recover on proof that the damage resulted from a *third* person repeating what the defendant had said. (f) Words, though actionable in themselves, and not stated in the declaration, may, we have seen, be given in evidence to show the malice of the defendant, but the jury ought not to give damages for such words. (g) So in an action at the suit of a reversioner, it must be specially shown that the injury was such as to affect his *reversionary* interest; (h) and in case for deceit, some resulting damage must be alleged and proved. (i)

Before the 3 & 4 W. 4, c. 42, s. 29, *interest* was recoverable only in a few cases of *contract*; but under that act a jury may give damages, in the nature of interest, over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance.

In trespass the declaration concludes "*and other wrongs to the plaintiff then did, against the peace, &c.*;" and under this allegation of *alia enormia* damages and matters which naturally ^{*Alia enormia.*} arise from the act complained of, or cannot with decency be stated, may be given in evidence in aggravation of damages, though not specified in any other part of the declaration. (k) Thus, in trespass for

(c) *Lindon v. Hooper*, Cowp. 418.

(d) 1 Saund. 243, note (5).

(e) 1 Saund. 243, note (5); Bul. N. P. 6; *Lowe v. Harewood*, Sir W. Jones, 196; *Morris v. Langdale*, 2 B. & P. 284; *Ward v. Weeks*, 7 Bing. 211.

(f) *Ward v. Weeks*, 7 Bing. 211.

(g) *Rustell v. Macquister*, 1 Campb. 49, note; *Ward v. Weeks*, 7 Bing. 211. [See 2 Greenl. Evid. § 418.] But the defendant may prove such words to be true.

(h) *Jackson v. Pesked*, 1 M. & Sel. 234.

(i) *Pewtress v. Austin*, 2 Marsh. 217.

(k) Bul. N. P. 89; Holt, 699, 700; *Huxley v. Berg*, 1 Stark. Rep. 98; *Lowden v. Goodrick*, Peake N. P. Rep. 46; *Pettit v. Addington*, Peake N. P. 62, 3d ed. 64, 87. [In *Prentiss v. Barnes*, 6 Allen, 410, 411, *Bigelow C. J.* said: "The practice act of Mas-

sachusetts (Genl. Sts. c. 129, § 2) does not require that the plaintiff shall set out specifically or in detail the elements or grounds of the damages which he seeks to recover, but only the substantial facts necessary to constitute the cause of action. Under the general allegation of damages he has a right to recover all the damage which are the natural or necessary consequences of the cause of action set forth in the declaration. In this respect the rule at common law remains unchanged. It is only when special or peculiar damages are claimed that it is necessary to aver them specifically." In an action for an assault, the plaintiff, without alleging special damages in his declaration, may prove, in aggravation of damages, that he became subject to fits as a result of the assault *Tyson v. Booth*, 100 Mass. 258.]

breaking and entering a house, the plaintiff may, in aggravation, give in evidence the debauching of his daughter, the immorality of his servants, under the general allegation *alia enormia*; and yet this matter may be stated specially; (m) but he cannot give the *alia enormia* give in evidence the *loss of service*, or any other matter which would of itself bear an action; for if it would, it must be stated specially. Therefore in trespass *quare clausum fregit*, the plaintiff would not, under the above general allegation, be permitted to give evidence of the defendant's taking away a horse, &c.; in the other cases the evidence is allowed to be given not as a substantive ground of action, but merely to show the violence of the defendant's conduct, (o) and give a character to the case. *Trespass* for breaking and entering the plaintiff's house "under a false and unfounded charge * and assertion that the plaintiff had stolen goods therein, *per quod* he was injured in his credit, &c." and then the plaintiff may give damages for the trespass, as it is aggravated by and connected with the evidence to such false charge. (p)

The particular damage in respect of which the plaintiff brings his action must be the *legal* and *natural* consequence of the injury done, and not an *illegal* consequence thereof. (q) Therefore, in an action for slander, it is not sufficient special damage to allege or prove a mere loss of business of a third person induced by the slander; as that the third person dismissed the plaintiff from his employ before the end of the term for which he was hired; or that in consequence of the words spoken a number of persons afterwards assembled and seized the plaintiff and detained him, because these tortious acts of others may be compensated by damages brought by the plaintiff against them, and the law supposes

(l) See preceding note; *Russell v. Corn*, 6 Mod. 127; *Huxley v. Berg*, 1 Stark. Rep. 98; *Tidd*, 9th ed. 441; *sed vide* *Peake's Evid.* 87, 3d ed.; 2 *Phil. Evid.* 134.

(m) *Ib.* *Ibid.*

(n) *Bul. N. P.* 89; *Holt*, 700; *Sippora v. Basset*, 1 Sid. 225; *Newman v. Smith*, 2 Salk. 643; *Dix v. Brookes*, 1 Stra. 61.

(o) *Huxley v. Berg*, 1 Stark. 98. [In an action of tort for breaking and entering a close and removing a fence, the defendant, under an answer which only denies the breaking and entering, cannot disprove the removal of the fence. *Knapp v. Slocomb*, 9 Gray, 73, 75; *Gilbert v. Thompson*, 9 Cush. 348. The gist of the action in such a case is the breaking and entering of the plaintiff's close. *Ante*, 195. All the other averments, in the declaration are incidental to this allegation, and operate only by way of aggravation of the principal injury. They are not essential to the maintenance of the action, and can be proved only as affecting the amount of damages. The plaintiff cannot support his action by proof of these incidental averments without evidence to show a forcible entry of the close. A justification of

the breaking and entering would be a complete defence to the plaintiff's action, though no justification were proved for the other acts alleged by way of aggravation. *Knapp v. Slocomb*, *supra*; *Ex parte*, 8 Cush. 337. But see *Henry*, 13 Pick. 36; *Smith v. H.* 212; *Lock v. Mathis*, 37 N. H. 201; *Merriam v. Willis*, 10 A. 201; it is otherwise, under the present proceeding in New York. A special count for them. *Knapp v. Slocomb*, 9 Gray, 75; *Randall v. M'Laury*, 201; *Merriam v. Willis*, 10 A. 201; there be had for the wrongful taking of property, although the force alleged in the same count be proved. *Cotton v. Jones*, 7 Rob. (N. Y.) 100. (p) *Bracegirdle v. Orford*, 5 T. 201; See *Meerest v. Harvey*, 5 T. 201; *Marsh*, 139, S. C.

(q) *Vicars v. Wilcocks*, 8 East 101; *Langdale*, 2 B. & P. 289; *Talbot v. Salk*, 693; *Kelly v. Partington*, 645; *ante*, 410.

such actions the plaintiff would receive a full indemnity. (r) But if the evidence will support the allegation, it may in some cases be stated that the defendant *procured* the third person to commit the injury, though such person might also be liable to an action. (s) In an action of trespass against a huntsman for riding over lands, he is liable not only for mischief occasioned by himself, but also for a concourse of people following him. (t) It seems to be a general rule, that *extra costs* occasioned by the defendant's tort are not recoverable as damages. (u)

Special damage must be stated with particularity, in order that the defendant may be enabled to meet the charge if it be false, and if it be not so stated, it cannot be given in evidence; and therefore, a declaration by a victualler for calling his wife "a whore," whereby *several* customers left his house, without naming any in particular, is too general, and no evidence of *particular* customers leaving the house will be admissible. (x) So in a declaration for slander of title to an estate, whereby the plaintiff *lost the sale* of it; (y) or for slandering a single woman, by saying "she was with child, and had miscarried," in consequence of which she had lost *several* suitors, &c. is insufficient. (z) But in an action for consequential damage arising from slander, imputing incontinence to the plaintiff, it is sufficient to state "that he was employed to preach to a dissenting congregation at a certain licensed chapel, situate, &c. and that he derived considerable *profit for his preaching there, and that by reason of the scandal, *persons* frequenting the chapel had refused to permit him to preach there, and had discontinued giving him profits which they usually had, and otherwise would have given, without saying who those persons were, or by what authority they excluded him. (a) In this case a general allegation is sufficient, in consequence of a minute statement being inconvenient, and tending to prolixity. (b) So where a declaration in assumpsit, for not permitting the plaintiff to take possession of premises which the defendant had let to him, stated that "thereby the plaintiff sustained loss;" it was held that the plaintiff might prove a particular loss in respect of his wife being a milliner, and having lost a profitable part of the year. (c) In stating the damages, care must be taken that no part of it appear to have accrued after the commencement of the action, though if it be laid under a *videlicet* it will be aided by verdict. (d)

(r) *Vicars v. Wilcocks*, 8 East, 1, 3; *Morris v. Langdale*, 2 B. & P. 289; *ante*, 410, 411. *See quere*.

(s) *Plunket v. Gilmore*, Fortesc. 211.

(t) *Hume v. Oldacre*, 1 Stark. 351.

(u) *Hathaway v. Barrow*, 1 Campb. 151, 152; *Sinclair v. Eldred*, 4 Taunt. 7; *Jenkins v. Biddulph*, 4 Bing. 160; but see *Sandback v. Thomas*, 1 Stark. 306. What recoverable in action for mesne profits, *ante*, 219.

(z) *Bul. N. P. 7*; 1 Saund. 243 c, note

(5); 1 Rol. Abr. 58. [See *Wier v. Allen*, 51 N. H. 177.]

(y) *Lowe v. Harewood*, Sir W. Jones, 196.

(z) *Hartley v. Herring*, 8 T. R. 132; *Barnes v. Bruddell*, 1 Sid. 396; 1 Vent. 4, S. C.; *Hunt v. Jones*, Cro. Jac. 499.

(a) *Hartley v. Herring*, 8 T. R. 130.

(b) *Ante*, 258; and see *Olroyd v. Cramp-ton*, 4 Bing. N. C. 24.

(c) *Ward v. Smith*, 11 Price, 19.

(d) 2 Saund. 169, 171 b; Vin. Abr.

THE REQUISITES OF DECLARATIONS FOR WRITTEN OR VERBAL
DECLARATION IN PARTICULAR.

In the second volume are given a great variety of forms of declarations for libels and slander, and to those forms are appended explanatory notes (*e*) *technical* objections to the various forms of declarations for causes of action of *this description*, whether *written* or *verbal* slander, have certainly been admitted to be of great extent injurious to the mode of administering justice. (*f*) The principal rules which regulate the framing of a *declaration* for libel may be conveniently considered under the following heads: 1st, The *inducement* or prefatory statement of *introductory* matter; 2dly, The *colloquium*, or statement that the libellous or slanderous imputations have reference to the plaintiff, and sometimes to antecedent inducement or introductory matter; 3dly, The *scandal itself*, whether written or verbal, and the *consequences* thereof; 4thly, The *innuendoes*; and 5thly, The *consequences* thereof.

1st. *Inducement, or prefatory or introductory statement.* The *inducement* or presumption of law need not in general be pleaded; (*g*) and because the law presumes the defendant to be guilty of a crime or other misconduct, the plaintiff need not aver his innocence of the charge or attack upon the defendant. (*h*) It is, * however, *usual* to state by way of introduction the plaintiff's innocence of the imputation; and the defendant may even before the Reg. Gen. Hil. T. 4 W. 4, under the general issue, assert the plaintiff's guilt, although the declaration contained no introduction, (*i*) and the same rule now continues even in strong cases.

Where the libel or slander is *prima facie* or *per se* actionable, the declaration stating the defendant's malicious intention is sufficient without any *prefatory inducement* of the facts and circumstances under which the words, &c. were spoken, &c. (*k*)

Damages, Q. R.; [Warner v. Bacon, 8 Gray, 397, 401.]

(*e*) *Post*, vol. ii. 538, 543 *et seq.* See Stark. on Slander, &c. 2d ed. Index, Declaration, and Phillips and Starkie on Evid.; also, Selw. N. P. Libel and Slander.

(*f*) MS. per Tenderden C. J. and Best C. J. on error from the exchequer, in Adams v. Meredith, 3 You. & Jer. 219; overruling the judgment, 2 You. & Jer. 417, S. C. See analysis, Harrison's Index.

(*g*) *Ante*, 243.

(*h*) *Ib.*; 1 Stark. on Slander, 2d ed. 357.

(*i*) See *post*, as to pleas in case. And if there be a preferable statement of general good character, the defendant cannot traverse it by his plea. *Wolverley v. Strachey*,

Styles, 118; *Jones v. Stever*, 235.

(*k*) Com. Dig. Action for D. 9; *Adams v. Meredith*, 3 Y. & J. 219; *Stein v. Foss*, 6 B. & C. 154; 9 S. C.; same case in error, in 1 and 4 Bing. 489. See *Archbishop v. Robeson*, 2 M. & P. 32; 5 B. & C. 154; and next note; [*Robinson v. H. 323*. To utter words imputing criminality to another is actionable, although the crime committed by the party charged, less this fact is known or disclosed to the hearer; as to charge a woman of a chattel with stealing, no explanation that he was a felon. *Carter v. Andrews*, 16 F.

necessarily an inducement be stated, it is not material to prove it. (*l*) But if the libel or words do not *naturally* and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to some *extrinsic matter* to show that they are actionable, it must be expressly shown that such matter existed, and that the slander had relation thereto. (*m*) Thus, if the imputation be that the plaintiff was "*forsworn*," this not being of *itself* actionable, because it does not necessarily impute the offence of *perjury*, (*n*) it must be specifically alleged, by way of inducement, that there had been a suit or other judicial proceeding, in which the plaintiff was a witness and gave evidence, and that the defendant, when speaking the words, referred to such matter in using the term "*forsworn*," (*o*) and intended to impute that the plaintiff had been guilty of the crime of perjury. (*o*¹) So if the slander were, "*you have robbed me of one shilling tan money*," as the word

Stitzell v. Reynolds, 67 Penn. St. 54; McCaleb v. Smith, 22 Iowa, 242.]

(*l*) Cox v. Thomason, 2 Cr. & J. 361; [Hills v. Miles, 9 N. H. 9; Loomis v. Swick, 3 Wend. 205; Croswell v. Weed, 25 Wend. 621; Nestle v. Van Slyck, 2 Hill, 282; Atkinson v. Scammon, 22 N. H. 42.]

(*m*) Hawkes v. Hawkey, 8 East, 431; Roberts v. Camden, 9 East, 93; The King v. Marsden, 4 M. & Sel. 164; Bell v. Byrne, 13 East, 554; Cartwright v. Wright, 5 B. & Ald. 615; 1 D. & R. 230, S. C.; [Bloss v. Tobey, 2 Pick. 320; Tebbets v. Goding, 9 Gray, 254; Van Vechten v. Hopkins, 3 John. 221; Case v. Buckley, 15 Wend. 327; Harris v. Burley, 8 N. H. 256; Brown v. Brown, 14 Maine, 317; Watts v. Greenleaf, 2 Dev. 115; Britian v. Allen, 3 Dev. 167; Linville v. Earlywine, 4 Blackf. 470; Kimmis v. Stiles, 44 Vt. 351; Atkinson v. Scammon, 22 N. H. 40; Patterson v. Wilkinson, 55 Maine, 42. Words in themselves harmless, or of doubtful import, become slanderous when used with reference to known existing facts and circumstances in such manner as to convey to the hearer a charge of crime. It must, however, be made apparent, by suitable averments in the declaration, that the language employed was used by the defendant slanderously, to the extent stated, and the words when taken in their plain and natural import, must be capable of the meaning attributed to them. General allegations that the defendant charged the plaintiff, falsely and maliciously, with the commission of a particular crime, accompanied with innuendoes, however broad and sweeping, will not aid a declaration otherwise imperfect. It is no answer, that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowl-

edge of the particular circumstances which make the act of which he speaks criminal. He is to be charged only for a wrong actually committed, irrespectively of his secret knowledge or intent. He is responsible only for the meaning which the words used by him, reasonably interpreted, convey to the understanding of the persons in whose presence they were uttered. Colt J. in Brettun v. Anthony, 103 Mass. 39, 40; Fowle v. Robbins, 12 Mass. 148.]

(*n*) Holt v. Schofield, 6 T. R. 691; Hawkes v. Hawkey, 8 East, 427; Roberts v. Camden, 9 East, 93.

(*o*) See post, vol. ii. 644; [Vaughan v. Havens, 8 John. 109; Niven v. Munn, 13 John. 48; Ward v. Clark, 2 John. 10; M'Claughey v. Wetmore, 6 John. 82; Chapman v. Smith, 13 John. 68; Crookshank v. Gray, 20 John. 344; Harvey v. Boies, 1 Penn. 12; Palmer v. Hunter, 8 Missou. 512; Sanderson v. Hubbard, 14 Vt. 462; Wood v. Scott, 13 Vt. 42; Spooner v. Keeler, 51 N. Y. 527; Small v. Clewley, 60 Maine, 262.]

(*o*¹) [Small v. Clewley, 60 Maine, 262; Kimmis v. Stiles, 44 Vt. 351; Crone v. Angell, 14 Mich. 340; Knight v. Sharp, 24 Ark. 602. But in Spooner v. Keeler, 51 N. Y. 527, it was held that words spoken in reference to a judicial proceeding, charging a witness with swearing to a lie, or swearing falsely in such proceeding, impute the crime of perjury, and are actionable *per se*; and in an action of slander founded thereon it is not necessary for the plaintiff to prove the pendency of an action or proceeding before a court having jurisdiction, or that the words were spoken in reference to material evidence given by the plaintiff therein. So, it is enough to allege and prove that the defendant charged that the plaintiff had committed the crime of perjury. Small v. Clewley, 60 Maine, 266.]

"robbed" does not necessarily impute a felony, an innuendo, without any inducement or prefatory allegation of the defendant's having used the words in a *felonious* sense, will be defective. Where what is complained of in the declaration as a libel, upon the face of it apply to the plaintiff, and impute a crime, must be an inducement stating such facts as will support such *innuendo*, and show the libellous application of the statement to the plaintiff. (q)

Upon the same ground, in declarations upon libels and wrongs are only actionable in regard to their having affected the plaintiff in his *profession, trade, or business*, (r) there must be a declaration that the plaintiff was, at the time of the scandal, in that profession, or exercised such calling, &c.; otherwise the declaration will be substantially defective. (t) In these cases care should be taken to avoid *unnecessary minuteness* in showing the plaintiff's profession, by a simple statement that he exercised it, without alleging that he was "qualified," or had "taken a degree," is all that is necessary. (u) Where an averment of extrinsic matter is made, such as an allegation that the slander applies to such extrinsic matter, as a mode of description, and must be in general proved as laid, though necessarily minute; thus, in a declaration for slander of an attorney, if after alleging that he was an attorney, it be averred that he conducted a particular suit, and then state that the slander was published of and concerning his conduct in *that suit*, it is enough to prove the existence of the suit, and that the scandal had reference to the particular occasion stated. (x) Since the general plea of *non est* Hil. T. 4 W. 4, unless the inducement or prefatory matter

(p) *Day v. Robinson*, 1 Ad. & El. 555; [Dixon v. Stewart, 33 Iowa, 125; Filben v. Dautermann, 28 Wis. 134; Weil v. Schmidt, 28 Wis. 138; Emery v. Miller, 1 Denio, 208;] but see *Rowcliffe v. Edmonds*, 7 M. & W. 12, *contra*.

(q) *Hall v. Blandy*, 1 Y. & J. 480. [The practice act of Mass. (St. 1852, c. 312) Genl. Sts. c. 129, has not changed the rule of law which requires the plaintiff in an action for slander to allege the extrinsic facts and circumstances which are necessary in order to give significance to the words spoken, and render them intelligible to the court and jury, in the sense in which they were spoken as importing a charge of crime. This is the office of a *colloquium*. Bigelow J. in *Tebbetts v. Goding*, 9 Gray, 254, 255. See *Brettun v. Anthony*, 103 Mass. 37.]

(r) It need not appear to be a trade in which the plaintiff might become a bankrupt.

(s) It need not, it seems, be expressly averred that at the time of the publishing, &c. plaintiff carried on, &c. If it be alleged that he was and is an attorney, &c. and hath

for a long time carried on, &c. 2 Roll. Rep. 84; 1 Vin. Abr. 100; *Robinson, Alleyne*, 63; *Tuthill v. Yelv.* 159. See *Collis v. May*, 282; 1 Stark. Slander, 402-403; *White*, 33 Barb. 615.]

(t) Com. Dig. Action for Defamation, 3; 2 Saund. 307 a, note (1); note (3); *post*, vol. ii. 546, 547. Slander, 400, 2d ed.; *May v. Herring*, 1 C. 135; 4 D. & R. 670, S. C. *Griffin*, 11 Ad. & El. 186. [Words spoken of a person to be a villain, a cheater, are not actionable *per se*, but are actionable if spoken of one in reference to trade and business. *Nelson v. May*, 52 Ill. 236.]

(u) *Moises v. Thornton*, 8 T. R. 1; *Hartley v. Herring*, 8 T. R. 1; *Taylor*, 1 New Rep. 196; *Johnson*, 11 Price, 235. See *ante*, 235, 417.

(x) See *Teesdale v. Clement*, 603; *May v. Brown*, 3 B. & C. 680, S. C.; and other cases on Slander, 405, 2d ed.

ticularly traversed or denied, it will in effect be admitted, and certainly need not be proved by the plaintiff upon a mere plea of not guilty. (y)

But where the slanderous matter is actionable of itself, and independently of the plaintiff's profession or trade, it will not be fatal to introduce an averment of the plaintiff's profession, &c. and to state that the matter was published of and concerning him, "*and of and concerning him in his profession,*" &c.; for the averment is divisible. (z) And on the same ground, if the matter be actionable as it relates to one of two of the plaintiff's trades mentioned in the inducement, the declaration is sufficient, although one trade only be proved. (a) Where in a declaration for a libel it was alleged that the plaintiff's carriage and that of E. F. were in a highway, and that they had come in contact without any furious driving by the plaintiff, and that E. F. was injured, &c. and that the libel was published of and concerning the plaintiff, "and of and concerning the said accident;" the court held the averments as to the accident were divisible, and did not form entire matter of description thereof, so that it *became immaterial that the jury found that the accident was occasioned by the plaintiff's furious driving (there not being a sufficient plea of justification to protect the defendant as to the whole libel). (b) A declaration alleged that the plaintiff was vestry clerk of the parish of M., and that whilst he was vestry clerk certain prosecutions were carried on against B. for certain misdemeanors, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were applied in discharge of the expenses; and that the defendant, to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published of and concerning the plaintiff, and of and concerning his conduct in his office of vestry clerk, *and of and concerning the matters aforesaid*, a certain libel, stating the libellous parts; and it appeared upon the trial, upon the production of the libel, that the imputation was that the plaintiff had applied the parish money in payment of the expenses of the prosecution after it had terminated; it was held that the variance was unimportant, for it was immaterial to the character of the libel whether the money were so applied before or after the termination of the prosecution. (c) The principle seems to be, in declaring upon a

(y) *Duke v. Jostling*, 3 Dowl. 618; *Chalmers v. Shackle*, 6 C. & P. 475.

(z) *May v. Brown*, 3 B. & C. 138, note (b); *The King v. Holt*, 5 T. R. 436; *Spall v. Massey*, 2 Stark. Rep. 559; [*Carroll v. White*, 33 Barb. 615.]

(a) *Figgins v. Cogswell*, cited and approved by *Tindal C. J. in Chalmers v. Shackle*, 6 C. & P. 477; *Figgins v. Cogswell*, 3 M. & Sel. 369; *ante*, 401.

(b) *Lord Churchill v. Hunt*, 2 B. & Ald. 685. See *Hall v. Smith*, 1 M. & Sel. 287.

(c) *May v. Brown*, 3 B. & C. 113; 4 D. & R. 670, S. C. A declaration for words, imputing that tulips of the plaintiff, about to be sold by auction, were stolen property, stated that the tulips were about to be sold by auction, and alleged that the defendant asserted and represented that *the said tulips* were stolen property, and it was held suffi-

The statement in the libel or slander itself of a particular fact, dispenses with the proof thereof on the part of the plaintiff. (i)

2dly. The declaration must show by a *colloquium*; (i¹) or otherwise, that the words were spoken, or the libel was composed and published "*of and concerning the plaintiff.*" And where an inducement of extrinsic matter is necessary, it must not only be shown that the imputation related to the plaintiff's character, but it must also be charged that it had reference to such extrinsic matter: as (in regard to the instances just put) that it was published "*of and concerning the plaintiff's said evidence in the said suit, &c.*" or "*of and concerning him in his said profession, &c.*" (k)

Where a declaration stated that the defendant, contriving, &c. published a libel containing the false and scandalous matter following, without alleging that that matter was "*of and concerning the plaintiff,*" and then set out the libel, which on the face of it did *not manifestly appear to relate to the plaintiff*, and there was no *innuendo* to connect it with the plaintiff, it was held upon a writ of error that the count was bad. (l)

(i) *Jones v. Stevens*, 11 Price, 235. [In an action on words charging the plaintiff with administering to her daughter pills "to drive off a child," being actionable in themselves and imputing the crime of attempting to procure an abortion, it is not necessary that the complaint should aver that the plaintiff had a daughter, or that the defendant or hearers knew of the fact. *Filben v. Dautermann*, 26 Wis. 518.]

(i²) [See *Tebbetts v. Goding*, 9 Gray, 254, 255; *Brown v. Brown*, 14 Maine, 319; *Sturtevant v. Root*, 27 N. H. 69; *Lukehart v. Byerly*, 53 Penn. St. 418.]

(k) 1 Saund. 242 b, note (3); 1 Stark. Slander, 2d ed. 383; [Weiss v. Whittemore, 28 Mich. 366; *Lindsey v. Smith*, 7 John. 359; *Gidney v. Blake*, 11 John. 54; *Thomas v. Crosswell*, 7 John. 271; *Milligan v. Thorn*, 6 Wend. 413; *Sayre v. Jewett*, 12 Wend. 135; *Nestle v. Van Slyck*, 2 Hill, 282; *Davis v. Davis*, 1 Nott & McC. 290; *Ryan v. Madden*, 12 Vt. 51; *Brown v. Brown*, 14 Maine, 317; *Tenney v. Clement*, 10 N. H. 52; *Baldwin v. Hildreth*, 14 Gray, 221; *Ward v. Colghan*, 30 Ind. 395; *Kimmiss v. Stiles*, 44 Vt. 351; *Small v. Clewley*, 60 Maine, 262; *Patterson v. Wilkinson*, 55 Maine, 42; *Emery v. Prescott*, 54 Maine, 389. If it appears with reasonable certainty, on looking at the whole count, that the words were spoken of the plaintiff, it is enough after verdict. *Nestle v. Van Slyck*, 2 Hill, 282; *Titus v. Follett*, 2 Hill, 318; *Chenery v. Goodrich*, 98 Mass. 224. If words have been spoken in a peculiar sense, or with reference to some particular subject, to render them actionable, there must be a colloquium or averment of the subject-matter of the conversation, or the

peculiar use of the words employed, or the action cannot be sustained, even after verdict, upon a motion in arrest. *Fowler J. in Edgerly v. Swain*, 32 N. H. 481; *Miles v. Vanhorn*, 17 Ind. 245. If there be no colloquium, the plaintiff must be held to allege that the words spoken were used in their natural and ordinary sense, and this natural and ordinary sense must import a charge of crime, or some punishable offence, to make the speaking of the words actionable in itself. *Edgerly v. Swain*, *supra*; *Carroll v. White*, 33 Barb. 615. As to the competency of proof of the understanding of witnesses that the libel applied to the plaintiff, see the discussion in *Smart v. Blanchard*, 42 N. H. 146 *et seq.* and cases cited, from which the court, in the case cited, deduced the rules "that where the words are ambiguous, and the application doubtful, it must be shown by the plaintiff, (1) That the words were actually used in their actionable sense, and were applied to the plaintiff. (2) That the hearers so understood them; and, upon this point, the testimony of the hearers, as to how they understood them, is admissible, although it would have no legal tendency to show in what sense they were actually used, inasmuch as the hearers may have been under a total misapprehension, both of the meaning and the application, and it would be hard that the defendant should be responsible for such mistake," p. 149. See *Ranger v. Hummel*, 37 Penn. St. 130; *Smith v. Gafford*, 33 Ala. 168.]

(l) *Clement v. Fisher*, 7 B. & C. 459; 1 M. & R. 281, S. C.; *Stockley v. Clement*, 4 Bing. 162; [Sayre v. Jewett, 12 Wend. 135. It is otherwise, however, where there are innuendoes and other matter stated to connect

Where the actionable words were spoken *to a plaintiff*, "*you are, &c.*" it appears to be sufficient to lay a colloquium *with him*, without an express averment that the words were spoken "*of and concerning him*;" for it cannot but be intended that the words were spoken to * *him* with whom the conversation is alleged to have been had. (*m*) But where actionable words are spoken in the third person, as "*he is a thief*," though a *colloquium* of the plaintiff be laid, it is necessary to aver that the words were spoken "*concerning the plaintiff*." (*n*) And it is not, it seems, sufficient, in such case, to connect the words with the plaintiff by means of an *innuendo* (*o*)

But where a *colloquium* is laid, and there is an *innuendo* of the plaintiff, it seems that the want of a direct averment, that the words were spoken "*of and concerning the plaintiff*," must be pointed out by special demurrer, and that it will be intended after verdict, or upon general demurrer, that the words were spoken of the plaintiff; but where no *colloquium* concerning the plaintiff is laid, the omission of such averment is fatal to the declaration." (*p*)

The neglect to aver that the libellous or slanderous matter was published "*of and concerning the plaintiff*," is not cured by an allegation that the defendant published the matter "*with intent to injure the plaintiff, and impute to him the crime after mentioned*." (*q*)

3dly. Great care must be taken in setting out *the particular libellous matter or words complained of*. (*q*¹) The libel itself, or slanderous words, must be set out in *hæc verba*; and the declaration must *profess* so to set forth the matter; and an

8. The *slander*, written or verbal, and *publication* complained of.

averment that the libellous or slanderous matter was "*to the effect following*;" (*r*) or "*in substance as follows*," (*s*) setting out the

the libel with the plaintiff. *Weiss v. Whittemore*, 28 Mich. 366.]

(*m*) Rol. Ab. 85, pl. 8; 1 Saund. 242 a, note (3). [But no action can be maintained for words spoken to the plaintiff only, no other person being present or within hearing. *Broderick v. James*, 3 Daly, 481; *Sheffill v. Van Deusen*, 13 Gray, 304; *Desmond v. Brown*, 33 Iowa, 13.]

(*n*) Rol. Abr. 85, pl. 30; *Wallis v. —*, 1 Sid. 62; 1 Com. Dig. Action upon the Case for Defamation, G. 7.

(*o*) *Johnson v. Aylmer*, Cro. Jac. 126; *post*, 421, 422. See *Clement v. Fisher*, 7 B. & C. 459; 1 M. & Ry. 281, S. C.

(*p*) Rol. Rep. 244; *Skutt v. Hawkins*, 1 Saund. 242 b, note (3); [*Milligan v. Thorn*, 6 Wend. 413. Where the defendant assigns as the only ground of demurrer, that the declaration "*does not set forth anything which is by its natural import libellous, or*

which furnishes legal ground for an action for libel, or is actionable on any ground," the objection that the declaration does not contain sufficient averments that the publication declared on related to the plaintiff, is not open to him under the Massachusetts practice act. Genl. Sts. c. 129, §§ 11, 12; *Worthington v. Houghton*, 109 Mass. 481.]

(*q*) *The King v. Marsden*, 4 M. & Sel. 164; 1 Stark. Slander, 2d ed. 416. Even, it seems, although there be an innuendo applying the matter to the plaintiff. *Ib.* See *ante*, 418; and *post*, 422.

(*q*¹) [The degree of certainty with which a libel should be set forth in a declaration depends on the subject-matter; and where the ridicule consists mainly in ridiculous postures and movements, the use of language somewhat general is unavoidable. *Ellis v. Kimball*, 16 Pick. 132.]

(*r*) 3 Salk. 417; *The Queen v. Drake*, 11

(*s*) *Wright v. Clements*, 3 B. & Ald. 503; *Cook v. Cox*, 3 M. & Sel. 110; *Flint v. Pike*, 4 B. & C. 473; 6 D. & R. 528, S. C. [See

Gardner v. Dyer, 5 Gray, 22; *Kennedy v. Lowry*, 1 Binn. 393.]

libel or words, would be bad in arrest of judgment, although the words themselves be set out. It is not sufficient to declare generally that the defendant published a libel concerning the plaintiff in his trade, "purporting that his beer was of a bad quality, and sold in deficient measure;" or that the defendant "charged and asserted, and accused the plaintiff, a tradesman, of being insolvent." (t) The libel or slander itself ought to be expressly stated." (u) Where a libellous paragraph, as proved, contained two *references, by which it appeared to be in fact the language of a third person, speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references, it was held that these omissions altered the sense of the remainder, and that the variance was fatal. (x) And when a declaration alleges that the defendant spoke certain words, it must be taken to mean that the defendant himself used them as his own words, and if he repeated them as the words of another it is a variance. (y) The slanderous words should be stated as they were uttered; (z) and a proof of words spoken in the third person will not support a count for words spoken in the second, and *vice versa*; (a) nor will words spoken by way of in-

Mod. 78; *Newton v. Stubbs*, 3 Mod. 72; 2 Show. 436, S. C.; *Vin. Ab. Libel*, E.; *Cook v. Cox*, 3 M. & Sel. 115; *Wood v. Brown*, 1 Marsh. 522; 6 Taunt. 169, S. C.; *Gutsolo v. Mathers*, 1 M. & W. 495. But in an action for a malicious prosecution it is sufficient to declare *quod crimen felonice imposuit*, without stating the words used. *Pippet v. Hearn*, 5 B. & Ald. 634; *Davis v. Noake*, 6 M. & Sel. 33; *Blizard v. Kelly*, 2 B. & C. 283; 3 D. & R. 519, S. C. In an action for slander imputing adultery to the plaintiff, a physician, where no special damage was laid, it was held not sufficient to state the words to have been spoken of him "in his profession," but that it ought to have been set forth in the declaration in what manner the scandalous conduct was connected by the speaker with that profession. *Ayre v. Craven*, 2 Ad. & El. 2. See, also, *Doyley v. Roberts*, 3 Bing. N. C. 840; and *Jones v. Littler*, 7 M. & W. 423. See *ante*, 415, 416, as to how the declaration should in general be framed for slander of a person in his profession, trade, or business.

(t) *Cook v. Cox*, 3 M. & Sel. 110.

(u) *Wood v. Brown*, 6 Taunt. 169; [*Lee v. Kane*, 6 Gray, 495, 496, 497.]

(x) *Cartwright v. Wright*, 5 B. & Ald. 615; *Bell v. Byrne*, 13 East, 554. As to setting out divided sentences, as if they followed continuously, 1 Stark. Slander, 2d ed. 380.

(y) *M'Pherson v. Daniels*, 10 B. & C. 274; *Bell v. Byrne*, 13 East, 554.

(z) *Cook v. Cox*, 3 M. & Sel. 110; *Hall v. Smith*, 1 M. & Sel. 287. [And therefore a count in slander, stating merely that the defendant charged the plaintiff with the crime of forgery, is bad. *Yundt v. Yundt*, 12 Serg.

& R. 427; *Blessing v. Davis*, 24 Wend. 100. But under the practice act of Massachusetts, a declaration in slander is sufficient if it sets forth what crime the plaintiff was accused of, and the substance of the language in which the accusation was made. The substance of the words stated must be proved at the trial, and they must import the crime charged. *Chapman C. J. in Robbins v. Fletcher*, 101 Mass. 115, 117. See *Desmond v. Brown*, 29 Iowa, 53; *Allen v. Perkins*, 17 Pick. 369; *Pond v. Hartwell*, 17 Pick. 269; *Stone v. Clark*, 21 Pick. 51; *Whiting v. Smith*, 13 Pick. 364; *Nye v. Otis*, 8 Mass. 122. Under this act, a declaration in slander is sufficient, which alleges that the defendant publicly, falsely, and maliciously charged the plaintiff with the crime of perjury, by words spoken of the plaintiff substantially as follows: "He has been to New Bedford, and sworn to a pack of damned lies," and that the plaintiff at a certain term of the court holden at New Bedford, was summoned and attended as a witness in the case of a certain libel for divorce, and did before a certain judge of said court testify as a witness under oath, and that it is to this subject that the defendant's malicious declarations refer. *Gardner v. Dyer*, 5 Gray, 22. See *Allen v. Perkins*, 17 Pick. 369; *Pond v. Hartwell*, 17 Pick. 269. The charge must be proved in substantially the words alleged. *Doherty v. Brown*, 10 Gray, 250; *Payson v. Macomber*, 3 Allen, 72.]

(a) *The King v. Berry*, 4 T. R. 217; *Bul. N. P. 5*; *post*, vol. ii. 538, 547; [*Miller v. Miller*, 8 John. 75; *Cook v. Weatherby*, 5 Sm. & M. 333; *McConnell v. McCoy*, 7 Serg. & R. 223.]

terrogation support a charge of words spoken affirmatively. (b) So if words are spoken ironically, (c) or the slander is to be collected from a question and answer, not from the latter only, (d) there must be an express averment accordingly; in the first case, stating the words, and averring they were ironically spoken; in the second, showing the question and answer, &c. If the words are so laid as to import that they were spoken concerning a thing then present, and the words proved concerned and imported that they related to a thing not then present, the variance is fatal. (e) However, the addition or omission of a word in setting out a libel or slander will not prejudice, unless it alter the sense; (f) and the plaintiff need not prove all the words laid, if they do not constitute one entire charge, and the non-proof would not alter its meaning; though he must prove such of them as will be sufficient to sustain his action, and it will not suffice to prove *equivalent expressions*. (g) Where the words omitted to be proved do not qualify or affect these proved, the omission is immaterial, as where the words were, "Ware hawk, you must take care of yourself — mind what you are about," the variance was immaterial where the plaintiff failed to prove the words "mind what you are about." (h) Where some of the words were not actionable, yet, if spoken at the same time as the actionable words, they may be all stated in one count, (h¹) but if words not actionable be stated by themselves in a distinct count, and entire damages be given, judgment will be arrested; (i) and words not actionable may be given in evidence in aggravation of *damages, though not stated in the declaration; (k) and it has even been decided that words actionable of themselves, though not stated in the pleadings, may be proved in order to show *quo animo* the words declared upon were stated. (l)

(b) *Barnes v. Holloway*, 3 T. R. 150; [and the converse, *Lucas v. Nichols*, 7 Jones (N. C.), 32.]

(c) *The Queen v. Brown*, 11 Mod. 86.

(d) *Bromage v. Prosser*, 4 B. & C. 247; 6 D. & R. 296, S. C.

(e) *Walters v. Mace*, 2 B. & Ald. 756.

(f) *Bul. N. P.* 6; *Nelson v. Dixie*, Rep. temp. Hardw. 305, 306; *Tabart v. Tipper*, 1 Campb. 353; *Bell v. Byrne*, 13 East, 554. See 1 Stark. Slander, 2d ed. 369–383.

(g) *Maitland v. Goldney*, 2 East, 438; *Gilb. Law & Evid.* 229; 2 Saund. 74 b; 1 Salk. 11, in notes; *Nelson v. Dixie*, Rep. temp. Hardw. 305, 306; *The King v. Berry*, 4 T. R. 217; *Bul. N. P.* 5; *Rex v. Leese*, 2 Campb. 134; 1 Stark. Slander, 374; *Flower v. Pedley*, 2 Esp. Rep. 491; and see *Orpwood v. Barks*, 4 Bing. 261; [*Bundy v. Hart*, 46 Missou. 460; *Pennington v. Meeks*, 46 Missou. 217; *Ward v. Clark*, 2 John. 12; *Johnston v. Tate*, 6 Binn. 121; *Doherty v. Brown*, 10 Gray, 250; *Payson v. Macomber*, 3 Allen, 69.]

(h) *Orpwood v. Barks*, 4 Bing. 261; *Rutherford v. Evans*, 6 Bing. 451.

(h¹) [See *Klumph v. Dunn*, 66 Penn. St. 141; *Robbins v. Fletcher*, 101 Mass. 115. In *Pennington v. Meeks*, 46 Missou. 217, it was held that different sets of words, spoken on different occasions, may be set forth in the same count of a complaint in an action for slander, and be included in the same cause of action. *Rathbun v. Emigh*, 6 Wend. 407; *Hoyt v. Smith*, 32 Vt. 304.]

(i) 10 Co. 131 a; 2 Saund. 307 a, note (1); *Onslow v. Horne*, 3 Wils. 185; *Vin. Ab. Damages*, Q.; [*Cheetham v. Tillotson*, 5 John. 430.]

(k) *Mead v. Daubigny*, *Peake's N. P. Rep.* 125; *Charlter v. Barrett*, *Peake's N. P. Rep.* 22; *Lee v. Huson*, *Peake's N. P. Rep.* 166; *Bul. N. P.* 7; *Cook v. Field*, 3 Esp. 133, 134; *Rustell v. Macquister*, in note, 1 Campb. 48; [*Thomas v. Crowell*, 7 John. 270, 271.] But the defendant may prove the truth of these words.

(l) *Thompson v. Bernard*, 1 Campb. 48,

The declaration must show a *publication* of the libel or slander; but *any words* that denote a publication are sufficient. (m)

After verdict, an allegation that the defendant "*printed and caused to be printed a libel in a newspaper,*" was held to be sufficient. (n) And an averment that words were spoken "*in the presence of divers persons,*" (n¹) although not stating that they heard or understood them, is sustainable; (o) but it is not correct merely to aver that the words were *spoken*, omitting the words, "*and published.*" (p)

The unlawful publication.

In an action for a libel in a *foreign* language, the original must be set out; (q) and it seems to be necessary also to give a translation in English; (r) and perhaps, if slanderous words be spoken in a *foreign* language, a *translation* of them should be set forth; (s) although it has been considered sufficient to aver that the hearers understood such language. (t) But provincial expressions in this country may be set forth without express explanation on the record. (u)

There should be an averment that the defendant *maliciously* published the matter, but any equivalent expressions, as "*wrongfully and falsely,*" &c. will, it seems, suffice; (x) the word *maliciously* appears

49; [Cavanaugh v. Austin, 42 Vt. 576; Klumph v. Dunn, 66 Penn. St. 141.]

(m) 1 Saund. 242, note (1); 1 Stark. Slander, 2d ed. 358, 411. [The slanderous words must have been spoken in the hearing of persons other than the plaintiff. Desmond v. Brown, 33 Iowa, 13; Sheffield v. Van Densen, 13 Gray, 304; Broderick v. James, 3 Daly (N. Y.), 481; Erie C. J. in Force v. Warren, 15 C. B. N. S. 808.]

(n) Baldwin v. Elphinstone, 2 Bl. Rep. 1037. Published or caused to be published, when aided. The King v. Brereton, 8 Mod. 328; Vin. Ab. Libel E. pl. 4.

(n¹) [Where it was alleged in a declaration for slander, that the defamatory words were spoken in the presence and hearing of "divers citizens of the commonwealth," and the proof only showed a speaking in the presence of one third person, not a citizen of the commonwealth, it was held to be a fatal variance. Chapin v. White, 102 Mass. 139. Colt J. said: "The fact of the publication of the words by the defendant must be alleged and substantially proved. If alleged generally, the fact may be proved by any person who heard them. But if the pleader adds any allegation which narrows and limits that which is essential, it becomes descriptive, and must be proved as alleged. It identifies the slander. 1 Greenl. Evd. § 56." Payson v. Macomber, 3 Allen, 69.]

(o) Hall v. Hemmaley, Noy, 57; Goulds. 119; Kellan v. Manesby, Cro. Jac. 39; Smart v. Easdale, Cro. Car. 199.

(p) Anonymous, Sty. 70; 1 Stark. Slander, 2d ed. 360.

(q) Zenobio v. Axtell, 6 T. R. 162; Cook v. Cox, 3 M. & Sel. 116.

(r) See The King v. Goldstein, 3 B. & B. 201; Rex v. Gouldstein, 10 Price, 88; 1 Saund. 242 a, note (b), 5th ed.; 1 Stark. Slander, 2d ed. 368, 369; Bayl. on Bills, 5th ed. 445; [K— v. H—, 20 Wisc. 239; Bellows J. in Smart v. Blanchard, 42 N. H. 148; Kerschbaugher v. Slusser, 12 Ind. 453.]

(s) *Ib.*; see *vide* 1 Saund. 242 a, note. [So where the words used are apparently harmless, but have in fact a technical or local defamatory meaning, this latter meaning must be affirmatively alleged. Miles v. Vanhorn, 17 Ind. 245.]

(t) 1 Saund. 242 a, note. *Sed query.* [Warmouth v. Cramer, 3 Wend. 394; Bechtell v. Shatler, Wright, 107. As to the necessity for such an averment, see Amann v. Damm, 8 C. B. N. S. 597; Kiene v. Ruff, 1 Clarke (Iowa), 482.]

(u) Com. Dig. Action, Defamation, G. 6; 1 Rol. Ab. 86, pl. 1.

(x) See 1 Saund. 242 a, note (2); 1 Stark. Slander, 2d ed. 433; ante, 404; post, vol. ii. 540, note; but see Saxon v. Castle, 6 Ad. & El. 652. [An averment that the defendant spoke, uttered, and published the false, scandalous, malicious, and defamatory words following, &c. has been held to be a sufficient charge of malice. Keesling v. McCall, 36 Ind. 321. Malicious intent is an inference of law which arises from the speaking of the words alone, whenever the words spoken are in themselves actionable. Colt J. in Dale v. Harris, 109 Mass. 196.]

to import that the words were *falsely* uttered; (y) but it is usual and better to state that the matter was "*falsely and maliciously*" published, &c.

We have already adverted to the statute, (z) which gives the court the power to permit amendments of errors in setting out *written* instruments to be made at the trial of the cause; (a) and the enactment in 3 & 4 W. 4, c. 42, s. 23, should also be referred to.

4thly. The *innuendo*, as "he (*meaning* the plaintiff), &c." also requires * great attention and care. (b) It is merely a form or mode of introducing *explanation*: "It means no more than the words '*id est*,' '*scilicet*,' or '*meaning*,' or '*aforesaid*,' as *explanatory of a subject-matter sufficiently expressed before*; as such a one, meaning the defendant, or such a subject, meaning the subject in question." (c) It is only explanatory of some matter already expressed; it serves to *point out* where there is precedent matter, but never for a new charge; it may *apply* what is *already expressed*, but cannot add to or enlarge or change the sense of the previous words. (d) Thus, where the declaration charged that the slander was "he has *forsworn* himself (*meaning* that the plaintiff had committed wilful and corrupt perjury)," it was held, that as there was no inducement or previous or other statement, that the words related to false swearing in a *judicial proceeding*, the declaration was bad, for the *innuendo*

(y) *Sutton v. Johnstone*, 1 T. R. 493; 1 Stark. Slander, 2d ed. 436; *ante*, 404, 405.

(z) 9 Geo. 4, c. 15.

(a) *Ante*, 327, 328.

(b) See 1 Stark. Slander, 418, 2d ed.; Sel. Slander, III.; 1 Saund. 243, note (4). [In Massachusetts, innuendoes are no longer necessary, it being sufficient simply to aver that the alleged libellous or slanderous words were published or spoken of and concerning the plaintiff, and the inducement or introductory matter, and the *colloquium*, including the reference to the inducement or prefatory statement, when it is necessary to an understanding of the alleged libellous or slanderous matter, are not required to be set forth with technical accuracy, but only in such manner as to make the words relied on intelligible to the court and jury in the same sense in which they were spoken or written. These provisions were designed to abrogate the nice distinctions which the application of the strict rules of pleading at common law to declarations for slander and libel had created. Genl. Sts. c. 129, §§ 2, 87; *Chenery v. Goodrich*, 98 Mass. 224, 228; *Goodrich v. Hooper*, 97 Mass. 1, 5; *Doherty v. Brown*, 10 Gray, 250. It must appear upon the record that the words set forth, by their natural signification, when interpreted, in the light of the extrinsic facts alleged, are fairly capable of the meaning imputed. *Goodrich v. Hooper*,

97 Mass. 5; *Tebbetts v. Goding*, 9 Gray, 254. Under the above act, the objection, that a declaration in slander, which sets forth a general charge in itself imputing a felony, and states the words spoken, is insufficient by reason of not stating the circumstances necessary to show the sense in which the words were spoken, must be taken by demurrer. *Clay v. Brigham*, 8 Gray, 161.]

(c) *Per De Grey C. J. Rex v. Horne*, Cowp. 683.

(d) 1 Saund. 243, note (4). See *post*, vol. ii. 542, notes; *Hawkes v. Hawkey*, 8 East, 430, 431; *Roberts v. Camden*, 9 East, 95; *Gompertz v. Levy*, 9 Ad. & El. 282; 1 P. & D. 211, S. C.; [*Brown v. Brown*, 14 Maine, 317; *Harris v. Burley*, 8 N. H. 256, 257; *M'Curg v. Ross*, 5 Binn. 218; *Ellis v. Kimball*, 16 Pick. 132; *Neil v. Allenhofen*, 26 Wisc. 708; *Snell v. Snow*, 13 Met. 278; *Brettan v. Anthony*, 103 Mass. 39; *Van Vechten v. Hopkins*, 5 John. 211; *Vaughan v. Havens*, 8 John. 109; *Patterson v. Wilkinson*, 55 Maine, 42; *Pelton v. Ward*, 3 Caines, 76; *Thomas v. Croswell*, 7 John. 271; *Miller v. Maxwell*, 16 Wend. 9; *Goodrich v. Woolcott*, 3 Cowen, 321; *M'Cuen v. Ludlum*, 2 Harr. 12.] A demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the innuendo. *Wheeler v. Haynes*, 1 P. & D. 55; 9 Ad. & El. 286, S. C.

could not extend their meaning. (e) Whenever, therefore, an inducement or prefatory statement of the existence of some extrinsic fact, to which the libel or words referred is essential, the omission, as we have seen, is fatal, (f) and there must also be an innuendo expressly referring to such inducement. (f¹)

A declaration for libel, after certain introductory matter, which was immaterial, because not properly connected with the libel, set out the following publication "*of and concerning the plaintiff*:" "Society of Guardians, for the Protection of Trade against Swindlers and Sharpers, &c. I (meaning defendant) am directed to inform you, that A. B. (meaning plaintiff) and C. D. are reported to this society as improper to be proposed to be balloted for as members thereof; (*meaning that the plaintiff was a swindler and a sharper, and an improper person to be a member of the said society.*)" After verdict for the plaintiff, it was held, in arrest of judgment, that the *innuendo* was not warranted by the libel, and that the words of the libel, unexplained by *introductory* matter, were not actionable. (g) The *innuendo* cannot supply the omission of a necessary inducement of material matter; and an innuendo introducing new facts or otherwise than by reference to a previous inducement is fatally defective; (h) and a statement that he is a regular prover under bankruptcies, "*meaning that plaintiff * was accustomed to prove fictitious debts under commissions,*" was held ill without a previous averment that the defendant had been accustomed to employ the words in that sense. (i)

An *innuendo*, though it may in the particular case be unnecessary, will sometimes limit and confine the plaintiff in his proof, to show that the slander had the meaning thereby imputed to it; thus, where that plaintiff alleged that he was treasurer and collector of certain tolls, and that the defendant spoke of him, as such treasurer and collector, certain words, "*thereby meaning that the plaintiff, as such treasurer and collector, had been guilty,*" &c. it was held that the plaintiff was bound by the *innuendo* to prove that he was treasurer and collector. (k) If the words imported either fraud or felony, but by the innuendo they be *confined* to the latter, the plaintiff must prove they were

(e) *Holt v. Scholesfield*, 6 T. R. 691; *Core v. Morton*, Yelv. 27. See *ante*, 414, 415. So if the declaration be, "he has burnt my barn," an *innuendo*, "a barn full of corn" is bad; there being no inducement that the plaintiff had corn in a barn, and that the words related thereto. 4 Coke's Rep. 20.

(f) *Ante*, 414-418. The author, however, ventures to assume that if the *essential* matter to be averred appear in *any part* of the declaration, however out of order or clumsily, still if it sufficiently relate to and control the other parts it will suffice.

(f¹) [See *Jacobs v. Tyler*, 3 Hill, 572. But an innuendo in one count may be supported by reference to introductory averments in a

previous count. *Bloss v. Tobey*, 2 Pick. 329; *Abendorth v. Boardley*, 27 Wisc. 555.]

(g) *Goldstein v. Foss*, 6 B. & C. 154. Affirmed in error, 1 M. & P. 402; 4 Bing. 489; and 2 Y. & J. 156, S. C.; [*Atkinson v. Scammon*, 22 N. H. 40.]

(h) *Day v. Robinson*, 1 Ad. & El. 554.

(i) *Angle v. Alexander*, 7 Bing. 119; 1 Cr. & J. 146, in error; and see note (g), *supra*.

(k) *Sellers v. Till*, 4 B. & C. 655; *Sellers v. Killew*, 7 D. & R. 121, S. C.; *Smith v. Carey*, 3 Campb. 461; *Gainsford v. Blackford*, 7 Price, 544; and see *May v. Brown*, 3 B. & C. 128.

spoken in the latter sense. (l) The *innuendo* affixing a particular signification to the slander should therefore never be unnecessarily adopted, as is too frequently the case. It is not unusual, even after setting out words which clearly of themselves import a charge of felony, to add, "thereby then meaning that the plaintiff had feloniously stolen, &c.:" this is unnecessary; and as it is a statement of a mere legal conclusion, is improper, though it may be surplusage. (m)

On the other hand, where *new* matter, introduced by an *innuendo*, without any *antecedent colloquium* or statement to which it can refer to support it, is altogether *unnecessary* to sustain the action, then the *innuendo* may be rejected as surplusage. (n)

5thly. Little explanation need here be given with regard to the statement of the *injury* or *damage* resulting from the *scandal*, because the observations which we shall presently make as to the statement of *damages in all actions ex delicto* will equally apply to an action for a libel or slander. (o) The general rule is, that where *the law infers damage*, and the words are actionable without special damage, none need be laid in the declaration; but that it is otherwise when the words are only actionable in respect of the *particular injury* resulting from them. (o¹)

6thly. Having ascertained the *mode* of stating the *cause of action*, the points relating to *several counts* in the *same* declaration are next *to be considered. (p¹) The rules as to the *joinder* of different *forms* and *causes* of action have already been treated of; (q) and it is here only necessary to inquire *when* or to *what*

(l) *Smith v. Carey*, 3 Campb. 461; *Williams v. Stott*, 1 Cr. & M. 675; 3 Tyr. 688, S. C. And if at the time the words are uttered there are circumstances which clearly show the words are not used in the sense imputing a felony, no action will lie. Per Parke B. in *Hemming v. Powers*, 10 M. & W. 570.

(m) See *Woolnoth v. Meadows*, 5 East, 463; 1 Stark. Slander, 2d ed. 428. The general rule, *ante*, 236, 243, 247, 248; [*Thomas v. Crosswell*, 7 John. 272.]

(n) *Roberts v. Camden*, 9 East, 93; *Harvey v. French*, 1 Cr. & M. 11; *Cox v. Thomson*, 2 Cr. & J. 361; 1 Stark. Slander, 2d ed. 426; [*Mix v. Woodward*, 12 Conn. 285, 286; *Nestle v. Van Slyck*, 2 Hill, 282.]

(o) *Ante*, 409-414; *post*, 434; 1 Stark. Slander, 2d ed. 439; 1 Saund. 243 c, note (5.)

(o¹) [Where the action is brought for uttering words not actionable in themselves, the plaintiff must allege and prove special damages, and the special damages must be particularly stated in the complaint; a mere allegation that the false and slanderous statements of the defendant greatly injured the

plaintiff, and caused her relations to slight and shun her, does not specify any pecuniary injury for which a recovery can be had. *Bassil v. Elmore*, 65 Barb. 627; S. C. 48 N. Y. 561. See *Windsor v. Oliver*, 11 Geo. 538; *Hollingsworth v. Shaw*, 19 Ohio St. 430; *Cook v. Cook*, 100 Mass. 194; *Joannes v. Burt*, 6 Allen, 236; *Shipman v. Burrows*, 1 Hall, 399; *Harcourt v. Harrison*, 1 Hall, 474; *Diqyt v. Tanner*, 20 Wend. 190; *Windsor v. Oliver*, 41 Geo. 538; *Weiss v. Whittemore*, 28 Mich. 366.]

(p) In general, *Stephen*, 5th ed. 301, 304.

(p¹) [Under the Massachusetts practice act any number of counts for different causes of action belonging to the same division of actions may be inserted in the same declaration. Actions of contract and actions of tort shall not be joined, except where it is deemed doubtful to which of these classes a particular cause of action belongs. Genl. Sta. c. 129, 2, div. 5. But two causes of action, not arising on the same contract, shall not be embraced in one count, except the count on an account annexed. Ib. div. 4.]

(q) *Ante*, 221, 226.

extent the statement of the *same* cause of action in different counts is at present permitted. (*q*¹) We will, however, first consider the practice *before* the *recent* rules, and then state those rules and the advisable course of framing declarations as respects *several counts*.

Before the pleading rules, Hil. T. 4 W. 4, r. 5, a declaration might consist of numerous counts, and the jury might assess entire or distinct damages on all the counts; (*r*) and it was usual, particularly in *assumpsit* and in actions on the case, to set forth the plaintiff's same cause of action *in various shapes* in different counts, so that if he failed in the proof of one count he might succeed on another. (*s*) Such additional counts have been aptly termed *safety valves*. (*t*) The variations, however, must even then have been *substantial*; for if the different counts were so similar that the same evidence would support each, and the variation was of any considerable length and vexatiously inserted, (*u*) the court would, on application, refer it to the master for examination, and to strike out the redundant counts, and in gross cases direct the costs to be paid by the attorney; (*v*) but under the restriction of avoiding as much as possible any unnecessary increase of the costs, it was advisable, when the case would admit, to state in various counts the facts in different ways, corresponding with the evidence which might probably be adduced, and such counts were in general progressively more brief and concise; and this was particularly necessary in special *assumpsits*, where there was a doubt either as to the *consideration* or of the terms of the contract or its legal effect, or the mode in which the plaintiff had performed his part, or the defendant had violated his. (*x*) Thus, in a special action of *assumpsit* for a breach of promise of marriage, if the defendant promised to marry upon a particular day, the first count was framed accordingly, but for fear the plaintiff should not be able to prove such particular promise; it was usual, when the evidence would probably support the allegation, to add a count to marry on request, another to marry in a reasonable time, and another to marry generally. (*y*) So in declaring on a contract to

The practice antecedent to the pleading rules of Hil. T. 4 W. 4.

(*q*¹) [Two counts are inadmissible in a writ of right and of replevin. *Boston v. Otis*, 20 Pick. 30; *Hart v. Fitzgerald*, 2 Mass. 509.]

(*r*) *Per De Grey C. J.* *Onslow v. Horne*, 3 Wils. 185; [*Neal v. Lewis*, 2 Bay, 206.]

(*s*) 3 Bl. Com. 295. In mixed actions, as *quare impedit*, several counts are admissible, and often essential. See *The King v. The Archbishop of York*, 1 Ad. & El. 394. In indictments the courts object to there being several counts, when. 2 Stark. Crim. Law, 460; 1 Chit. Crim. Law, 252.

(*t*) *Per Vaughan B. Ward v. Bell*, 2 Dowl. 76; 1 Cr. & M. 848, S. C.

(*u*) *Lane v. Smith*, 3 Smith, 113.

(*v*) *Meeke v. Oxlade*, 1 New Rep. 289; *Wilkins v. Perry*, Rep. temp. Hardw. 129; [*People v. New York C. Pleas*, 19 Wend. 113.] See the former practice as to striking out superfluous counts. Tidd, 9th ed. 616. See *Gabell v. Shaw*, 1 D. & R. 171; *Newby v. Mason*, 1 D. & R. 508; *Cunnack v. Gundry*, 1 Chit. R. 709; *Nelson v. Griffiths*, 2 Bing. 412.

(*x*) See Steph. 2d ed. 315.

(*y*) *Post*, vol. ii. 205 *et seq.*; *Phillips v. Crutchley*, 1 M. & P. 239.

deliver goods, if the stipulation was to * deliver within a specified time and at a particular place, the first count was adapted to such facts, and the second to deliver on request or generally, and a third within a reasonable time; (z) and it was frequently advisable to declare in different counts, the one on an executory, the other on an executed consideration, the first to admit of evidence of the defendant's stipulation at the time of entering into the contract, the other of subsequent admissions or promises. And we have seen that in an action at the suit of an executor or administrator, it is frequently necessary to add a set of counts on promises to the plaintiff in his representative capacity, in order to admit of evidence of a promise or acknowledgment to the plaintiff, to take the cause out of the statute of limitations. (a) It was usual also to add such *common* counts as were applicable to any part of the plaintiff's case, (b) and after the *indebitatus* count for work and labor, or goods sold, &c. it was usual to add a *quantum meruit* or *valebant* count, (c) though the latter had for some time been considered unnecessary. (d)

Also in *debt* on simple contracts, legal liabilities, and penal statutes, it was frequently advisable to vary the statement of the cause of action in different counts. But in *debt* on specialties and records, and in *covenant*, as the instrument declared upon could not, if due care were taken, vary from the statement in the declaration, one count would in general suffice. In an action upon a deed, of which a profert, or an excuse for it might be necessary, if it were doubtful whether the deed could be produced, or whether it were in the possession of the defendant, or be lost or destroyed, it was proper to declare in one count, stating the profert; in another count, stating the deed to be in the possession of the defendant; and in a third that it was lost, &c. (e) so that the risk of being restricted to making a profert without being able to give over, or of alleging an excuse which could not be established, might be avoided.

In declarations for *torts*, several counts for the same cause of action were also frequently advisable, particularly in actions for *words*, which are usually stated in different ways, and sometimes with different *innuendoes*, so as to meet the probable evidence. (f) In trespass, if there had been two or more assaults, it was proper to insert as many counts as there were assaults, in order to avoid the necessity for a new assignment; (g) and if there were only one count, and the plaintiff failed in proving one battery, he could not, after attempting to do so,

(z) *Post*, vol. ii. 240.

(a) *Ante*, 373. See the form, *post*, vol. ii. 119; and see fully the form in *Foxwist v. Tremaine*, 2 Saund. 207, 208.

(b) *Ante*, 349-373.

(c) 3 Bl. Com. 295.

(d) 2 Saund. 122 a.

(e) *Smith v. Woodward*, 4 East, 585; *Beckford v. Jackson*, 1 Esp. Rep. 337; *post*, vol. ii. 47, note (h).

(f) *Post*, vol. ii. 538, 542; in *replevin*, see *Vin. Abr. Declaration, Q.*

(g) 1 Saund. 299, note (6); *Smith v. Miles*, 1 T. R. 479; *post*, vol. ii. 671.

give in evidence another assault, as he might do if there had *been two counts. (*h*) So in trespass *quare clausum fregit*, if there had been any asportation of personal property, it was usual to insert two counts, in the first charging an injury to the land and taking the goods there, which is in its nature local and must be proved as laid; and in the second declaring merely for the asportation of the goods, which is transitory, and may be supported, though the taking be proved elsewhere. (*i*) And where there had been an *asportation* of personal property (which in the case of roots, earth, or other matter *affixed* to the *freehold*, must be an actual *carrying away* from the land where the same was dug, &c. and not a mere conveyance of it to another part of the premises where the same was dug), (*k*) it was expedient to insert the common asportavit count. (*l*) If, however, a declaration in trespass contained two counts, and the defendant pleaded not guilty to the first, and suffered judgment by default as to the other, and on the trial the plaintiff only proved one act of trespass, to which the second count was applicable, he was not entitled to a verdict on the first. (*m*) So if a declaration contained two counts in fact on the same bond or instrument, and the defendant pleaded a plea applicable to both the counts, and also a special plea which was an answer to the first count only, and such special plea was substantiated, then the plaintiff could not at the trial abandon the first count and proceed on the second, so as to avoid the effect of the special plea. (*n*)

In the adoption of several counts care must be taken that there be *no misjoinder*. (*o*) The jury may indeed assess entire or distinct damages on each of the counts when separate injuries have been proved. (*p*) If *distinct* damages be assessed, judgment may be given upon either of the counts; but if the jury find *entire* damages on all the counts, the judgments must be entire, in which case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable, (*q*) and the judgment will be arrested *in toto*, and *no venire*

(*h*) *Stante v. Pricket*, 1 Campb. 473.

(*i*) Per Buller J. *Smith v. Milles*, 1 T. R. 479; and see *Stead v. Gamble*, 7 East, 325; [*Sawyer v. Goodwin*, 34 Maine, 421. Where in trespass for breaking the plaintiff's close and taking away his chattels, the declaration does not contain a count for taking the chattels only, the plaintiff cannot recover for taking them, unless he proves a breach of the close. *Ropps v. Barker*, 4 Pick. 239; *Eames v. Prentice*, 8 Cush. 337; *Gilbert v. Thompson*, 9 Cush. 348; *Knapp v. Slocumb*, 9 Gray, 73, 75; *Sterling v. Warden*, 51 N. H. 230.]

(*k*) *Hullock*, 76.

(*l*) *Hullock*, 74-84; and see *Stead v. Gamble*, 7 East, 325.

(*m*) See *Compere v. Hicks*, 7 T. R. 727.

(*n*) And see *ante*, 349; [*Driggs v. Rockwell*, 11 Wend. 506.]

(*o*) As to misjoinder, see *ante*, 221-229; *Hensworth v. Fowkes*, 1 Nev. & Man. 321.

(*p*) *Ib. Ibid.*; [*Burnham v. Webster*, 5 Mass. 269.]

(*q*) *Peake v. Oldham*, Cowp. 276; *Onslow v. Horne*, 3 Wils. 185; 2 Saund. 171 b; *Grant v. Astle*, Doug. 722, 730; *Cook v. Cox*, 3 M. & Sel. 110; [*Backus v. Richardson*, 5 John. 476; *Cheetham v. Tillotson*, 5 John. 435; *Bayard v. Malcolm*, 2 John. 573; *Van Rensselaer v. Platner*, 2 John. Cas. 18, 21, 23; *Hopkins v. Beedle*, 1 Caines, 349; *Vaughan v. Havens*, 8 John. 110; *Bell v. Lovett*, 19 Wend. 546; *S. C.* 22 Wend. 369; *Bodley v. Roop*, 6 Blackf. 158; *Benson v. Swift*, 2 Mass. 53; *Richmond v. Whittlessey*, 2 Allen, 230; *Baker v. Sanderson*, 3 Pick. 353. But see *Neal v. Lewis*, 2 Bay, 204; *Neilson v. Emerson*, 2 Bay, 439; *Blanchard v. Fiske*, 2 N. H. 398.]

de novo awarded. (r) In case, therefore, there be an insufficient count, if the mistake be discovered before verdict, it is expedient to strike it out by leave of the judge, or to enter a *nolle prosequi* as to such count; or at the trial to take a verdict only on the sufficient counts, cautiously avoiding to give evidence in support of the bad count. However, where a general verdict has been taken and evidence given only on the good counts, the court will permit the verdict to be amended by the judge's notes, &c. (r¹) and if it appear by the * judge's notes that the jury calculated the damages on evidence applicable to the good count only, the judge will amend the *postea* by directing that the verdict be entered on those counts, though evidence was given applicable to the bad count also. (t) And where judgment has been given on demurrer, or by *nil dicit* in favor of the plaintiff, he may, after entering judgment for himself upon the whole declaration, upon discovering any error in one of the counts, waive his judgment on that count and enter it for the defendant. (u) A *nolle prosequi* as to one count does not preclude the plaintiff from proceeding at the trial upon another count, which, although apparently for a different cause of action, is in reality founded on the demand which might have been recovered upon the count which the plaintiff abandoned.

The costs, also, were always to be considered in adding several counts. Before the pleading rules the law was thus,—
Costs of several counts. (x) where the plaintiff obtained a verdict only upon one of several counts or issues, whether in the queen's bench or common pleas, he was only entitled to the costs relating to the trial of such issue; and the defendant was not allowed the costs of the counts found for him, though upon supposed causes of action different from that in respect of which the plaintiff recovered; (y) and the same rule prevailed where a defendant succeeded on a demurrer as to part of the

(r) *Ib.* *Ibid.*; [Gordon v. Kennedy, 2 Binn. 287; Hopkins v. Beedle, 1 Caines, 347; Lyle v. Clason, 1 Caines, 323.]

(r¹) [See Union Turnpike Co. v. Jenkins, 1 Caines, 381; Stafford v. Green, 1 John. 505; Van Rensselaer v. Platner, 2 John. Cas. 17; Roe v. Crutchfield, 1 Hen. & M. 365; Roulain v. McDowall, 1 Bay, 490; Cooper v. Bissel, 15 John. 318; Cornwall v. Gould, 146; Patten v. Gurney, 16 Mass. 187; Clarke v. Lamb, 6 Pick. 512; Jones v. Kennedy, 11 Pick. 124; Walker v. Dewing, 8 Pick. 520; Paul v. Harden, 9 Serg. & R. 23; Norris v. Dunham, 9 Cowen, 151; Sayre v. Jewett, 12 Wend. 135; Jackson v. Cannon, 2 Cowen, 615; Hanley v. Lewin, 5 Ohio, 227; Girard v. Stiles, 4 Yeates, 1; Scott v. Galbraith, 1 Dall. 134.]

(t) 2 Saund. 171 b; Grant v. Astle, Doug. 730; Barratt v. Collins, 10 Moore, 446, 452 a; Tidd, 9th ed. 713, 901. [A general verdict for the plaintiff in an action of tort against two defendants, with counts for as-

sault and battery, conversion of personal property, and slander, with an assessment of entire damages, furnishes no ground for a motion in arrest of judgment, if the jury were expressly instructed that the defendants were not responsible on the count for slander, and no request was made that the damages should be assessed on each count separately. Richmond v. Whittlesey, 2 Allen, 230.]

(u) Spicer v. Teasdale, 2 B. & P. 49; [but see Backus v. Richardson, 5 John. 476.]

(x) See Tidd, 9th ed. 917, 971.

(y) Penson v. Lee, 2 B. & P. 334; Postan v. Stanway, 5 East, 261; Morgan v. Edwards, 2 Marsh. 201; Durham v. Marquis of Hertford, 3 M. & Sel. 323; Hubbard v. Biggs, 16 East, 129. In Tidd, 4th ed. 874, note (8), and Postan v. Stanway, 5 East, 263, the practice of the common pleas is stated otherwise; but the case in Penson v. Lee, 2 B. & P. 334, appears to have escaped observation; and see Tidd, 9th ed. 974, 975

plaintiff's demand, and the plaintiff had obtained a verdict as to the residue, in which case no costs were allowed to the defendant in respect of the demurrer; (z) but if there were two distinct causes of action in two separate counts, and as to one the defendant suffered judgment by default, and as to the other took issue and obtained a verdict, he was entitled to judgment for his costs on the latter count, notwithstanding the plaintiff was entitled to judgment and costs on the first count. (a) It was considered that where the plaintiff in different counts varied the statement of the *same* cause of action for fear of a variance and non-suit on the trial, and succeeded upon one, it was but reasonable that he should not be punished with the payment of costs in respect of such other of the counts as he might not be able to prove; but that where he unnecessarily and without foundation proceeded in the same declaration in different counts for *distinct* causes of action, requiring the defendant to adduce different or additional evidence to resist them, it might be * more reasonable to allow the *defendant* the costs of such *improper counts*, and of the *evidence* which the defendant adduced to negative them; (b) but according to the practice the defendant was not in either case entitled to costs. (c)

At length, however, the general rule, Hil. T. 2 W. 4, r. 74, ordered "that no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs;" and it has been held that the general issue to a declaration containing many counts creates as *many issues* within the meaning of this rule, and the defendant is now entitled to costs upon *every count* on which the plaintiff fails, (d) and the rule also applies to *each separate count in ejectment*; (e) and it has been held that if the plaintiff do not prove all the words in the count in slander, the defendant is entitled to the costs of the pleadings found for him. (f) The decisions and practical operations upon this rule have been pointed out in another work, to which the reader is referred. (g)

The existing Rule Hil. T. 2 W. 4, r. 74, as to costs of several issues.

In framing a second or subsequent count for the same cause of action, care was, and still is, essential to avoid any *unnecessary* repetition of the *same* matter; and by an inducement in

Form of subsequent counts.

(z) *Postan v. Stanway*, 5 East, 261; Tidd, 9th ed. 972.

(a) *Day v. Hanks*, 3 T. R. 654; *Braithwaite v. Bradford*, 6 T. R. 602, 603.

(b) See Lord Eldon's observations in *Penson v. Lee*, 2 B. & P. 335, and *Ld. Kenyon's*, in *Braithwaite v. Bradford*, 6 T. R. 601.

(c) *Penson v. Lee*, 2 B. & P. 335; *Postan v. Stanway*, 5 East, 261; Tidd, 971, 972; *Hopkins v. Barnes*, 2 Price, 136; and see

Jervis's Rules, Hil. T. 2 W. 4, r. 74, note (x). [If judgment is arrested for one bad count, the defendant is entitled to his full costs on all the issues, as the prevailing party. *Gibson v. Waterhouse*, 5 Greenl. 19.]

(d) *Cox v. Thomson*, 2 Cr. & Jer. 498.

(e) *Doe v. Webber*, 1 Har. Rep. 10.

(f) *Prudhomme v. Fraser*, 1 Har. Rep. 5.

(g) 3 Chitty's Gen. Prac. by Lush, 396. See, also, Chitty's Arch. Pr. 7th ed. 1158.

the first count, applying any matter to the following counts, and by referring concisely in the subsequent counts to such inducement, much unnecessary prolixity may be avoided; and this is usual in actions for words, and proper to be attended to in all cases. (h) But unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for though both counts are in the same declaration, yet they are for all purposes as distinct as if they were in separate declarations; and consequently, they must independently contain all necessary allegations, or the latter count must expressly *refer to the former. (i) The commencement of a second count, "And, whereas, also," &c. is sufficiently positive. (k) In order to avoid any objection on the ground of duplicity, (l) it is advisable to insert in the second count for the same cause of action, the word "other" goods, &c. (m) or in ejectment, "other" messuages, &c.; (n) but after verdict the court will not intend the goods, &c. mentioned in the second count to be the same as those in the first, unless it be expressly so stated. (o)

It not unfrequently happens that the defendant attempts to defeat the advantage to be derived from several counts, by alleging in his plea thereto that the supposed causes of action therein mentioned are one and the same cause of action, and then showing matter which is only an answer to one cause of action; (o¹) as in the instance of two counts for two assaults, the plea often has been, "that the assaults in the different counts are but one and the same;" and then *son assault demesne* to the whole has been pleaded. (p) This mode of pleading is bad on demurrer; (q) but if

Pleading to several counts for same cause of action.

(h) See the observations of Lawrence J. Stiles v. Nokes, 7 East, 506; and Phillips v. Fielding, 2 H. Bl. 131, 132; Tindall v. Moore, 2 Wils. 114, 115; Barnes v. May, Cro. Eliz. 240; Baldwin v. Elphinstone, 2 Bl. Rep. 1038; and precedents, Crown Circ. Comp. 9th ed. (1820); post, vol. ii. 658; [Dent v. Scott, 3 Har. & J. 28; Griswold v. National Ins. Co. 3 Cowen, 96; Loomis v. Swick, 3 Wend 205; Nestle v. Van Slyck, 2 Hill, 282.] In a second count, on a deed or agreement, it is not unusual to commence the count by alleging that the deed or agreement in the first count mentioned, having been made as therein mentioned, &c. But it would seem to be more correct to aver, that a certain other deed or agreement was made between the parties containing the like terms and stipulations as were and are contained in the deed set forth in the first count; for, as observed by Mr. Serjeant Stephen (2d ed. 318, 319), whether the subjects of several counts be really distinct or identical, they must always purport to be founded on distinct causes of action, and not to refer to the same matter. This is evidently rendered necessary by the rule against duplicity (see

ante, 249), which, though evaded as to the declaration by the use of several counts in the manner here described, is not to be directly violated. But see Holford v. Dunnett, 7 M. & W. 348; and Deere v. Ivey, 12 L. J. R. N. S. Q. B. 132; as to the importance of not alleging a second agreement, as the word "other" will mean, unless there be evidence to support it.

(i) Bac. Abr. Pleas and Pleading, B. 1; [Nelson v. Swan, 18 John. 483.]

(k) Post, vol. ii. 34; and see Hughes v. Rees, 4 M. & W. 204.

(l) See ante, 249.

(m) Hart v. Langfitt, 2 Ld. Raym. 842; 7 Mod. 148, S. C.; Com. Dig. Pleading, C. 33; see *vide* West v. Troles, Salk. 213. See *supra*, note (h).

(n) Fisher v. Hughes, 2 Stra. 908. [It is not necessary to allege that the second count is for a cause of action different from that of the first. Ware v. Webb, 31 Maine, 41.]

(o) West v. Troles, Salk. 213; Bac. Abr. Pleas, B. 1; Vin. Abr. Declaration.

(o¹) [See Colby v. Everett, 10 N. H. 329.]

(p) See post, vol. ii. "Trespass."

(q) See Index, *Quæ sunt eadem*.

the plaintiff *reply* to the plea instead of demurring, he admits the allegation that there is but one cause of action, and is restricted thereto at the trial. (r) The plaintiff should therefore in such case demur, if it be material to him to rely upon each separate count, and not to be limited to proof of one cause of action; or if there be two distinct causes of action, he might, it should seem, traverse and take issue upon the allegation that the torts are one and the same.

The common law right to introduce several counts into the same declaration, in fact, for the *same subject-matter of complaint*, and varying from the first count only in *statement, description*, or *circumstances*, having been vexatiously abused, and the *necessity* for permitting such variations having been removed by the 3 & 4 W. 4, c. 42, s. 23, giving the judge power to amend *pending* the trial of an action in almost every case of *variance*, not prejudicing the opponent on the trial of the *merits*, the Reg. Gen. Hil. Term, 4 W. 4, reg. 5, after reciting that consequence, then limits the use of several counts.

The rule Hil. T. 4 W. 4, reg. 5, 6, 7, prohibiting several counts, and decisions thereon.

Reg. 5 orders, that *several counts* shall not be allowed, unless a *distinct subject-matter of complaint is intended to be established in respect of each*; nor shall *several* pleas, or *avowries*, or *cognizances* be allowed, unless a *distinct ground of answer or defence* is intended to be established in respect of each.

Several counts and pleas not allowed.

* Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Instances in declarations.

Ex. gr. counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

Contract with condition.

So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

Non-delivery of bill in payment.

So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

Not accepting and paying for goods.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint; for the debt and the security are different contracts, and such counts are to be allowed.

Bills and notes.

Policies. Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Premium.

Charter-parties. Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed.

Freight pro rata.

Demise and use and occupation. Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed.

Misfeasance. In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

Nonfeasance. In the like actions for nonfeasance, several counts founded on varied statements of the same duty are not to be allowed.

Trespass. Several counts in trespass for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *ex. gr.*, for wages, work, and labor as a hired servant, *work and labor generally*, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Indebitatus assumpsit. Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not *be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

Account stated.

Several breaches. The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging *more breaches* than one of the same contract in the same count.

Instances of pleas and avowries, &c. Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed. The rule then contains directions as to pleas of payment; accord and satisfaction; release; liability of third party; agreement to forbear in consideration of liability of third party; *lib. ten.*, easement, right of way, right of common, common of turbary, and estovers; distress for rent, and damage *feasant*, and avowries for distress for rent.

The cases above mentioned as The rule then declares that the examples in this and other places specified are given as *instances* only of the application of the rules to which they relate; but the *principles* contained

in the rules are not to be considered as restricted by the ex-
amples specified.

instances
only.

Where more than one count, plea, avowry, or cognizance, shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to *apply to a judge*, (s) suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading; (s¹) whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that *some distinct subject-matter* of complaint is *bond fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application, which shall be allowed.

Departure
from these
rules, how
taken ad-
vantage of.

Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have * so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance, allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bond fide* intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bond fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which *he succeeds*, arising out of any count,

Costs of
counts and
pleas.

(s) The application must in first instance be to a judge at chambers. *Ward v. Graystock*, 4 Dowl. 717.

(s¹) [As to striking out statements of ev-

idence, redundant averments, &c. under the practice in Indiana, see *King v. The Enterprise Ins. Co.* 45 Ind. 43.]

plea, avowry, or cognizance, with respect to which the judge shall so certify.

The meaning of the terms of the rule, "unless a *distinct subject-matter of complaint* is intended to be established in respect of each," is in some measure explained by the *instances* stated in the rule, and by the instances given of several pleas to be permitted or rejected. But we have seen it is still rather uncertain when a second varying count may be permitted, and the cases are contradictory. (t) It seems * that in an action on the case for an injury to a watercourse there may be two counts, one claiming it in right of an ancient building, and another in right of a close, (u) and that in an action against the sheriff there may be a count for an arrest and escape, and another for not arresting the third person when there was an opportunity; (v) and in a declaration for treble

(t) The construction which has been put on the words *distinct subject-matter of complaint* by recent cases cannot be better explained than by quoting the language of Tindal C. J. in *James v. Bourne*, 4 Bing. N. C. 420, which was an action of assumpsit against the owner of a steam-vessel, for non-delivery of goods shipped on board. The first count described the contract as one to carry the goods to the port of London, and there to deliver them to the plaintiff or his assigns. The second, after stating in the same terms the delivery of the goods to be carried to and delivered at London, alleged the contract to be to take care of the goods at the wharf, where they should be landed at London, and deliver them at the plaintiff's place of business there. In giving judgment in this case, Tindal C. J. observed, undoubtedly if we were to take in their most general sense the words of the rule, counts founded on one and the same principal matter of complaint, the allowing the two to stand together would appear to be a violation of the rule; because it is impossible not to see that the subject-matter of complaint in both counts is, that the goods were not delivered by the defendant. But taking the whole of the instances given in connection with the rule, I think it means that *if there be a second and distinct contract in respect of the same subject-matter, the count on such contract may stand, and that it would be an unnecessary extension of the rule to strike it out*. Here the first count is on a contract to carry goods from Belfast to Dublin, and from Dublin to the port of London. The second count relates to the same subject-matter so far as the goods are concerned, but it is on a separate and distinct contract as to the defendants undertaking, that is, to carry goods from the place of their landing at the port of London to the plaintiff's place of business. The instances given in the rules themselves show that a distinct subject-matter of complaint means, in cases of contract, a separate contract. Take the first instance: counts

founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed; e. g. counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract. Here, the second count is not a variation in the statement of one and the same contract, but a separate and distinct contract, importing a different degree of liability. Take the next example: "So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered and for the price of the same goods to be paid in money, are not to be allowed: so, counts for not accepting and paying for goods sold; and for the price of the same goods, as goods bargained and sold, are not to be allowed; but counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint. Why so? Because they are different contracts." The language of the same learned judge in the case of *Curry v. Arnott*, 7 Dowl. 250, as to the application of the rule with regard to pleas, may be well applied to several counts. He says, where the same facts and circumstances are differently stated in distinct pleas, the rule applies; but where the same facts lead to different conclusions in law, it is material that the different views of the facts relied on should be put upon the record.

(u) Per Patteson J. in *Frankum v. Earl Falmouth*, as stated in *Boanquet's Rules*, 14; 1 Har. & Wol. 1; 4 Nev. & Man. 330; 6 C. & P. 529, 8 C.

(v) Per Patteson J. in *Guest v. Everest*, 9 Legal Observer, 75; and *Boanquet's Rules*, 13, in note.

value in not setting out tithes there may be a second count for tithes as bargained and sold, or at least the court will bind the defendant not to set up a composition on the trial; (x) and in a declaration for double rent a count for use and occupation may be added; (x) but in one case Parke B. refused to allow a count to recover four-pence per chaldron for metage on all coals imported into the port of Truro, and another for the same sum claimed to be due as a port duty, saying, that at the trial of such a cause of action he should certainly, if necessary, amend the declaration by altering one statement to the other to meet the proof; and that in all the instances given in the rules in which two counts are to be permitted for the same cause of action, though grounded on the same cause they were not framed so as to claim exactly the same sum; *ex. gr.* on a bill of exchange, and on the consideration for it, a count on a charter-party and a count *pro ratâ itineris.* (y)

* The construction of this rule prohibiting the use of more than one count or plea being much connected with the *practice* of the courts has been fully considered in another work. (x) Upon the whole in practice, when, after full consideration, it appears that the proposed several counts are essential for the purpose of just security to the

(x) *Lawrence v. Stevens*, 1 Gale, 164; but see 3 Dowl. 777, differently reported. *Thornton v. Whitehead*, 1 M. & W. 14.

(y) *Jenkins v. Treloar*, 1 M. & W. 16; 4 Dowl. 690, S. C. So where the declaration charged the defendants in one count as liable with others, and in another as liable by themselves, the court ordered one count to be struck out. *Cholmondeley v. Payne*, 3 Bing N. C. 708. And where one count of a declaration was on a promise by the defendant that he was authorized by a third person to sell shares, and another on a promise by the defendant personally to sell on his own account, the court doubted whether both could be allowed. *Roy v. Bristow*, 5 Dowl. 452. Where the first count charged the defendant, assignee of a lease, with disannexing a steam-engine boiler, which was covenanted to be delivered up, and *converting and disposing* thereof to his own use; and the second count was a common count in trover for the same goods, the court ordered so much of the first count as alleged a conversion to be struck out. *Weston v. Woodcock*, 5 M. & W. 143; 7 Dowl. 384, S. C. So where a declaration in ejectment on the demise of the church-wardens and overseers of a parish to recover parish property, contained two sets of counts, one specifying the names of the lessors of the plaintiff, and the other not, the court ordered one of the counts to be struck out. *Doe v. Roe*, 4 Dowl. 222. And where a declaration contained a special count on a charter-party, from which it appeared that a certain number of days on

demurrage were allowed, and a breach was assigned in detaining the vessel for a period beyond the laying and demurrage days, but no breach in non-payment of demurrage was assigned, and a general count for demurrage was also introduced, it was holden that the two counts must be considered as substantially for the same cause of action, and therefore ought not to be allowed. *Temperley v. Browne*, 1 Dowl. N. R. 310. But counts on an express and implied contract will sometimes be allowed, although relating to the same subject-matter of complaint. Thus in the case of *Vaughan v. Glenn*, 5 M. & W. 577; 8 Dowl. 396, S. C.; where the first count of the declaration was for not taking goods on board, pursuant to the terms of a charter-party, and the other for not taking care of the goods until landed, both counts were allowed, Lord Abinger C. B. saying: "Under the first count the plaintiff cannot prove a breach of the charter-party, otherwise he makes out no case, then if it turns out either from the construction of that instrument or by usage, that the charter-party does not extend to the liability between the shore and the ship, then the plaintiff can have recourse to the second count for the breach of the implied contract to take due care of the goods from the shore to the vessel." See, also, *Bleaden v. Rupallo*, 9 Dowl. P. C. 857. Each of the common counts is, for the purpose of pleading and costs, considered as a separate count. *Jourdain v. Johnson*, 2 Cr., M. & R. 564; 4 Dowl. 534.

(x) 3 Chitty's Gen. Prac. by Lush, 400.

plaintiff, and that they do not contravene the rule, it seems to be advisable to insert such counts in the declaration, and explicitly to state the reasons for so doing to the learned judge in answer to any application to strike out all but one; and then, in case that judge should order them to be erased, to submit to his decision, and not pertinaciously retain the counts objected to, at the risk of losing the costs under the seventh rule; and in which case, should a variance appear on the trial, it is most probable the judge who will try the cause, on proof of such prior proceedings at chambers, will permit an amendment.

After stating the tort or cause of action, and, when necessary, the special injury or damage resulting therefrom, the declaration concludes "to the damage of the plaintiff of £——, &c." (y)

7thly. The conclusion *ad damnum*, &c.

In *penal actions* at the suit of a common informer, as the plaintiff's right to the penalty did not accrue till the bringing of the action, and he cannot have sustained any damage by a previous detention of the penalty, it is not proper to conclude *ad damnum*; (z) but the mistake may be amended even after error brought. (a) In an action by *husband and wife* for a battery, &c. of the wife, or whenever the wife is properly joined in the action, the declaration should conclude *ad damnum ipsorum*; (b) and when the plaintiff sues *as executor, administrator, or assignee* of a bankrupt, it is usual to state that he was injured *as such executor, &c.* (b¹) In *debt*, the object of the action being to recover a sum of money *eo nomine*, and in *detinue* the main object of the action being the recovery of the goods themselves, the damages are generally nominal. (c) But in *assumpsit, covenant, case, replevin, trespass*, and other actions really for the recovery of *damages*, the sum * in the conclusion of the declaration must be sufficient to cover the real demand; (d) for in general the plaintiff cannot recover greater damages than he has declared for, and laid in the conclusion of his declaration; (e) and after a verdict taken, the court will not give leave to increase the damages laid in the declaration, and take judgment for the enlarged damages. (f) But if the plaintiff will waive the verdict, he may be allowed to amend his declaration by increasing

(y) Com. Dig. Pleader, C. 84; 10 Co. 116 b, 117 a, b. As to this conclusion see *Jackson v. Pesked*, 1 M. & Sel. 236. When damages should in general be claimed in actions *ex delicto*, *ante*, 409, 410; in *assumpsit*, *ante*, 348.

(z) *Frederick v. Lookup*, 4 Burr. 2021; *Cuming v. Sibley*, 4 Burr. 2490; *Hardy v. Cathcart*, 1 Marsh. 180.

(a) *Hardy v. Cathcart*, 1 Marsh. 180. *Quære*, if the claim to damages might not in such case be treated as mere surplusage.

(b) Com. Dig. Pleader, C. 84; *Ib.* 2 A. 1; *Nelthorp v. Anderson*, 1 Salk. 114.

(b¹) [But this is unnecessary. *Martin v. Smith*, 5 Binn. 16, 21.]

(c) *Ante*, 389.

(d) *Bolton v. Lee*, 2 Lev. 57.

(e) 10 Co. 117 a, b; *Vin. Abr. Damages*, R.; Com. Dig. Pleader, C. 84; *Usher v. Dansey*, 4 M. & Sel. 100; [*ante*, 349, note (b).]

(f) *Pearse v. Cameron*, 1 M. & Sel. 675; [*Corning v. Corning*, 6 N. Y. 97.]

the damages, and will be let into a new trial. (*g*) If judgment be given for more damages than those laid in the declaration, it is error, and a court of error cannot reduce the sum to the amount stated in the declaration; (*h*) but the court in which the action was brought will allow the plaintiff to enter a remittitur of the surplus damages, and thus aid the error. (*i*) If, therefore, the verdict be for more than the damages laid in the declaration, a remittitur should be entered as to the surplus before judgment. The jury, however, may give a verdict for as much as is declared for, and also give *costs separately*, which costs may afterwards be increased by the court, though such damages and costs might together exceed the damages laid in the declaration. (*k*) It is usual in practice to state a sum sufficient to cover the real demand, with interest up to the time of final judgment.

In point of *form*, the usual conclusion of a declaration in the *king's bench* before the pleading rules had always been "to the damage of the plaintiff of £——, and therefore he brings his suit, &c.;" or in a *qui tam* action "and therefore as well for our said lord the king (or 'for the poor of the said parish of ——,') as for himself in this behalf he brings his suit, &c.;" but in the latter case the general conclusion, and "therefore he brings his suit, &c." would suffice. (*l*) In the *common pleas* the conclusion was, "wherefore the said plaintiff saith that he is injured, and hath sustained damage to the value (or 'amount') of £——, and therefore he brings his suit, &c.;" and in the *exchequer* the form was, "To the damage of the said plaintiff of £——, whereby he is the less able to satisfy our said lord the king the debt which he owes his said majesty at his exchequer, and therefore he brings his suit, &c." The above differences in the form of concluding in each court are still to be observed in declarations in actions *removed* from an inferior court, but in *all personal actions commenced* in either of the superior courts the Reg. Gen. Trin. T. 1 W. 4, prescribes the following form: "*To the damage of the plaintiff * of £——, and thereupon he brings suit, &c.*" (*m*) but which it is implied is to vary when at the suit of husband and wife, executors, administrators, or assignees. (*n*)

By the above word *suit* or *secta* (*a sequendo*), was anciently understood the witnesses or followers of the plaintiff, by whom he proposed to prove his case, for in ancient times the law would not put the defendant to the trouble of answering the charge till the plaintiff had

(*g*) Tomlinson v. Blacksmith, 7 T. R. 132.

(*h*) Usher v. Dansey, 4 M. & Sel. 94; Pearce v. Cameron, 1 M. & Sel. 675; Bonner v. Charlton, 5 East, 142.

(*i*) Usher v. Dansey, 4 M. & Sel. 94. [See Burger v. Kortright, 4 John. 415; Hubert v. Hardenberg, 5 Halst. 222.]

(*k*) Vin. Abr. Damages, R. pl. 9, 10, 11; 10 Co. 117 a, b.

(*l*) Walter v. Loughton, 10 Mod. 253.

(*m*) See the rule, *post*, vol. ii. 5.

(*n*) See forms, *post*, vol. ii. 7 *et seq.*

professed himself ready to make out his case; but the actual production of the suit, the *secta*, or followers, has long been antiquated, though the form of it still continues. (*o*) In actions against *attorneys* and other officers of the court, the declaration used to conclude *unde petit remedium*, instead of bringing suit; (*p*) but an inaccurate conclusion in that case was no cause of demurrer; (*q*) however, in one case, on a special demurrer, the court, for the sake of keeping up the old established form of "prays relief, &c." proposed an amendment without payment of costs. (*r*) When the action was by bill against a member of the House of Commons, the *bill* concluded with a prayer of process to be made by the plaintiff, according to the statute, &c. but now in all cases, as well against attorneys as privileged persons, the above mentioned common conclusion, "To the damage of the plaintiff of £—, and thereupon he brings suit, &c." is proper and sufficient. (*s*)

In an action at the suit of an executor or administrator, immediately after the conclusion, "to the damage," &c. and before the pledges, it was always the course to make a *profert* of the letters testamentary, or letters of administration; (*t*) but in *scire facias* the *profert* might be either in the middle or at the end of the declaration; (*u*) and in an action on a note indorsed to the plaintiff by an administrator no *profert* is necessary, because the plaintiff is not entitled to the custody of the letters of administration, which however must be proved on the trial. (*x*) The omission of the *profert* when necessary is now aided, unless the defendant demur specially for the defect. (*y*)

At the end of the declaration in the king's bench by bill, it was usual to add the plaintiff's common *pledges to prosecute*, John Doe * and Richard Roe. (*z*) But in proceedings by original, and in the common pleas, pledges omitted were supposed to have been found in the first instance before the defendant was summoned, and therefore they were not to be stated at the end of the declaration unless in proceedings against attorneys, &c. (*a*) In

(*o*) 3 Bl. Com. 295; Gilb. C. P. 48; Stephen on Pleading, 5th ed. 474. Perhaps in the spirit of conciseness evinced in the modern rules, the concluding words, "and thereupon he brings suit," might have been omitted. Those words seem equivalent to, "and this the plaintiff is ready to verify."

(*p*) Gilb. C. P. 49.

(*q*) Beer v. Alleyn, Andr. 247; Clarke v. Cotton, Barnes, 3.

(*r*) Spencer v. Thomlinson, Barnes, 167.

(*s*) Reg. Gen. Mich. Term, 1 W. 4, reg. 15.

(*t*) Bac. Abr. Executor, C.; Walker v. Witter, Dougl. 5, in notes. As to the statement of administration, see 1 Rich. C. P.

443. [In Connecticut it is not common to make *profert* of letters of administration. Champlin v. Tilley, 3 Day, 305. And in debt by an administrator, upon a judgment recovered by him, he need not declare as administrator. Talmage v. Chapel, 16 Mass. 71.]

(*u*) Bosworth v. Ridgley, Carth. 69.

(*x*) Stone v. Rawlinson, Willes, 560.

(*y*) 4 & 5 Anne, c. 16, s. 1.

(*z*) 3 Bl. Com. 295; Co. Litt. 161 a, note

(4); Com. Dig. Pleader, C. 16.

(a) Summary on Pleading, 42; Littlehales v. Bosanquett, Barnes, 163.

an action at the suit of the king, the queen, or an infant, pledges were not at any time necessary; (b) and as they have long ceased to be real, (c) the statement of them had long been considered to be unnecessary, and the omission could not be taken advantage of even by special demurrer, (c¹) because *cessante ratione, cessat et ipsa lex*; (d) and the Reg. Gen. Mich. T. 8 W. 4, reg. 15, *expressly prohibits* the addition of *pledges* in any declaration in a *personal* action.

In considering the various parts of a declaration, we have incidentally noticed a great variety of instances, in which a defect may be aided or become unimportant, either by the defendant's omission to demur specially or generally, or by his pleading over, (e) or by virtue of the statutes of jeofails, or by the effect of a verdict. It is proposed to consider these rules in a connected point of view, as they have relevance to all parts of pleading, towards the end of this volume, and therefore no further notice need here be taken of the subject. (f)

(b) 8 Co. 61; Goodwin v. Moore, Cro. Car. 161; Co. Litt. 133 a; Younge v. Younge, Sir W. Jones, 177.

(c) 3 Bl. Com. 295; Co. Litt. 161 a, note (4); Mansfield v. Richman, Fortesc. 330; 1 Crompt. Intr. 48.

(c¹) [Baker v. Phillips, 4 John. 100.]

(d) Read v. Brookman, 3 T. R. 157, 158; Littlehales v. Bosanquett, Barnes, 163; Ilderton v. Ilderton, 2 H. Bl. 161; Summary on Pleading, 43. And yet it was enacted by the statute 4 Ann. c. 16, s. 1, that no advantage shall be taken of the omission of pledges,

unless assigned specially as cause of demurrer, thereby admitting the omission to be then an existing objection; and since that statute leave has been given to amend. See Watson v. Richardson, 1 Wils. 226; How v. Denin, 2 Wils. 142; Umfreville v. Lock, Rep. temp. Hardw. 315; Mansfield v. Richman, Fortesc. 330; Littlehales v. Bosanquett, Barnes, 163; Young v. Young, Palmer, 518.

(e) See an instance, Darling v. Gurney, 2 Cr. & M. 226.

(f) See Index, "Defects."

OF THE CLAIM OF CONUSANCE, APPEARANCE AND DEFENCE, OYER,
AND IMPARLANCES.

BEFORE we consider the different pleas in personal actions, it may be proper in this chapter to examine a few points relating to, 1st, The claim of *conusance*; 2dly, *appearance and defence*; 3dly, *oyer*; and 4thly, *imparlances*. The *first* has long been a proceeding of rare occurrence. The *second*, viz. the statement in pleading of any appearance and defence, has been almost entirely altered by the Reg. Gen. Hil. T. 4 W. 4; and the *fourth*, relating to imparlances, has as respects *personal actions commenced* in one of the superior courts been virtually abolished; but still it is advisable for students and practitioners to take a concise view of the ancient practice respecting those three subjects. As regards the third, *oyer* and pleadings thereupon, there has been but one recent alteration. We will consider each in the above order.

I. CLAIM OF CONUSANCE.

The claim of *conusance*, or *cognizance of a suit*, (a) is defined to be an intervention by a *third person*, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of the claimant's court. (b) It is in form a question of jurisdiction between the two courts, (c) and not between the plaintiff and defendant, as in the case of a plea to the jurisdiction, and therefore it must be demanded by the party entitled to conusance, or by his representative, and not by the defendant or his attorney. (d) A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney. (e) Hence the consideration of this claim might on first view appear to be foreign to a treatise of this nature; but as it was frequently made at the instigation of the de-

(a) As to conusance in general, see Gilb. C. P. 192, &c.; 1 Sellon, c. vii.; Tidd, 9th ed. 631; Vin. Abr. Conusance; Com. Dig. Courts, P.; Bac. Abr. Courts, D. 3; 3 Bl. Com. 298. As it is stated that the claim of conusance should be made before defence, see 3 Bl. Com. 298. I have considered the nature of such claim anterior to defence and imparlance, oyer, and pleas to the jurisdiction, and in abatement.

(b) Leasingby v. Smith, 2 Wils. 409, 410.

See the precedents in Rast. Ent. 128; Welles v. Trahern, Wilses, 233; Williams v. Brickenden, 11 East, 543; Brown v. Renouard, 12 East, 12.

(c) Pern v. Manners, Fortesc. 157; 5 Vin. Abr. 588, 589, S. C.

(d) Ib.; 5 Vin. Abr. Conusance, 588, 593, 596, 600; Taylor v. Reignolds, 12 Mod. 666

(e) Leasingby v. Smith, 2 Wils. 410; 5 Vin. Abr. 599.

fendant, and affects the pleadings, it is proper to be concisely inquired into. This claim, when made against the jurisdiction of the courts of Westminster, has not been encouraged, and therefore the greatest accuracy * must be observed in the time and manner of making it. (f) It may be considered with reference, 1st, To the several sorts of inferior jurisdictions; 2dly, To the actions in which conusance may be claimed; 3dly, To the time and manner of claiming it; and 4thly, To the proceedings thereon.

The privilege of claiming conusance is confined to courts of record, except in the case of ancient demesne. (g) According to the various decisions collected in Viner's Abridgment, (h) ^{1st. What courts may claim it.} there are three sorts of inferior jurisdictions. The first is by grant *tenere placita*, which is of the lowest description, and is merely a *concurrent* jurisdiction, and can neither be claimed nor pleaded, and where priority of suit gives one court the preference. (i) The second is by grant *habere cognitionem placitorum*, and gives a *general conusance of pleas*, and this must be limited as to place, and being intended for the benefit of the lord may be claimed by him, though it cannot be pleaded by the defendant to the jurisdiction. The third is by grant *habere cognitionem placitorum, with exclusive words*, as where the queen grants to a city that the inhabitants shall be sued within the city, and *not elsewhere*. This may follow the person, and need not be confined to any place, and being an exempt jurisdiction, may be either claimed by the lord or pleaded by the defendant to the jurisdiction; but even in the latter case the proceedings in the superior courts must be objected to in the first instance by claim of conusance, or plea to the jurisdiction. (k) Hence, it is a general rule that where the defendant is at liberty to plead to the jurisdiction of the court, the lord of the franchise may claim conusance, but not *vice versa*. (l) Where two persons claim conusance, it is to be granted to him who first demanded it, and the right of the parties claiming conusance must be tried in another action between them. (m) The principal modern instances of conusance having being claimed and allowed, have been on behalf of the *Universities of Oxford and Cambridge*. (n)

(f) See the reason, *Leasingby v. Smith*, 2 Wils. 408, 409; *Welles v. Trahern*, Wilses, 237, 238.

(g) 2 Gilb. C. P. 191, 192; 2 Inst. 140; *Welles v. Trahern*, Wilses, 239; *Dowland v. Slade*, 5 East, 284.

(h) Tit. Conusance, vol. v. 569. See, also, Com. Dig. Courts, P.; Bac. Abr. Courts, D.; Pern v. Manners, Fortesc. 156; Tidd, 9th ed. 631.

(i) Ib.; Case of University of Cambridge, 10 Mod. 126; *Castle v. Lichfield*, Hardr. 509; *Hampton v. Phillips*, Palm. 456; *Crosse v. Smith*, 12 Mod. 643.

(k) Ib.; *Chapman v. Mettison*, Andr. 198. In some cases the jurisdiction of the courts at Westminster is expressly taken away by different statutes, which create courts of requests for the recovery of small debts, and in such cases the objection may be pleaded in bar or given in evidence under the general issue, &c. *Parker v. Elding*, 1 East, 352; *The King v. Johnson*, 6 East, 583. See Tidd, 9th ed. 954-962.

(l) Gilb. C. P. 193.

(m) 5 Vin. Abr. 599.

(n) *Thornton v. Ford*, 15 East, 634; *Williams v. Brickenden*, 11 East, 543; *Perrin v.*

The power of claiming conusance is restricted to *local* actions; (*o*)
 * except where the defendant is a member of the University
 of Oxford or Cambridge. (*p*) It is also confined to such
 actions as were *in esse* at the time of the grant; (*q*) and
 does not extend to those created since by act of parliament, except
 where a common law action is given against a person by another name,
 as debt against an administrator. (*r*) Neither will this privilege be
 allowed where the court claiming conusance cannot give remedy, (*s*)
 and when there would consequently be a failure of justice; (*t*) as in
 replevin, because if the plaintiff be nonsuited, a second deliverance
 should be granted, which the franchise cannot issue; (*u*) nor in *quare*
impedit, because the inferior court cannot send a writ to the bishop; (*x*)
 nor in waste, or where the lord is a party and the plea is to be
 holden before himself; (*y*) or where the defendant is a stranger who
 hath nothing within the franchise; (*z*) or where the plaintiff is a
 privileged person, as an attorney or officer of the court. (*a*) It also
 seems that the court cannot grant conusance in part; (*b*) though upon
 a plea in abatement the writ may abate as to a part. (*c*) Conusance
 might, however, have been claimed where the defendant was in the
 actual custody of the marshal. (*d*)

With respect to the *time* when conusance should be claimed, it
 should be after the defendant has appeared, because till then
 there is no cause in court, and the defendant might counter-
 plead the conusance. (*e*) It is said that it should be before
 full defence, (*f*) and according to the entries, it is to be made before
 any defence, immediately after the statement of the defendant's
 appearance. (*g*) It is an established rule of law, "that it must be
 claimed in the first instance, or at the first day," (*h*) and, conse-
 quently, it should have been made before imparlance; (*i*) though in

West, 1 Har. & Woll. 401, for *Oxford*; and
Brown v. Renouard, 12 East, 12, for *Cam-*
bridge; and see other cases Harrison's Index,
 tit. University, III.

(*o*) 4 Inst. 213; Bishop of Ely's case, 1
 Sid. 103.

(*p*) Gilb. C. P. 193; Bac. Abr. 102; Wil-
 liams v. Brickenden, 11 East, 543. He must
 be a *resident* member. Hayes v. Long, 2
 Wils. 310.

(*q*) 14 Hen. 4, 20, B.

(*r*) Ib.; 22 Edw. 4, 22.

(*s*) Draper v. Crowther, 2 Vent. 363.

(*t*) Ib.; Castle v. Lichfield, Hardr. 507.

(*u*) 2 Inst. 140.

(*z*) Bac. Abr. Courts, D. 3.

(*y*) 8 Hen. 6, 18-21; Day v. Savadge,
 Hob. 87. See the singular argument, 3 Bl.
 Com. 299, note (*d*).

(*z*) 1 Rol. Abr. 493, pl. 16, 1, 48; 22 Ass.
 83.

(*a*) Welles v. Trahern, Willes, 233; Barnes,
 346; The Lord Anderson's case, 3 Leon.

149; Anonymous, Litt. Rep. 304; 5 Vin.
 Abr. Conusance, 590, S. C.; Ib. 562, *acc.*;
 Bendl. 233, *contra*; nor where the defendant
 is an attorney. See 5 Vin. Abr. 572; 1 Rol.
 Abr. 489, *acc.*; 5 Vin. Abr. 594, *contra*. Not
 claimable in the court of exchequer. Wil-
 kins v. Shalcroft, Hardr. 188; Tidd, 9th ed.
 81, 82.

(*b*) 5 Vin. Abr. 597; 1 Rol. 495.

(*c*) 2 Saund. 209 *c*, 210, in *notis*.

(*d*) Jones v. Bodinner, 1 Salk. 2; Gilb. C.
 P. 195; Bro. Abr. Conusance, 50.

(*e*) Gilb. C. P. 196; Wild v. Villers,
 Comb. 319; Brown v. Renouard, 12 East, 12.

(*f*) 3 Bl. Com. 298; but see 5 Vin. Abr.
 597; 1 Rol. Abr. 495.

(*g*) Rast. Ent. 123; Leasingby v. Smith,
 2 Wils. 410.

(*h*) Rex v. Agar, 5 Burr. 2823; Woodcocke
 v. Brooke, Rep. temp. Hardw. 241; Leasingby
 v. Smith, 2 Wils. 411; Welles v. Trahern,
 Willes, 233.

(*i*) Ib. Ibid.; Leasingby v. Smith, 2

general when a declaration was delivered in vacation as of the preceding term, the claim of conusance might have been entered on the first day of the following term as of the preceding term. (*k*) Where the writ disclosed the particulars of the *cause of action, it appears to have been considered as legal notice to the lord, &c. of the invasion of his jurisdiction, so as to make it incumbent on him to claim conusance on the very first day the defendant had in court, even upon the return day of the writ; but when the writ did not disclose the precise cause of action, then it was sufficient to make the claim on the first day given upon the declaration. (*l*)

In point of *form* (*m*) conusance may be claimed by the lord of the franchise, or by his bailiff or attorney. (*n*) It may be claimed by the vice chancellor of Oxford University, the chancellor ^{The form and mode of claim, &c.} being dead, &c. (*o*) If it be claimed by attorney, the warrant of attorney must be produced in court and filed. (*p*) The *grant* of conusance must also be produced, (*q*) or an exemplification of it under the great seal, (*r*) and if the grant was before time of memory, an allowance must be shown in the queen's bench, or before justices in eyre, or confirmation by patent, (*s*) and it cannot be claimed by prescription. (*t*) Upon a claim made by either of the universities of Oxford or Cambridge, (*u*) there must, in addition to the grant, be an exemplification of the private statute confirming it, (*x*) together with an affidavit of the defendant's residence within the local jurisdiction. (*y*) The claim of conusance is usually supported by affidavits verifying the necessary facts. (*z*) The claim itself must be entered upon a roll. (*a*) It being a demand of something *quod sibi debetur*, it must be perfectly entered upon record, and must state everything that is to take away the general jurisdiction of the superior court, and *the whole*

Wils. 411; Welles v. Trahern, Wiles, 233; 3 Bl. Com. 298; Case of University of Cambridge, 10 Mod. 127; Pern v. Manners, Fortesc. 157.

(*k*) Leasingby v. Smith, 2 Wils. 411, 412; Brown v. Renouard, 12 East, 18.

(*l*) Rex v. Agar, 5 Burr. 2823; Leasingby v. Smith, 2 Wils. 413; Case of University of Cambridge, 10 Mod. 127.

(*m*) Com. Dig. Courts, P. 3; Rast. Ent. 128. See the form, Williams v. Brickenden, 11 East, 543; Brown v. Renouard, 12 East, 12.

(*n*) Bro. Abr. Conusance, 50; Crosse v. Smith, 12 Mod. 644; Taylor v. Beignolds, 12 Mod. 666. See the entry, Rast. Ent. 128; Welles v. Trahern, Wiles, 234.

(*o*) Williams v. Brickenden, 11 East, 543, note.

(*p*) See the form, Welles v. Trahern, Wiles, 233, 234; Hampton v. Phillips, Palm. 456; Bishop of Ely's case, 1 Sid. 103; 1 Lev. 89; Leasingby v. Smith, 2 Wils. 406.

(*q*) Crosse v. Smith, 12 Mod. 644; Kendrick v. Kynaston, 1 Bl. Rep. 454.

(*r*) Rex v. Agar, 5 Burr. 2820.

(*s*) Keilw. 189, 190; Bishop of Ely's case, 1 Sid. 103; Foster v. Mitton, 1 Salk. 183; Foster v. Hexam, 1 Ld. Raym. 427, 428, 475; S. C. Gilb. C. P. 195; but see Bro. Abr. Conusance, 51.

(*t*) Com. Dig. Courts, P. 3.

(*u*) Case of University of Cambridge, 10 Mod. 126; Kendrick v. Kynaston, 1 Bl. Rep. 454; Brown v. Renouard, 12 East, 12.

(*x*) 13 Eliz. c. 29; Leasingby v. Smith, 2 Wils. 412.

(*y*) Boot v. Graham, 1 Barn. K. B. 49, 65; Paternoster v. Graham, 2 Stra. 810; Hayes v. Long, 2 Wils. 311; Kendrick v. Kynaston, 1 Bl. Rep. 454; Rex v. Agar, 5 Burr. 2820; Brown v. Renouard, 12 East, 12. But in Thornton v. Ford, 15 East, 634, an affidavit of the residence of a common serjeant, called marshal of the university, having local duties to perform, was dispensed with.

(*z*) Brown v. Renouard, 12 East, 12.

(*a*) Wild v. Villers, Comb. 319; Boot v. Graham, 1 Barn. K. B. 65; Paternoster v. Graham, 2 Stra. 810.

*ought to be set forth with all the proceedings in the cause in the court till the instant of making the claim, and after stating the proceedings the entry runs thus: "And the said defendant by attorney, comes," (but the defendant says no more, nor makes defence, and then the entry proceeds as follows: "and hereupon the chancellor of the University of Oxford, by G. H., his attorney, demands, claim, prosecute, and defend his liberties and thereof, that is to * say, to have the conusance of the plea aforesaid cause he saith," &c. (setting out with great precision all the instances on which the claim is founded, and concluding thus:)* the said chancellor demands his liberties and privileges aforesaid in the form and effect of the letters-patent aforesaid, and confirmation aforesaid in this plea, between the parties aforesaid in the court of our said lady the queen, now depending, to be as him as heretofore hath been allowed," (b) though the latter is not necessary where the franchise is given by act of parliament.

The claim of conusance, if insufficient in form or substance, may be demurred to, or the facts therein alleged may be denied by the plaintiff. (d) If the claim be disallowed, the plaintiff murrer, the judgment, after the usual entry of *curia vocat*, and giving day to hear judgment, as well to the plaintiff as to the person claiming conusance as to the defendant, is, "that the claim aforesaid, by the party claiming conusance in manner and form aforesaid, is not sufficient in law, therefore it is considered void, &c. (the person claiming conusance) have not his aforesaid claim in his said plea mentioned, and it is commanded by the court as well to the said, &c. (the person claiming conusance) as to the defendant, that to the writ and count aforesaid, the said defendant answer, &c. and thereupon the said defendant defends the writ as of injury, when, &c. and prays leave to imparl," &c. and the cause proceed as usual. (e)

If the claim be allowed, a day is given upon the roll for the plaintiff to hold his court, and the parties are commanded to appear there on that day. (f) But the record still remains in the court above, and a transcript only is sent down to the court below, (g) so that if justice be not done there, as if the defendant be a stranger, and has nothing within the franchise by which he can be summoned, or if the judge refuse to do justice, the plaintiff may have a *repleader* upon the record in the court above, (h) the cause assigned

(b) Per Wilmut C. J. *Leasingby v. Smith*, 2 Wils. 409, 410; *Rast.* 128; *Welles v. Trahern*, Wils. 234; *Brown v. Renouard*, 12 East, 12.

(c) *Ib.* *Ibid.*

(d) *Leasingby v. Smith*, 2 Wils. 410; *Wild v. Villers*, Comb. 319; *Rast.* Ent. 129.

(e) *Rast.* Ent. 128 b.

(f) *Ib.* 129; *Leasingby v. Smith*, 2 Wils. 411; *Crosse v. Smith*, 2 Ld. Ray. 411; 12 Mod. 644; 3 Salk. 79, S. C.

(g) *Ib.*; *Jenk.* 31; 5 Vin. Abr. 100.

(h) *Leasingby v. Smith*, 2 Wils. 410; *Crosse v. Smith*, 12 Mod. 644.

re-summons may be traversed by the party who originally claimed conusance, and if found for him the cause will be remanded, but if found against him, the parties go on in the superior court from the period or stage in which the cause was at the allowance of the claim, just as if such claim had never been allowed. (i) And if a re-summons issue upon failure of right in a franchise, the lord of the franchise shall never afterwards have conusance of that plea. (k)

• II. OF APPEARANCE AND DEFENCE, AND FORMS OF STATING THEM.

Before we inquire into the qualities and parts of the various pleas in personal actions, it is advisable to consider the statement of the defendant's *appearance*; of his *defence*; and of *imparlances*; which, when they occur in pleading, usually precede the statement of the subject-matter of the defence. The language of the *plea* and of the *entry on the record* of these allegations *used formerly in all cases* to be thus: "And the said C. D. (*the defendant*) by E. F. his attorney, *comes and defends the wrong (or in trespass 'force')* and injury, when, &c. and craves *oyer* of the said writing obligatory, and it is read to him, &c. he also craves *oyer* of the condition of the said writing obligatory, and it is read to him in these words: The condition, &c. (*setting out the condition verbatim*), which being read and heard, the said C. D. prays leave to *imparl* to the said declaration until — next after — and it is granted to him, and the same day is given to the said A. B. (*the plaintiff*) here, &c. At which day, to wit, on — next after —, at Westminster aforesaid, come as well the said A. B. as the said C. D. by their respective attorneys aforesaid; and the said C. D. saith that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he saith that, &c. (*stating the ground of defence*)." (l)

II. OF APPEARANCE AND DEFENCE, AND FORMS OF STATING THEM.

The above "*venit*" was the statement on record of the defendant's *appearance* in court, and was said to be necessary to make him a party to the suit, because *dicit* without *venit* might be *ore tenuis*. (m)

Lichfield, Hardr. 507; but see 5 Vin. Abr. Conusance, 589; Case of University of Cambridge, 10 Mod. 127.

(i) Leasingby v. Smith, 2 Wils. 411; 6 Vin. Abr. 3, 4.

(k) Jenk. 34; 5 Vin. Abr. 576, 588.

(l) See the forms, 3 Bl. Com. Appendix, No. iii.

(m) Skin. 582; Gilb. C. P. 186; Bac. Abr. Pleas, D.; Com. Dig. Abatement, I. 16; Lutw. 8, 9; Co. Litt. 127 b. [See Mann v. Carley, 4 Cowen, 148. To constitute an appearance there should be some formal entry, plea, or motion, evincing an intent to appear, and it should be ascertainable by the record. Scott v. Hull, 14 Ind. 136; Foreman v. Lay, 6 Ala. 784. Steps held to constitute or imply an appearance: Putting in an answer,

Hayes v. Shattuck, 21 Cal. 51. Demurring, Kegg v. Welden, 10 Ind. 550; Knight v. Low, 15 Ind. 374; Evans v. Iles, 7 Ohio St. 283. Moving to dissolve an attachment, Whiting v. Budd, 5 Missou. 443; Chittenden v. Hobbs, 9 Iowa, 417. Taking an appeal, Fee v. Big Sand Iron Co. 13 Ohio, 563; Weaver v. Stone, 2 Grant Cas. 422. Moving for a continuance and change of venue, Shaffer v. Trimble, 2 Greene, 464. Moving to set aside an interlocutory order, Tallman v. McCarty, 11 Wisc. 401. Attending and taking part in the trial, Scott v. Niles, 40 Vt. 573. An appearance for any other purpose than to question the jurisdiction, is general Ulmer v. Hiatt, 4 Greene, 439; Clark v. Blackwell, 4 Greene, 441. An appearance will be taken to be general unless the con

It has however been decided, that the word *venit* was no *plea*, so that if defence were made without it, it would be good. If the defendant's making defence shows him to be in court, and he is a party to the plea, particularly where he appears to *todid*. (n) When the defendant pleaded in a *different* name in the writ, whether in abatement or in bar, the statement of appearance must not have been, "and the *said* C. D. comes and defends," &c. (o) In general the appearance must be stated to have been in *person* or by *attorney*, according to the nature of the action; but in an action against a feme covert sued alone, it was sufficient to allege that she had appeared *in person*; (q) and an infant always have *pleaded by guardian*, and not by attorney or guardian ** ami*; (r) and this though he be sued with others in a rep-

trary appears. *Deshler v. Foster*, 1 Morris, 403. When a party appears for a specific purpose, as to show that he is not properly before the court, he should so restrict his motion. *Abbott v. Semple*, 25 Ill. 107; *Flake v. Carson*, 33 Ill. 518. A special appearance to make an objection will not be a waiver of that objection. *Nye v. Liscombe*, 21 Pick. 263; *Ames v. Winsor*, 19 Pick. 247; *Boales v. Shules*, 29 Iowa, 507. See *Pomeroy v. Bells*, 31 Missou. 419; *Tingley v. Bateman*, 10 Mass. 343; *Gardner v. Parker*, 12 Mass. 36; *Wheeler v. Lampman*, 14 John. 481. As to the service or return, *Campbell v. Swasey*, 12 Ind. 70; *Allen v. Lee*, 6 Wisc. 478; *Knox v. Summers*, 3 Cranch, 496; or to the jurisdiction, *Hodges v. Brett*, 4 Greene, 345; *Ulmer v. Hiatt*, 4 Greene, 439; *Johnson v. Buell*, 26 Ill. 66; *Weil v. Lowenthal*, 10 Iowa, 575. A general appearance is a submission of the person to the jurisdiction, and after it the cause may proceed as if the party had been regularly brought in, irrespective of the manner in which the plaintiff proceeded for that purpose. *Shields v. Thomas*, 18 How. (U. S.) 253; *United States v. Yeates*, 6 How. (U. S.) 605; *Knox v. Summers*, 3 Cranch, 496; *Pollard v. Dwight*, 4 Cranch, 421; *Farrar v. United States*, 3 Peters (U. S.), 459; *Gracie v. Palmer*, 8 Wheat. 699; *Segee v. Thomas*, 1 Blatchf. 11; *Carrington v. Brents*, 1 McLean, 174; *Payne v. Farmers' Bank*, 29 Conn. 415; *Suydam v. Pitcher*, 4 Cal. 280; *Abbott v. Semple*, 25 Ill. 107; *Cruikshank v. Cogswell*, 26 Ill. 366; *Roberts v. Thompson*, 28 Ill. 79; *Miles v. Goodwin*, 35 Ill. 53; *Deputy v. Betts*, 4 Harr. (Del.) 352; *Little v. Vance*, 14 Ind. 22; *Eldredge v. Folwell*, 3 Blackf. 208; *Beil v. Pierson*, 1 Morris, 21; *Hall v. Biever*, 1 Morris, 113; *Winchester v. Cox*, 8 Iowa, 575; *Lewis v. Nickols*, 26 Missou. 278; *State v. Woolrey*, 39 Missou. 525; *Harris v. Guin*, 10 Sm. & M. 563; *Choteau v. Rice*, 1 Minn. 192; *Anderson v. Morris*, 12 Wisc. 689; *Fox v. Reed*, 3 Grant Cas. 81;

Flanders v. Aetna Ins. Co. 3. *Brown v. Balde*, 3 Lansing, 3. Effect of service or of jurisdiction of person of the defendant is waived by his appearance and the want of jurisdiction is cured by the matter, it is not cured by the defendant. *Loomis v. Wa* 561; *Johnson v. Knoblauch*, *Johnson v. West*, 43 Ala. 689. *Pennsylvania practice*, an appearance be entered *de bene esse* to save on irregular and informal proceedings. *Mason*, 66 Penn. Stat. 138.] 5th ed. 23, 26, as to appearance. (n) *Salk*. 544; *Skin*. 582. Abatement, I. 16; *Steph*. 2d ed. (o) *Roberts v. Moon*, 5 T. 41. *der v. Mawman*, *Willes*, 41. *Saund*. 209 a, note (1); *Pea*. *Taunt*. 653, note (a). (p) *Tidd*, 9th ed. 92, 93. Lunatics, &c. *Ib*; *Oulds v. Sa* 261.

(q) 2 *Saund*. 209 b, note. (r) 2 *Saund*. 117 f, note (1). 212 a, notes (4), (5); [*Mock*]. *John*. 192; *Cook v. Totten*, *Smith v. Bradley*, 6 Sm. & M. 4. *v. Carr*, 6 Wend. 526; *Alderr*. 3 *John*. 418; *Bustard v. Gate* 436; *Knap v. Crosby*, 1 Mass. 436; *Gilmanton*, 12 N. H. 515, 51. Code of Procedure, § 115; *Fair* 7 *Rob*. 546. Where judgment against an infant he may assignance by attorney as a ground. *Abbott C. J.* in *Bird v. Peg* 418, 419; *Swan v. Horton*, 1 *Arnold v. Stanford*, 14 *John*. *v. Grey*, 2 *John*. 192; *Mayna* 13 Wend. 575; *Dewit v. Post*, *Moore v. M'Ewen*, 5 *Serg. & R* *v. McAvoy*, 29 *How. Pr.* 2. *Klock*, 2 N. Y. Code R. 28. waive the objection that his ri

character as administrator. (s) Nor could common bail be filed for an infant under the statute, even when he was sued jointly with other defendants. (t) And in pleas to the jurisdiction, the appearance must be stated to have been in person. (u) And though several attorneys in partnership may be retained by the defendant, he can only plead by one, and not in the name of *the firm*, (v) and therefore a plea should be in the name of that one attorney only who appeared. (x) A defendant may plead in person to an information by the crown. (y)

After the statement of the appearance follows that of the *defence*, which has been defined to be the *denial* of the truth or validity of the complaint, and does not merely signify a *justification*. (y¹) It is a *general* assertion that the plaintiff has no ground of action, and which assertion is afterwards extended and maintained in the body of the plea. (z) This was so essential in pleading, that formerly if no defence were stated in the commencement of the plea, though the plea were in other respects sufficient, judgment was given against the defendant. (a) In *scire facias*, however, no defence used to be stated; (b) and it was not necessary in a plea of ancient demesne, (c) or in a plea to the jurisdiction of an inferior court having no jurisdiction of the matter, though it was otherwise when the plea related rather to the person than to the subject-matter of the action. (d) Where, however, an attorney of the common pleas was sued in the king's bench, and

been protected according to law. *Fairweather v. Satterly*, 7 Rob. 546. There is no difference, in this respect, between actions on contract and for tort. *Fairweather v. Satterly*, 7 Rob. 546; *Goelling v. Acker*, 2 Hill, 391; *De Witt v. Post*, 11 John. 460. The duty to have a guardian *ad litem* appointed for the infant devolves on the plaintiff in the action, if no motion to that effect proceeds from the other side. *Swan v. Horton*, 14 Gray, 179, 180; *Crockett v. Drew*, 5 Gray, 399. As to appearance of persons *non compos mentis*, see *Faulkner v. McClure*, 18 John. 135; *Mitchell v. Kingman*, 5 Pick. 431.]

(s) *Freesehold v. Kinaston*, 2 Stra. 784; 1 Moore, 250. The infant defendant may avail himself of the objection on writ of error. 2 Saund. 212 a, note; *Bird v. Orms*, Cro. Jac. 289. But the plaintiff cannot. *Bird v. Pegg*, 5 B. & Ald. 418.

(t) Tidd, 9th ed. 99.

(u) 2 Saund. 209 b, note; but see 2 Saund. 2 b, note (i).

(v) See *Bunn v. Guy*, 4 East, 195, per Lord Ellenborough.

(x) 2 New Rep. 509.

(y) 1 Tyr. 351.

(y¹) [The word "defence," in the New York Code (§ 149), which sets forth what is required in an answer, is not used in its technical, legal sense. It has no application to that part of the answer which contains de-

nial only of the facts stated in the complaint, but it is used in reference to the statement of new matter, and it must be such new matter as constitutes a complete or a partial bar to the action, as payment, partial or full, justification, &c. *Houghton v. Townsend*, 8 How. Pr. 441; *Ross v. Longmuir*, 15 Abb. Pr. 326; 8 S. C. 24 How. Pr. 49; *Hubber v. Pullen*, 9 Ind. 273. Thus the word "defence" has ceased to mean only justification, and as now used it applies to matters which go to a partial as well as a total extinguishment of the plaintiff's claim. *Bush v. Prosser*, 11 N. Y. 347, 352.]

(z) 3 Bl. Com. 296; Co. Litt. 127 b; *Tampiam v. Newsam*, Yelv. 210. This denial is mere matter of form, for it is used, although the plea in the body of it, so far from denying the matters alleged in the declaration, confesses and avoids them. See Stephen, 2d ed. 480. The word "*defends*," in this place, means *denies* the supposed *wrong* or *injury*. As to defence in general, see the same references, and Bac. Abr. Pleas, D. and 8 T. R. 631; Stephen, 2d ed. 478.

(a) Co. Litt. 127 b; *Hampson v. Bill*, 3 Lev. 240; Bac. Abr. Pleas, D.; *Alexander v. Mawman*, Willes, 41; but see *Skin*. 582. See Steph. 2d ed. 482, 483.

(b) *North v. Hoyle*, 3 Lev. 182.

(c) *Ib.*; *Britton v. Gradon*, 1 Id. Raym 117.

(d) Bac. Abr. Pleas, D.

pleaded his privilege without any commencement of defence held sufficient. (e) Defence was of two descriptions: first, defence, which was as follows, "*venit et defendit vim et injuriam* &c." or secondly, full defence, "*venit et defendit vim et quando*, &c." (meaning "*quando et ubi curia consideravit*," and where it shall behoove him), "*et damna et quicquid defendere debet et dicit*," &c. (f) It was a maxim that "*quando*, &c." ought not to be added when only half defence be made, and *that after the words "*venit et defendit vim et injuriam*," the subject-matter of the plea should immediately be stated. (g) It had however of late become the practice in whether half or full defence were intended, to state it as "and the said C. D. by — his attorney, comes and defends the wrong (or in trespass, 'force') and injury, *when*, &c. and so &c." which would be considered as half defence in cases where defence should be made, but as full defence when the latter was necessary. (h) If full defence were made expressly by the words "and where it shall behoove him," and "the damages and what he ought to defend," the defendant was precluded from pleading the jurisdiction or in abatement, for by defending *when* and *where* it should behoove him, the defendant acknowledged the jurisdiction of the court, and by defending the *damages* he waived all exception to the person of the plaintiff. (i) Want of defence being only in form, the omission was aided on a general demurrer. (j)

The Reg. Gen. Hil. Term, 4 W. 4, reg. 10, orders that *no defence* shall be *required* in a plea, and *it shall* be commenced in the following form: "The said defendant, by — his attorney (or 'in person') says that, &c." so that the *venit* or *comes* is to be omitted. It has been observed that by this clause the distinction between half defence and full defence is abolished, (k) although formerly it was insisted, in modern times, that distinction was much insisted upon. It has been observed that although this pleading rule orders that a plea *shall commence* in the prescribed form, still that a slight variation or the adoption of the ancient *full formal defence*, would not be a ground of demurrer, but at most, would be the ground of summary motion to strike out the part objected to as an unnecessary and vexatious plea with costs. (l)

(e) 1 Salk. 30; Bac. Abr. Pleas, D.

(f) Co. Litt. 127 b; Bac. Abr. Pleas, D.; Rast. Ent. 652; Alexander v. Mawman, Willes, 41; Gilb. C. P. 188; 8 T. R. 633. See the forms, 3 Bl. Com. Appendix, No. iii.

(g) Gilb. C. P. 188; 8 T. R. 632; 3 B. & P. 9, note (a).

(h) 8 T. R. 633; Alexander v. Mawman, Willes, 41; 3 B. & P. 9; 2 Saund. 209 b, note (1); Steph. on Pleading, 2d ed. 481.

(i) 2 Saund. 209 c; 3 Bl. Com.

Co. Litt. 127 b; Bac. Abr. Pleas, D. (j) 3 Salk. 271.

(k) Bosanquet on Rules of P. It has been considered that this applies to pleas in abatement as well as to all other pleas. J. Chitty on Abatement, 20, note (d).

(l) Ib. 37, note (33).

III. OF OYER.

Oyer is a prayer or petition recited or entered in pleading, (*n*) that the party may *hear* read to him the deed, &c. stated in the pleadings *of the opposite party, and which deed is by intend-^{III. OYER.} ment of law in court when it is pleaded with a *profert*. (*o*) The statement of the prayer of oyer, and that the deed has been read to the defendant (setting it out), used to *follow* the *defence*, and precede the entry of the imparlance, if any. (*p*) But now it is to be stated immediately after the statement of the appearance.

It is a principle of pleading, that a party relying upon a *deed*, &c. either as the foundation of a cause of action, or as a ground of defence or answer to the pleading of his opponent, shall make a *profert* of the instrument, that is, produce it (nominally) in court. (*q*) But in alleging the deed the plaintiff need not in his pleading show more of it than answers *his* own immediate purpose; and even that part which he states may be set forth according to its legal purport or in substance. The obtaining oyer, therefore, becomes frequently important, especially on the part of the defendant, not only to ascertain the authenticity of the instrument, but also for the purpose of rendering available other parts of the deed which may restrict or explain that portion of the instrument which is shown in the adverse pleading. It is demandable by either party, whether plaintiff or defendant, and in every action, whether real, personal, or mixed.

If, the plaintiff in his declaration, or the defendant in his plea, have *necessarily* made a *profert* of any deed, probate, letters of administration, or other instrument under seal, the other party *may* pray oyer, which cannot in such case be refused by the court. (*r*) If the deed be lost or destroyed, the party, instead of making

In what cases demandable.

(*n*) As to demanding oyer and form of demand, see 3 Chitty's Gen. Prac. by Lush, 513, 514.

(*o*) See the form, *ante*, 443. At the present day oyer is demanded before the party pleads, by a note in writing addressed to the attorney of the party on the other side; and it is given by providing the party requiring it with a copy of the deed, &c. at his expense. Tidd, 9th ed. 586; Steph. 5th ed. 73, 74. But oyer does not include inspection. See Chitty's Arch. 7th ed.

(*q*) 3 Bl. Com. 299; 8 Salk. 119; Roberts v. Arthur, 12 Mod. 598; Bac. Abr. Pleas, I. 12, 13; Jarvis v. Harridge, 1 Sid. 308, *acc.*; Simpson v. Garside, Lutw. 1644, *contra*. The practice relative to the demand of oyer has been so fully considered in the works referred to in this note, that it will be sufficient here to confine our attention to such points as relate to pleading. Tidd, 9th ed. 586; 1 Sell. 261, 285-291; 1 Saund. 9, and notes; Com. Dig. Pleader, P.; Steph. 5th ed. 72; Chitty's Arch. Pr. 7th ed. [Where oyer of a deed

pleaded with a *profert* is not prayed, no part of the deed will be noticed by the court but that which the plaintiff has declared on; Bender v. Fromberger, 4 Dall. 131; Wriston v. Lacy, 7 J. J. Marsh. 219; and the writing must be taken as set forth in the declaration. Pollard v. Yoder, 2 A. K. Marsh. 264.]

(*p*) *Ante*, 443. But see instances of oyer after imparlance. 1 Saund. 3, 289.

(*q*) See, as to the *profert*, *ante*, 378.

(*r*) Soresby v. Sparrow, 2 Stra. 1186; Read v. Brookman, 3 T. R. 151; Tidd, 9th ed. 587; [Brown v. Jones, 10 Gill & J. 334.] *Profert* having been made of an administration bond, and oyer craved, the prerogative court, in whose custody it was, declined to produce it at the office of the defendant's attorney, the court of common pleas refused to substitute a copy of the bond, or to compel a production of it at the register office. The proper way to proceed in such case would be by *mandamus*. The Archbishop of Canterbury v. Tubb, 3 Bing. N. C. 789.

a profert thereof, should state the excuse for omitting it; and the opponent, though he may traverse the truth of the excuse alleged, is precluded from praying oyer. (s) But if a profert be *unnecessarily* made, the defendant must plead without oyer; (t) though if it be made, and given, he has a right to make use of it. (u) The defendant may *crave* oyer except where profert has been made. (u¹) This was formerly allowed of the original *writ*, in order to demur or to obtain abatement for any insufficiency or variance between the writ and the declaration, (u²) but that practice was altered by rule of court, so that if the defendant demand *oyer of the writ, the plaintiff may plead it, if no such demand had been made. (x) Oyer is not demanded of a record; (y) nor of a recognizance; (z) nor of a private act or indentment; (a) nor of letters-patent, though pleaded with a profert; nor of a writ of re-summons; (c) nor of the precept or warrant of justice of the peace. (d) And oyer cannot be craved of an acknowledgment, a note, or other instrument not under seal; (e) nor of a deed of a stranger, where the party pleading it was neither party nor privy to it. (f) As it cannot be granted of any deed, &c. which is presumed to have been brought into court, (g) the defendant may in an action upon a bond conditioned for the performance of covenant, or another deed, *crave* oyer of such deed, but he, and not the plaintiff, must show it or the counterpart with a profert or an excuse for its omission; but it seems that the court will compel the plaintiff to give the defendant a copy to enable him to plead, by granting the plaintiff as much time to plead until the copy be provided, on the defendant's

(s) *Ante*, 378, 425. [See *Paddock v. Higgins*, 2 Root, 482; *Respublica v. Coates*, 1 Yeates, 2; *Powers v. Ware*, 2 Pick. 451.]

(t) *Morris's case*, 2 Salk. 497; *The King v. Amery*, 1 T. R. 149, 150; *ante*, 380.

(u) *Jeffery v. White*, Dougl. 476; 1 Saund. 317, note (2); 9 *a*, note (d).

(u¹) [*Story v. Kimball*, 6 Vt. 541; *Bettle v. Wilson*, 14 Ohio, 257.]

(u²) [According to the practice in New Hampshire, a plea in abatement for a defect in the service of a writ by copy, must *crave* oyer of the writ, declaration, and officer's return, set them out at length, and also make profert of and enroll the copy served. *Lary v. Evans*, 35 N. H. 172. So where an insufficient summons, or one not containing the substance of the writ or declaration, is relied upon as the foundation of a plea in abatement, the defendant must *crave* oyer of the writ, declaration, and officer's return, set them out at large, and also make profert of and enroll the summons. *Lary v. Evans*, 35 N. H. 174; *Dinsmore v. Pendexter*, 28 N. H. 18; *Lyman v. Dodge*, 13 N. H. 197; *Clark v. Brown*, 6 N. H. 434; *Baker v. Brown*, 18 N. H. 551; *Colby v. Dow*, 18 N. H. 557.]

(x) *Tidd*, 9th ed. 588; [*Renner v. Reed*, 3 Pike, 339.]

(y) *Groenvelt v. Burrell*, 1 Ld. Raym. 252;

Theobald v. Long, Ib. 347; *Jeffery v. White*, Dougl. 476; *The King v. Amery*, 1 T. R. 149. But where a judgment or a *same* court is pleaded, the defendant must give a note in writing of the term and the number roll of the record. *Tidd*, 9th ed. 588; and see *Reg. Gen. Hil. T. 4*; 4 Vt. 541. [As to oyer of a record, see, further, *wealth v. Roby*, 12 Pick. 496; *Gardner v. Wardson*, 6 Pick. 364; *Slayton v. Mass.* 478; *Hall v. Williams*, 8 Mass. 478; *Williams v. Perry*, 2 Root, 462; *man*, 2 Blackf. 46.]

(z) *Chambers' case*, Popham, 111.

(a) *Jeffery v. White*, Dougl. 476; *Tidd*, 9th ed. 588; but *Godb. 18*.

(b) *The King v. Amery*, 1 T. R. 149; *Archb.* 164.

(c) 3 Hen. 6, 56.

(d) 21 Hen. 5, 6; *Bro. Oyer*, 111.

(e) *Hill v. Aland*, Salk. 215; *Adams*, 3 A. K. Marsh. 429; *Barry*, 2 J. J. Marsh. 265.] But the judges, by analogy to the doctrine of the will, in most cases, order that the plaintiff have an inspection and copy of the record. See *Tidd*, 9th ed. 589, &c.

(f) 3 Hen. 6, 46.

(g) *Longmore v. Rogers*, Will. 100.

an affidavit that he has no copy. (*h*) In *scire facias* on a judgment on a deed, the defendant cannot demand oyer of the deed, for the *scire facias* is founded not on the deed, but on the judgment; if, however, oyer be improperly craved and granted, and the deed be stated upon it, the defect in the plea will be aided on a general demurrer. (*i*)

Though a party be entitled to crave oyer, yet he is not in general bound to do so. (*k*) But in some cases it *must* be craved. Thus, if the defence be founded upon any objection to the form of the bond, as where a bail bond has been given to the sheriff, but not by his name of office, and the defect do not appear upon the face of the declaration, oyer *must* be craved, and after setting forth the bond, the defendant may demur. (*l*) And in an action at the suit of an administrator, the defendant should crave oyer, and set out the letters of administration, if he wish to avail himself of any variance in the statement of them in the declaration. (*m*) The instances in which oyer should be demanded, if the defendant's contract be not truly stated in the declaration, will be hereafter considered. (*n*) In pleading *payment or performance of the condition of a bond, if the condition be not set out in the declaration, the defendant must set forth the condition after craving oyer. (*o*) But it is necessary in an action on a bond or deed, conditioned for the performance of covenants in *another* deed, for the defendant, in his plea of performance, to show such deed without craving oyer. (*p*)

Where either the plaintiff or the defendant omits, in pleading a deed, of which a profert is made, to state any part which is material to the case of his opponent, the only way by which the latter can relieve himself is by praying oyer of the deed, and setting it out in *hæc verba*; for he cannot plead that by the said deed "it was further agreed," &c. (*q*)

(*k*) *Per cur.* Hilary Term, 21 Geo. 3, K. B. Tidd, 9th ed. 586; 1 Saund. 10, note (1), and 52.

(*i*) 1 Saund. 8 *b*.

(*k*) 2 Lil. Rep. 221; Archb. 164, 165.

(*l*) *Sheriffs of Middlesex v. Barnes*, 2 Ld. Raym. 1135; 2 Saund. 60, note (3); 366, note (1); *Samuel v. Evans*, 2 T. R. 575; *Bac. Abr. Pleas*, I. 12. So in a plea of non-joinder of a co-obligor. 1 Saund. 291. [See *James v. Walruth*, 8 John. 410, as to oyer of an award misstated in the declaration.]

(*m*) *Garrard v. Early*, 2 Wils. 413.

(*n*) *Post*, 449.

(*o*) *Com. Dig. Pleader*, 2 V. 4; 2 Saund. 409, note (2); 1 Saund. 9 *b*, note (1). [And the omission is fatal on a writ of error. *United States v. Arthur*, 5 Cranch, 257.] In *Lil. Prac. Reg. Oyer*, it is said that the defendant may plead, if he please, without oyer; for he may take upon himself to remember the bond without hearing it; but see

Smith v. Sir John Boucher, *Hutt. Rep.* 33; *Prisland v. Cooper*, 1 Keh. 513; 1 Saund. 317, note (2); *Com. Dig. Pleader*, 2 W. 33; *Vin. Abr. Oyer*, D.

(*p*) See *ante*, 447; 1 Saund. 10, note (1); *Com. Dig. Pleader*, 2 W. 33; *Lady Cook v. Remington*, 6 Mod. 237.

(*q*) 1 Saund. 317, note (2); *Stibbs v. Clough*, 1 Stra. 227. Oyer is demandable at any period before the time for pleading is out, though it has been extended by a judge's order on terms, unless the order expressly except the right to demand oyer; and the right is not waived by pleading, unless the plea be to the bond or other instrument, of which oyer is demanded. *Goodricke v. Turley*, 2 Cr., M. & R. 695. [Oyer of a deed, of which profert is made in the first count of the declaration, does not make it a part of the record for other counts. *Hughes v. Moore*, 7 Cranch, 176.]

If oyer be denied when it ought to be granted, the party making the claim should move the court to have the prayer of oyer entered on record, which entry is in the nature of a plea; and the plaintiff may counterplead the right to oyer, or strike out the rest of the pleading following the oyer and demur; upon which the judgment of the court is, either that the defendant have oyer, or that he answer without it. (*r*) On the latter judgment, the defendant may bring a writ of error, for to deny oyer when it ought to be granted is error; but not *à converso*. (*s*)

The oyer of a deed that has been altered by a stranger must be of the deed as originally drawn, and must be so set out in the pleading, or the variance will be fatal. (*t*) If oyer of a bond only be craved, the other party is not bound to give oyer of the condition, unless that be craved also. (*u*) But if there be a condition, or other matter indorsed on a deed, and which was indorsed before execution, oyer must be granted of the indorsement as well as of the deed. (*x*) And a party craving oyer is entitled to a copy of the attestation and names * of the witnesses. (*y*) But, as before observed, on oyer of a bond and condition, the copy of a deed referred to in the condition need not be furnished. (*z*)

Oyer having been granted, the defendant has, it seems, at least in the queen's bench, (*a*) an election whether or not he will set forth the deed in his plea. In that court it appears that he may plead without noticing that he has craved oyer or stating the deed; and if the plaintiff would avail himself of the deed, he should pray that it be enrolled, and should state

What advantage to be taken of oyer, and the manner of taking advantage.

(*r*) 1 Saund. 9 c, note (1); 2 Saund. 46 b, note (7); Tidd, 9th ed. 588; Steph. 5th ed. 78. A party properly craving oyer cannot be compelled to plead until it is given. *Soresby v. Sparrow*, 2 Stra. 1186; *Thoresby v. Sparrow*, 1 Wils. 16, S. C. Demand of oyer cannot, as a matter of right, be entered of record, unless it was regularly made according to the practice of the court. *Goodricke v. Turley*, 2 Cr., M. & R. 694; 1 Tyr. & Gr. 149, S. C.

(*s*) 1 Saund. 9 c, note (1); Tidd, 9th ed. 588; Bac. Abr. Pleas, I. 12; [*State v. Hicks*, 2 Blackf. 336; *Pendleton v. Bank of Kentucky*, 1 Monroe, 171.]

(*t*) *Waugh v. Bussell*, 1 Marsh. 217.

(*u*) *Lady Cook v. Remington*, 6 Mod. 237; 1 Saund. 9 b, note (1); [*United States v. Sawyer*, 1 Gall. 86.]

(*x*) *Ib.* But where an indorsement is made on a deed after its execution, the defendant is not entitled to a copy of that indorsement on oyer, although it is admitted that it may alter the effect of the deed. *Smith v. Goldsworthy*, 1 Dowl. N. S. 288.

(*y*) *Longmore v. Rogers*, Willes, 288; 1 Saund. 9 b, note (e); [*Smith v. Alworth*, 18 John. 445.] *Semble*, that a plan referred to in an indenture, and indorsed on the back of one of the skins of parchment, need not be set out on oyer. *Newton v. Wilmot*, 8 M. & W. 711.

(*z*) *Ante*, 448. In an action by an executor, if the defendant craves oyer of the letters testamentary to which the will is annexed, the plaintiff must set out the will as well. *Day v. Mahon*, 4 Bing. N. C. 235. [As to furnishing of copies, and when perfect of the original being made, oyer of the original may be demanded, see *Butler v. State*, 5 Gill & J. 511; *Carson v. Pearl*, 4 J. J. Marsh. 92; *Thatcher v. Lyman*, 5 Mass. 260; *Judge v. Merrill*, 6 N. H. 256; *Smith v. Alworth*, 18 John. 445.]

(*a*) *The Weavers' Company v. Forrest*, 2 Stra. 1241; *Simmonds v. Parmenter*, 1 Wils. 97; Tidd, 9th ed. 589; Com. Dig. Pleader, P. 1.

it in his replication. (b) But it is said that in the common pleas, if the defendant has had oyer, and omit to set it out in his plea, *the plaintiff might insert* it for him at the head of his plea in making up the issue. (c) The Reg. Gen. Hil. T. 2 W. 4, reg. 44, expressly provides for a case of this nature, and renders the practice uniform. It orders "that if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, in making up the issue or demurrer book, may, if he think fit, *insert it for him*; but the costs of such insertion shall be in the discretion of the taxing officer." (d) We have before remarked, that if the party craving oyer desire to avail himself in pleading of the condition of a bond, or a part of a deed not shown by the pleading of the other party, he must show the oyer and instrument on the face of his own pleading. (e) If no occasion of this sort occur, it is important to consider whether or not the deed be truly described by the opponent; for by setting it out on oyer and then pleading *non est factum*, an error in such description might be cured. If the deed be set out on oyer, it becomes parcel of the record, (e¹) and the court will adjudge upon it accordingly, though it were not strictly demandable when granted. (f) Should the true effect and meaning of the deed be misstated in the declaration, the variance is cured and becomes immaterial, if the deed be set out on the plea on oyer, and *non est factum* be pleaded; for *on that issue* the only question at the trial is, whether the deed as *set out in the plea* was executed by the defendant or not, and the jury are not competent to decide what is the legal effect of the deed. In such case the defendant had better plead *non est factum*, (g) without craving oyer; and then the question would * be, whether the deed, *as described in the declaration*, was executed by the defendant. (h)

The tenor of the deed, as it appears upon oyer, is considered as forming part of the precedent pleading, (h¹) and, therefore, if the breach laid in the declaration be not supported by the deed, in other words, if the deed thus set out in the plea be found to contain in itself matter of objection or answer to the plaintiff's case as stated in the declara-

(b) *Ib.*

(c) *Ib.*; The Weavers' Company v. Ware, Barnes, 327; Steph. 2d ed. 96, note (c).

(d) See Jervis's Rules, 4th ed. 70, 71.

(e) *Ante*, 446.

(e¹) [See Cooke v. Graham, 3 Cranch, 235; 2 H. & Gill, 86. But a writing proffered is not a part of the record unless oyer is taken. Adams v. Macy, 1 Bibb, 328; Gist v. Steele, 1 Bibb, 571; Palmer v. McGinnis, Hardin, 504.]

(f) 1 Saund. 316, 317; Anonymous, 3 Salk. 119; Jeffery v. White, Dougl. 476; Tidd, 9th ed. 589.

(g) See the 9 Geo. 4, c. 15, for amending

at the trial certain variances in setting out written instruments.

(h) Snell v. Snell, 4 B. & C. 741; 7 D. & R. 257, S. C. See Howell v. Richards, 11 East, 633; Waugh v. Bussell, 5 Taunt. 707. See note (i) *infra*, and the observations of Pattison J. in the case of Snell v. Snell, in Smith v. Jennings, 9 Dowl. 162. Where the declaration was upon a certain writing, it was held that the defendant, by praying oyer *conditiones scripti obligatorii predicti*, admitted it to be a bond. Moore v. Jones, 1d. Raym. 1541; Courtney v. Greenville, Cro Car. 209.

(h¹) [Commissioners v. Gains, 1 Const. Ct. Rep. 459.]

tion, the defendant's course (after setting out the deed on oyer) is to *demur*, not to make the objection the subject-matter of a plea. (i) The defendant may *demur* after setting out the deed on oyer, if in the declaration any part of the deed which qualifies the contract as shown in the declaration, or which renders it dissimilar to that described in the declaration, be omitted or misstated by the plaintiff therein. (k) And if it appear at the trial on *non est factum* that there is a variance between the deed produced and the oyer, it is fatal. (l) But the defendant cannot *demur* on account of a variance in an immaterial part between the deed as stated in the declaration, and as set out on oyer. (m) If it be material for the plaintiff in his replication, &c. to show the indenture, he may pray an enrolment, and so make it part of his replication. (n)

Before the pleading rules, Hil. T. 4 W. 4, if the oyer were stated, the plea should in strictness have been intituled of the same term as the declaration, for in contemplation of law the deed, unless denied, was in court only during the term of which it was pleaded, and was afterwards in the custody of the party to whom it belonged, and therefore when that practice prevailed, oyer of such deed ought not in pleading to be stated to have been demanded in a *subsequent* term, and consequently not after a general imparlance. (o) But now by that rule a plea setting out a deed on oyer is, like all others, to be dated of the very day it is pleaded. But oyer might have been craved after a special imparlance to another day in the same term; (p) * and there are precedents where oyer was craved after the statement of an imparlance; (q) and where the plaintiff declared in vacation before the essoign day of the following term, with analogy to the claim of conusance and pleas in abatement, a plea stating the claim of oyer might have been intituled of a term subsequent to the declaration with a special imparlance, or might have been intituled generally of the preceding term. (r) But the rules before referred to put

(i) Snell v. Snell, 4 B. & C. 741, 750; 7 D. & R. 257, S. C.; Jeffery v. White, Dougl. 476; Ashton v. Freestun, 2 M. & Gr. 1; Steph. 5th ed. 77; Tidd, 9th ed. 589.

(k) *Ib.*; 2 Saund. 366, note (1). But if the deed is described in the declaration according to its legal effect, and the deed set it out on oyer in *hæc verba*, he cannot *demur* on the mere ground of variance, because the deed as set out on oyer becomes part of the declaration. Payne v. Emery, 2 Cr., M. & R. 304; 5 Tyrw. 1097, S. C.

(l) Waugh v. Bussell, 1 Marsh. 214. The defendant having had oyer of a deed, cannot, on a plea of *non est factum*, take advantage of a variance between the deed itself and that set out in the declaration, but must set it out on oyer and *demur*. Per Pattison J. in Smith v. Jennings, 9 Dowl. 162.

(m) Ross v. Parker, 1 B. & C. 358; 2 D. & R. 662, S. C.

(n) The Weavers' Company v. Forrest, 3 Stra. 1241; Simmonds v. Parmenter, 1 Wils. 97; 1 Saund. 9 b, note (1), *acc.*; Barnes, 337; *contra*.

(o) Tidd, 9th ed. 587; Steph. 2d ed. 95; 2 Saund. 2, note (2); Vin. Abr. Oyer, F.; Bac. Abr. Pleas, 1, 12. See the form, 3 Bl. Com. Appendix, No. 3, *acc.*; Longueville v. Thistleworth, 2 Ld. Raym. 970, *contra*. And see the precedents, 1 Saund. 3, 289.

(p) Anonymous, 12 Mod. 99; 2 Show. 310; Tidd, 9th ed. 587.

(q) 1 Saund. 3, 289.

(r) Leasingby v. Smith, 2 Wils. 411, 413; Jennings v. Webb, 1 T. R. 278; Blackmore v. Fleming, 7 T. R. 447, note (d); 2 Saund. 2, note (2).

an end to imparlances, and now require that every plea be intituled on the very day it is pleaded. (s)

If the defendant assumed to set out the whole of the deed or condition of a bond on oyer, the whole should be stated with all recitals, *verbatim et literatim*; and if the defendant do not set forth the whole, or state it untruly, the plaintiff may sign judgment as for want of plea; (t) or may by his replication pray that the deed be enrolled, and set it forth, and then it seems may demur, for by craving oyer the defendant undertakes to set out the whole, (u) or according to Reg. Gen. Hil. T. 2 W. 4, reg. 44, he may insert the deed for the defendant. But in pleading to a bond conditioned for the performance of covenants in *another* deed distinct from that set out on oyer, though the party must state the deed referred to in the condition truly, or subject his plea to a demurrer, and the practice is to set forth the whole deed; (x) it may perhaps suffice to state the substance of the deed and those covenants only which he has engaged to perform, averring that the indenture contains no other covenants on his part; (y) or perhaps even an allegation that the indenture contains no negative or disjunctive covenants, with an averment of general performance, would be sufficient; (z) and the plaintiff might pray an enrolment, and set it forth, if untruly stated. (a) Certainly it would be desirable to promulgate a rule that it shall be sufficient for either party to set out only such parts of deeds or instruments as may be sufficient to sustain any charge or defence without setting forth useless matters.

When oyer is prayed of a bond and the condition, it is usual in a plea not to set forth the obligatory part of the bond, but to say, "and it is read to him," &c. and then to pray oyer of the condition, and set it forth in *hæc verba*; (a¹) but the bond ought to be entered at large as well as the condition, if the terms of the obligatory part * be material to the defence. (b) So, if it be material to the plaintiff that the penal part of the bond be set forth, he may in his replication pray that it may be enrolled, and set it forth, (c) or under Reg. Gen. Hil. T. 2 W. 4, reg. 44, insert the deed in the defendant's plea for him. If no use is intended to be made of the bond, there is no need to pray oyer of it at all, or to enter any such prayer, but it is sufficient

(s) Reg. Gen. Hil. T. 4 W. 4, reg. 1 and 2.

(t) 1 Saund. 9 b, note (1); Wallace v. The Duchess of Cumberland, 4 T. R. 370; Slater v. Horne, Tidd, 9th ed. 565; Lockhart v. Mackreth, 5 T. R. 662, 663.

(u) Com. Dig. Pleader, P. 1; Wallace v. The Duchess of Cumberland, 4 T. R. 371, note (b); 1 Saund. 9 b, note (1). But it is laid down in Tidd, 9th ed. 589, which cites Ball v. Russel's bail, 2 Salk. 602, that the plaintiff cannot demur to the plea for not setting out the whole of the deed on oyer.

(x) 1 Saund. 9; Earl of Kerry v. Baxter, 4 East, 344, 345.

(y) 1 Saund. 317, note (2).

(z) Earl of Kerry v. Baxter, 4 East, 340, 344, note (f).

(a) 1 Saund. 9 b, note (1); 317, note (2).

(a¹) [See Henry v. Brown, 19 John. 49.]

(b) Sheriffs of Middlesex v. Barnes, 2 Ld. Raym. 1135; ante, 445, 449.

(c) Abney v. Hedges, Carth. 301, 302; Blewet v. Appleby, 1 Lutw. 680, 686; 1 Saund. 9 b, note (1).

to pray oyer of the *condition* only; (*d*) for the bond and condition are considered as distinct, the bond being complete without the condition, therefore there may be oyer of one without the other. (*e*) If it appear to the court that with reference to the deed as set out on oyer the defendant has pleaded a false plea, the court will give judgment for the plaintiff upon a demurrer to the plea. (*f*)

The commencement of pleas in bar after oyer (*f*¹) is thus: "And the defendant, by — his attorney, craves oyer of the said writing obligatory, and it is read to him, &c.; and he also craves oyer of the condition of the said writing obligatory, and it is read to him in these words. Whereas, &c. [setting forth the recitals and condition verbatim, and then proceeding thus:] Which being read and heard, the defendant saith that, &c. [then stating the substance of the plea.]"

Form of
plea after
oyer.

IV. IMPARLANCES.

The term *imparlance*, or *licentia loquendi*, in its most general signification, means time given by the court to either party to answer the pleading of his opponent, as either to plead, reply, rejoin, &c. and is said to be nothing else but the continuance of the cause till a further day. (*g*) But the more common signification of the term was *time to plead*. (*h*) In making up the issue joined between the parties, and in which all the proceedings are necessarily stated, an entry of an imparlance between the declaration and plea was formerly frequent and sometimes necessary; (*i*) but it was not usual in framing a plea or replication to state an imparlance separately, unless some new *matter had arisen since the former pleading when it was proper, (*k*) as a mode of introducing and stating at what time the new matter had arisen. (*k*)

IV. IMPAR-
LANCES.
The ancient
practice and
forms of.

Imparlances were of three descriptions: 1st, A *common* or general imparlance; 2dly, A *spécial* imparlance; and 3dly, A *general spécial* imparlance. (*l*) The *first* was without saving to the defend-

(*d*) Lib. Plac. 209, pl. 220; 1 Saund. 9 *b*, note (1). [See *United States v. Sawyer*, 1 Gall. 86.]

(*e*) 1 Saund. 9 *c*, note (1); 290, note (2).

(*f*) 1 Saund. 9, 317, note (2); 3 Salk. 119.

(*f*¹) [Both oyer and profert are now abolished in England. C. L. P. Acts, s. 55.]

(*g*) Bac. Abr. Pleas, G. See Com. Dig. Pleader, D.; 1 Sel. Pr. chapter vii. sect. 3; 3 Saund. 1, note (2); Tidd, 9th ed. 462; Steph. 2d ed. 97, as to the nature of imparlances in general. In Doct. Plac. Imparlance, it is thus defined, "*Imparlance est quando ipse defendens petit licentiam interloquendi, scilicet, quant le defendant desire le cour de doner a luy temps de pleader al suit ou action que et commence vers luy.*" Before declaration the continuance is by *dies datus prece*

partium; after declaration, and before issue joined, by *imparlance*; after issue joined, and before verdict, by *vicecomes non misit breve*; and after verdict or demurrer, by *curia adisari vult*.

(*h*) 2 Saund. 1, note (2); 2 Show. 310; Barnes, 346.

(*i*) 2 Saund. 1, note (2); 5 Co. 75; Tidd, 9th ed. 720.

(*k*) After issue, any new matter must have been pleaded *purs darrein continuance*. See the Observations and form, *post*, vol. ii.

(*l*) *Grant v. Lord Sondes*, 2 Bl. Rep. 1095, 1096. And as to the different kinds of imparlances, and when and how granted, and what might or might not have been done after each, see 2 Saund. 1, note (2); Tidd, 9th ed. 462.

ant any exception against the writ or jurisdiction, and was always to a subsequent term. (m) In making up the issue the entry of such an imparlance might have been necessary, in order to continue the cause in court; but in framing a plea such an entry of imparlance was not necessary unless the matter of defence had arisen after the declaration. In general, pleas in bar were intituled of the term of which they were pleaded, without reference to the title of the declaration; and as a plea of tender might have been pleaded as well after as before an imparlance, even such plea might have been intituled of a term subsequent to the declaration, though it was said to be more correct to intitule it of the same term as the declaration, in order to avoid the inconsistency of first praying an imparlance and then averring that the defendant has been *always ready* to pay. (n) After the entry of such a general imparlance, the defendant might plead *in bar* of the action though not in *abatement*, (o) or to the *jurisdiction* of the court; and therefore, when by the practice of the court the defendant was at liberty to plead in abatement in a term subsequent to the declaration (as occurred when the process was returnable on the last return of a term, or even before, and the plaintiff had neglected to deliver or file his declaration four days exclusive before the end of the term, or had neglected to declare before the *essoign day* of that term), the defendant must have pleaded such plea in abatement either of the same term as the declaration, or of the subsequent term with a special imparlance; and if it were pleaded of the latter without such a special imparlance, the plaintiff might have signed judgment as for want of a plea. (p) But where a bill was filed in Trinity vacation, against an attorney, intituled as of Trinity Term, and the defendant pleaded in abatement as of Michaelmas Term without an imparlance, the plea was held good. (q)

A *special imparlance* was with a *saving* of all exceptions to the writ, bill, or count, and after this imparlance the defendant might have pleaded in abatement, (r) but not to the jurisdiction of the court, unless * founded on a *personal* privilege as that of an attorney, &c. (s) In cases where the defendant was entitled to a special imparlance, it was in the common pleas granted of course by the prothonotary upon an application to him within the four first days of the term subsequent to that of the declaration; but in the king's bench it was said to be grantable only by leave of the court obtained by a side bar rule. (t)

(m) 6 Mod. 28; 2 Saund. 2 a.

(n) 2 Saund. 1, 2, note (2); 1 Saund. 33, note (2); Kilwick v. Maidman, 1 Burr. 59; Tidd, 9th ed. 463.

(o) Lloyd v. Williams, 2 M. & Sel. 484.

(p) 2 Saund. 1, note (2); Doughty v. Lascelles, 4 T. R. 520; 6 T. R. 369; 7 T. R. 447, note (d).

(q) Holme v. Dalby, 3 B. & Ald. 259; 1 Chit. Rep. 704, S. C.

(r) Gawen v. Surby, 1 Lutw. 6; and Bac. Abr. Pleas, C. 4; Grant v. Lord Sondes, 2 Bl. Rep. 1095.

(s) Hardr. 365; Bac. Abr. Pleas, C. 4.

(t) Grant v. Lord Sondes, 2 Bl. Rep. 1094; 2 Saund. 1, 2, note (2); R. E. 5 Ann. Tidd, 9th ed. 463, 465.

In both courts the special imparlance must have been stated in a plea in abatement, when it was intituled of a term subsequent to the declaration. (u)

The *third* description of imparlance, usually denominated a *general special* imparlance, was with a saving of all exceptions whatsoever, and could only be obtained by an application to the court on motion within the four first days of the next term after the declaration; and it was in the discretion of the court, governed by the particular circumstances of the case, to grant it or not; and it would not be granted in order to enable the defendant to plead to the jurisdiction if he had appeared by attorney. The prothonotary had no power to grant this description of imparlance, and a plea under a grant by him would be a nullity, and the plaintiff might sign judgment, or at least a *respondeas ouster* might be awarded. (y) When this imparlance had been obtained, the defendant might not only plead in abatement of the writ or count, but also personal privilege. (z) In point of form this imparlance was similar to the last, with the exception of the words "*saving to himself all advantages and exceptions whatsoever*," and sometimes in addition to those words the following were added, "*as well to the writ and declaration as to the jurisdiction of this court*;" (a) but the first is the better form.

If the defendant pleaded to the jurisdiction, or to the disability of the plaintiff or defendant to sue or be sued, after a general imparlance, or to the jurisdiction after a special imparlance, the plaintiff might in general either sign judgment, or apply to the court to set aside the plea, or he might demur to it, or allege the imparlance in his replication by way of estoppel; but if the plaintiff, instead of taking any of these advantages replied to the special matter of the plea, the fault was aided. (b)

As regards *personal actions commenced* in either of the superior courts, after the distinctions between the terms and vacations were *for many purposes annulled by statute 11 G. 4 and 1 W. 4, c. 70, and 1 W. 4, c. 3, and plaintiffs were, by 2 W. 4, c. 39, s. 11, enabled to declare and expedite their actions in the vacations, it was finally settled, after some opinions and decisions to the contrary, that *imparlances* in such actions were *virtually abolished*; (c) and Reg. Gen. Hil. T. 4 W. 4, reg. 2, expressly orders that no entry of continuances by way of *imparlance*

Imparances
in personal
actions now
virtually
abolished
and sugges-
tions in lieu.

(u) Doughty v. Lascelles, 4 T. R. 520, 521; 6 T. R. 369; 7 T. R. 447, in which Brewster v. Capper, 1 Bl. Rep. 51; 1 Wils. 261, were overruled. In all such cases the imparlance should have been stated in the issue. 2 Saund. 1 e, note (2).

(y) 2 Saund. 2 b, note (2).

(z) Ib.; Neave v. Nelsan, 1 Lev. 54.

(a) Grant v. Lord Sondes, 2 Bl. Rep. 1094; 2 Saund. 2 a, note (2).

(b) 2 Saund. 2 b, note (2); Tidd, 9th ed. 463, 464.

(c) Nurse v. Geeting, 3 Dowl. 157, 158; 1 Cr., M. & R. 567, S. C.; Wigley v. Tomlin, 3 Dowl. 7; 2 Chit. Gen. Prac. by Lush, 73, 589.

shall be made, but provides for the statement of matters that may have arisen pending the action and since the last pleading, by way of *suggestion* or *allegation*, and the forms of which statements will be found in the commencement of the second volume of this edition. In case of the death of one of several plaintiffs or defendants *pending* a suit, the 8 & 9 W. 3, c. 11, s. 7, directs that if the cause of action survive, the suit shall not abate, provided the death be duly suggested or stated on the record. In the commencement of the second volume there will be found several forms of such suggestions, which should be duly made in the earliest instance, or at least within eight days afterwards. (*d*)

(*d*) See Reg. Gen. Hil. T. 4 W. 4, reg. 2; and *post*, vol. ii. 8, note (*i*), 15, and note (*b*), 16.

OF PLEAS TO THE JURISDICTION, AND IN ABATEMENT, AND THE PROCEEDINGS THEREON.

THE law has prescribed and settled the order of pleading which the defendant is to pursue, and although it has been objected ORDER OF PLEADING. that as regards pleas in abatement the division is more subtle than useful, yet as regulating in some respects the forms of commencements and conclusions of the pleas, and the right to plead another plea in abatement in some cases after judgment against the defendant of *respondeas ouster*, it is deemed here expedient to adhere to the ancient order, especially as no preferable arrangement has been suggested, *viz.* (a)

- | | |
|---|---|
| { | 1st. To the jurisdiction of the court. |
| | 2dly. To the disability, &c. of the person. |
| | { 1st. Of the plaintiff. |
| | { 2dly. Of the defendant. |
| | 3dly. To the count or declaration. |
| { | 4thly. To the writ. |
| | { 1st. To the form of the writ. |
| { | { 1st. Matter apparent on the face of it. |
| | { 2dly. Matter dehors. |
| | 2dly. To the action of the writ. |
| { | 5thly. To the action itself in bar thereof. (b) |

This, it is said, is the natural order of pleading, because each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the matter, as when the defendant pleads to the person of the plaintiff he admits the jurisdiction of the court, for it would be nugatory to plead that defence in a court which has no jurisdiction; (c) and when the

(a) See Stephen on Pleading, 2d ed. 71, note (c); and see the arrangement of the subject of abatement, Comyn's Digest and Bacon's Abridgment, tit. Abatement.

(b) Per Holt C. J. *Longueville v. Thistleworth*, 2 Ld. Raym. 970; *Cadman v. Grendon*, Latch, 178; Co. Litt. 303, 304; Gilb. C. P. 49; Doc. Plac. in Preface; Com. Dig. Abatement, C.; Tidd, 9th ed. 630; and for

an account of the various kinds of pleas in equity, and their essential difference, see Beames's Pl. Eq. chap. ii.; [1 Reeves's Hist. E. L. 451; 2 Reeves's Hist. E. L. 236.]

(c) In inferior courts, however, this does not obtain, for if such court have not jurisdiction over the subject-matter it will be a ground of nonsuit on the trial; *Trevor v. Wall*, 1 T. R. 151; and if there be a total

defendant pleads to the count he admits that the plaintiff is able to *sue him and the defendant to be sued; and when the defendant pleads to the form of the writ he admits the form of the count; and after a *plea in bar* to the action the defendant cannot plead in *abatement*, unless for new matter arising after the commencement of the suit. (*d*)

If this order of pleading be inverted, the defendant will be precluded from pleading any matter prior in point of order. (*e*) And this is material, for though it is said that after a judgment of *respondeas ouster*, there can be no plea in abatement, because, if it were allowed, there would be no end of such pleas; (*f*) yet this must be understood of pleas in abatement in the *same degree* as popish recusancy and outlawry, (*g*) which are both to the *person*; for the defendant may plead to the person of the plaintiff, and if that be overruled he might afterwards, if in time, plead to the form of the writ. (*h*)

The more general division of *pleas* is, however, 1st, Pleas *dilatory*; 2dly, Pleas *peremptory*. (*i*) Of the *former* description are pleas to the *jurisdiction*; to the disability of the *person*; to the *count*, or *declaration* and to the *writ*; of the *latter*, or peremptory kind, and which lead to an issue which finally settles the dispute, are pleas in *bar* of the action.

I. OF PLEAS TO THE JURISDICTION.

Pleas of this description, though in effect they abate the writ, (*i*¹) yet differ from pleas in abatement principally in three points, viz. that they must be pleaded in person; that before the pleading rules, Hil. Term, 4 W. 4, only half defence should be made; and that they should conclude *si curia cognoscere velit*, and

I. PLEAS TO THE JURISDICTION.

want of jurisdiction in any of the courts in England, the matter may be pleaded in bar, or given in evidence under the general issue, even in actions in the superior courts at Westminster. The *King v. Johnson*, 6 East, 563; *Parker v. Elding*, 1 East, 352; *Tidd*, 9th ed. 960.

(*d*) Gilb. C. P. 50; Com. Dig. Abatement, C. I. 23, 24; [*Palmer v. Everton*, 2 Cowen, 417; *Potter v. McCoy*, 26 Penn. St. 458. "It is an elementary rule of pleading, that a plea to the jurisdiction is the first in the order of pleading, and that any plea which refers to the court any other question, is a tacit admission that the court has a right to judge in the cause, and is a waiver of all exception to the jurisdiction. Gould Pl. 231; *Biss v. Burnes*, McCahon (Kans.), 91; *Girty v. Logan*, 6 Bush (Ky.), 8. Wherever it appears upon the record that the court has no jurisdiction, nothing which the parties may do or omit to do will give it; but where the want of jurisdiction must be shown by proof *affirmative*, or where the particular facts giving

the jurisdiction may exist consistently with the record, a plea to the action is a waiver of any exception to the jurisdiction." Morton J. in *Carlisle v. Weston*, 21 Pick. 537; *Osgood v. Thurston*, 23 Pick. 110; *Simonds v. Parker*, 1 Met. 508; *Lawrence v. Bassett*, 5 Allen, 140; *Hastings v. Bolton*, 1 Allen, 529.]

(*e*) Co. Litt. 303; Com. Dig. Abatement, C.; Doc. Plac. Preface.

(*f*) Bac. Abr. Abatement, O.; Gilb. C. P. 186; 2 Saund. 401; Anonymous, 12 Mod. 230.

(*g*) Hetl. 126.

(*h*) Com. Dig. Abatement, I. 3, 4; Bac. Abr. Pleas, K. 1.

(*i*) See Steph. 5th ed. 50; and Ib. App. note (15).

(*i*¹) *Ingalls v. Richardson*, 3 Met. 340; *Osgood v. Thurston*, 23 Pick. 110. The court will abate a writ *ex officio* where it appears on the record that it has no jurisdiction of the case. *Osgood v. Thurston*, 23 Pick. 110.]

not *quod billa cassetur*. (*k*) Objections even to the jurisdiction of the superior courts may in some cases be taken under the general issue, but in general they must be pleaded. (*k*¹) In all transitory actions, and in local actions arising in England or Wales, if there be no plea to the jurisdiction, the courts at Westminster may in general hold plea thereof. (*l*) And therefore it cannot be *pleaded* that the debt is under 40*s.* and ought to have been sued for in the county court, because the superior courts have concurrent jurisdiction, and the only course is to apply * to the superior court by motion to stay the proceedings. (*m*) The instances in which an action may be brought here, although the cause of action arose in a foreign country, have been already noticed. (*n*) Where the court has *no jurisdiction* at common law, or it has been taken away by act of parliament, such want of jurisdiction may in general be pleaded in *bar*, or given in evidence under the general issue, and is not properly the subject of a plea in abatement. (*o*) And it has been decided that where a public statute for erecting a court of inferior jurisdiction enacts *that no action for* any debt not amounting to 40*s.* &c. and recoverable by that act, shall be brought against any person residing within the jurisdiction, &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior courts, unless the statute direct another course of proceeding. (*p*) In other cases the statutes relating to the courts of requests, and which invest them with exclusive jurisdiction in certain cases, enable the debtor, if sued elsewhere, to *plead* the exemption in bar, or direct that a *suggestion* of the matter shall be entered on the roll. The exact mode of relief pointed out by the respective statutes must be strictly pursued. (*q*)

In most of the *inferior* courts the want of jurisdiction is fatal to the suit without any plea stating the objection, for the cause of action must be alleged to have arisen within the jurisdiction, or a writ of false judgment may be supported; and if the fact be so alleged but not proved, the plaintiff ought to be nonsuited on the general issue;

(*k*) Bac. Abr. Pleas, E. 2, and Abatement; Bowyer v. Cook, 5 Mod. 146; Fowler v. Cooke, 1 Salk. 298; 3 Bl. Com. 301. As to pleas to the jurisdiction in general, see claim of consuance, *ante*, 438; Com. Dig. Abatement, D.; Bac. Abr. Pleas, E. and Courts, D.; and Gilb. C. P. 187-197; Tidd, 9th ed. 630; in equity, Beames's Pl. Eq. 57, 252.

(*k*¹) [See Badger v. Towle, 48 Maine, 20; Ryan v. Jackson, 11 Texas, 391; Webb v. Mann, 3 Mich. 139. It may be shown under the general issue that there is no court in the country which has jurisdiction of the cause. Rea v. Hayden, 3 Mass. 24; Anthon v. Fisher, Doug. 650. But see Smith v. Elder, 3 John. 113.]

(*l*) Chapman v. Mattison, Andr. 198; 1 Wood. 193; Bac. Abr. Pleas, E. 1.

(*m*) Sandall v. Bennett, 2 Ad. & El. 204.

(*n*) *Ante*, 281, 288.

(*o*) The King v. Johnson, 6 East, 583; Parker v. Elding, 1 East, 352; Doulsen v. Matthews, 4 T. R. 503; West v. Turner, 6 Ad. & El. 614.

(*p*) Parker v. Elding, 1 East, 352.

(*q*) Per Ld. Kenyon, Parker v. Elding, 1 East, 354. Several of these statutes are collected, and the mode of proceeding is pointed out in Tidd, 8th ed. 989-995; 9th ed. 954-962; and see Mr. Tidd Pratt's comprehensive collection of the statutes relating to courts of request. In many instances, if the debt be manifestly less than 40*s.* and be recoverable in the county court, &c. the superior courts will stay the proceedings in the action. Tidd, 9th ed. 516; but the objection cannot be pleaded. See Sandall v. Bennett, 2 Ad. & El. 204.

and if the inferior court admit the jurisdiction, a bill of exceptions may be tendered, or a prohibition issued. (*r*) In these cases, however, the defendant may plead to the jurisdiction, which seems to be the safer course. (*s*)

We have already seen that the defendant can only plead to the jurisdiction where the grant to the inferior court was *habere cognitionem placitorum*, with *exclusive* words. (*t*) In this case the plea cannot be in bar. At common law there was a distinction between a *foreign* plea and a plea to the *jurisdiction*. A foreign plea was where the action was carried out of the county or place where the venue was *laid. (*u*) Ancient demesne, and all pleas of privilege, are pleas to the jurisdiction, and not foreign pleas. (*x*) It was always necessary before the statute of Anne to verify a *foreign* plea by affidavit, but not a plea to the jurisdiction. (*y*)

Pleas to the jurisdiction, when the objection cannot be otherwise taken, are either in *local* or *transitory* actions. The defendant may, in *local* actions, plead to the jurisdiction, when the cause of action accrued in a jurisdiction into which *breve domini regis non currit*. (*z*) Therefore, he may plead that the lands are ancient demesne, holden of the queen's manor; (*a*) and before the statute, 1 W. 4, c. 70, s. 13, he might have pleaded that the cause of action arose in Wales; (*b*) or in a county palatine. (*c*) So he may plead that the cause of action arose in the cinque ports, (*d*) or in London, (*e*) or any other *exclusive* jurisdiction; (*f*) but Ely is not an exempt jurisdiction, though the bishop may demand consuance. (*g*) It has been held that it may be pleaded in a local action that the lands are out of the realm; (*h*) but as this might be pleaded in bar, or be given in evidence under the general issue, it is unnecessary to plead such matter in abatement. (*i*)

(*r*) Gilb. C. P. 188, 189; Bac. Abr. Pleas, E. 1; Courts, D. 4; 1 Saund. 98, note (1).

(*s*) Bac. Abr. Courts, D. 4. See the precedents of plea and replication, 1 Wentw. 51, 60, 69, 78, and 1 Wentw. Index; Lil. Ent. 475. See forms *post*, vol. ii. 16, note (*e*).

(*t*) *Ante*, 439.

(*u*) 1 Saund. 98, note (1); Cholmondley v. Broom, Carth. 402; Vin. Abr. Foreign Plea. See the precedent, Lil. Ent. 475.

(*x*) Vin. Abr. Foreign Pleas, A. 11; Cholmondley v. Broom, 5 Mod. 335.

(*y*) 1 Saund. 98, note (1); Cholmondley v. Broom, Carth. 402; 5 Mod. 335, S. C.; Vin. Abr. Foreign Pleas.

(*z*) Bac. Abr. Courts, D. 3; Gilb. C. P. 191; Lampley v. Thomas, 1 Wils. 206; Grant v. Bagge, 3 East, 128.

(*a*) Doe *dem.* Morton v. Roe, 10 East, 523; Com. Dig. Abatement, D. 1; Goodright v. Sheaff, 2 Ld. Raym. 1418; Barker v. Wich, 1 Salk. 56. See the precedents in Herne, 351; Rast. Ent. 101; Thomp. Ent. 2; Mod. Ent. 249; 3 Inst. Cl. 89; Hana.

103; 1 Wentw. 51; and see other forms and replications, 1 Wentw. Index.

(*b*) Com. Dig. Abatement, D. 2; Lampley v. Thomas, 1 Wils. 193; Penry v. Jones, Dougl. 213. See the precedents, 1 Wentw. 45, 49, 68; Lampley v. Thomas, 1 Wils. 193.

(*c*) Com. Dig. Abatement, D. 2. See the precedents, Rast. Ent. 419; Hern. 7; 3 Inst. Cl. 14; 1 Wentw. 49.

(*d*) Com. Dig. Abatement, D. 3; 4 Inst. 224; Jenk. 190; Keil. 88. See the precedents, Bro. Red. 475, and 1 Wentw. Index.

(*e*) Anonymous, 3 Leon. 148.

(*f*) Bro. Abr. Consuance, 52; Williams *dem.* Johnson v. Keen, 1 Bl. Rep. 197. See the precedents, 1 Wentw. Index.

(*g*) Cotton v. Johnson, Carth. 109; Salk. 183; Grant v. Bagge, 3 East, 128, 138.

(*h*) Show. 191; Barker v. Damer, 1 Salk. 80; Com. Dig. Abatement, D. 3.

(*i*) The King v. Johnson, 6 East, 583; Doulson v. Matthews, 4 T. R. 503; *aws*, 289, 290.

In *ejectment*, as the real defendant is obliged on appearing to enter into the consent rule, and to plead the general issue, he cannot plead to the jurisdiction without leave of the court. (*k*)

In all *transitory* actions the courts at Westminster have jurisdiction, unless taken away by particular act of parliament, (*l*) and with the exception in favor of the Universities of Oxford and Cambridge, (*m*) unless the plaintiff by his declaration shows that the action accrued in an exclusive jurisdiction, no objection to that of the superior courts can be taken. (*n*) And if the declaration disclose the * fact, still the defendant cannot demur or move in arrest of judgment, but must plead to the jurisdiction. (*o*) It has been said that there are no pleas to the jurisdiction of the courts at Westminster, in transitory actions, unless the plaintiff by his declaration admit that the cause of action accrued in a county palatine. (*p*) It is, however, presumed that those cases were only put as instances, and that if it appeared on the face of the declaration that the cause of action arose in any other exclusive or exempt jurisdiction, a plea to the jurisdiction might be pleaded. (*q*)

Some pleas in abatement arising from *privilege* of *person* may be classed under pleas to the jurisdiction, in respect of their affecting the jurisdiction of the court, and concluding whether the court ought to have further consuance of the suit; (*r*) as where an attorney or officer of a particular court, a tinner, or scholar of the universities, is sued out of the proper court. (*s*)

Where a person is wrongfully sued in an *inferior* court, he must tender his plea to the jurisdiction *in propria persona sedente curia*, and make oath of the truth thereof, (*s*¹) and if the inferior court will not accept his plea, he may have a *prohibition* from one of the common law courts at Westminster, or in vacation from the court of chancery. (*t*) In the *superior* courts, a plea to the jurisdiction must be pleaded within four days, the first of which is exclusive, and the last inclusive after declaration. (*u*) Formerly it must have been intitled of the

(*k*) *Williams dem. Johnson v. Keen*, 1 Bl. Rep. 197; *Hatch v. Cannon*, 3 Wils. 51; *Doe dem. Duchess of Hamilton v. Robinson*, 2 Stra. 1120; *Denn v. Fenn*, 8 T. R. 474.

(*l*) Bac. Abr. Courts, D. 3. See the different statutes, Tidd, 9th ed. 954-962.

(*m*) Bac. Abr. Courts, D. 3; Gilb. C. P. 191; Wood. Inst. 520; Vin. Abr. University, K.

(*n*) 4 Inst. 213; Bishop of Ely's case, 1 Sid. 103; Gilb. C. P. 191; Bac. Abr. Courts, D. 3.

(*o*) *Jennings v. Hankin*, Carth. 11; *Davis v. Stringer*, Carth. 354; Bac. Abr. Courts, D. 3; Gilb. C. P. 191; *Davis v. Speed*, 5 Mod. 144.

(*p*) 4 Inst. 212, 213, and other authorities; Tidd, 9th ed. 631, note (c).

(*q*) See *Lamplcy v. Thomas*, 1 Wils. 193.

See the precedents in transitory actions, Ib.; 1 Wentw. 45, 49, 68.

(*r*) See the precedents, *Wilkes v. Williams*, 8 T. R. 631; Com. Dig. Abatement, D. 4; Bac. Abr. Abatement, C. Pleas, E. 2; *Wentworth v. Squibb*, 45, 639; 22 Vin. Abr. 9; *Hixon v. Binns*, 3 T. R. 186; *Bowyer v. Cook*, 5 Mod. 146; Gilb. C. P. 208, 209, cited *Cholmondley v. Broom*, 5 Mod. 335; *Chal-land v. Thornley*, 12 East, 544.

(*s*) See the precedents, *post*, vol. ii. [See *King v. Coit*, 4 Day, 134.]

(*s*¹) [Teasdale v. The Rambler, Bee, 9; *Horton v. Townes*, 6 Leigh, 47.]

(*t*) 1 Saund. 98, note (1); *Sparks v. Wood*, 6 Mod. 146; Bac. Abr. Pleas, E.; Courts, D. 4; Pleas, E. 1. See *ante*, 441.

(*u*) Reg. Gen. Hil. T. 4 W. 4, a. 8; *Ryland v. Wormald*, 2 M. & W. 393.

same term as the declaration, (x) but Reg. Gen. Hil. T. 4 W. 4, now requires every pleading to be intituled of the day of the month and year when the same is pleaded, and shall bear no other time or date. It must be pleaded in person, and not by attorney, because the latter would admit the jurisdiction of the court; (y) and for the same reason, at least before Reg. Gen. Hil. T. 4 W. 4, full defence ought not to be made, but only half defence, though the words "*when, &c.*" would suffice. (z) A party paying money into court admits the jurisdiction of such court, and cannot plead in abatement to it. (a) After stating the appearance and defence, the plea may * proceed at once to show the defect of jurisdiction without any preliminary prayer *si curia cognoscere velit, &c.* (d)

In all pleas to the jurisdiction of the *superior* courts, it must be shown that there is another court in which justice may be effectually administered, (d¹) for if there be no other mode of trial, &c. that alone would give the superior court jurisdiction. (e) In transitory actions, it was necessary to aver in a plea that a county palatine court ought to entertain the suit; either that the defendant dwelt in the county palatine, or that he had sufficient goods and chattels there by which he might be attached, otherwise the plea could not be allowed lest a failure of justice should ensue. (f) But in a plea to the jurisdiction of an *inferior* court it was sufficient to allege that the cause of action accrued out of its jurisdiction, without showing the jurisdiction to which the plaintiff should have resorted. (g) These pleas should conclude with a prayer, "*si curia cognoscere velit,*" or "*respondere non debet,*" and not "*quod billa vel breve cassetur.*" (h) The former was the most usual conclusion when the subject-matter of the plea related to the cause of action, and the *respondere non debet* seems proper where the objection to the jurisdiction is a *personal privilege*. (i) If

(x) *Ante*, 443-445.

(y) 2 Saund. 209 b; Gilb. C. P. 187; Bac. Abr. Abatement, A. Pleas, &c. 2; Wilkes v. Williams, 8 T. R. 631.

(z) *Ante*, 444, 445; 2 Saund. 209 b.

(a) Miller v. Williams, 5 Esp. Rep. 21, 22.

(d) See the forms, Rast. Ent. 101, 419; Herne, 351; Lampley v. Thomas, 1 Wils. 193, and *ante*, 441. But see the precedent, Wilkes v. Williams, 8 T. R. 631.

(d¹) [Lawrence v. Smith, 5 Mass. 362; Rea v. Hayden, 3 Mass. 24; Jones v. Winchester, 6 N. H. 497; Dumoussay v. Delevit, 3 Harr. & J. 151.]

(e) The King v. Johnson, 6 East, 598, 600; Mostyn v. Fabrigas, Cowp. 172; Davis v. Stringer, Carth. 355; Anonymous, 3 Leon. 148; Doulsen v. Matthews, 4 T. R. 503; Dundalk Railway Company v. Tapster, 1 Q. B. Rep. 669; 1 G. & D. 657, 8. C.; 4 Inst. 213; Bac. Abr. Abatement, A.; Courts, D. 3. [See Rea v. Hayden, 3 Mass. 24.] So the courts by analogy will not stay the proceed-

ings, although the debt be under 40s. if there be no inferior court which has jurisdiction over it. Harwood v. Lester, 3 B. & P. 617; Tidd, 9th ed. 516; and see Sandall v. Bennett, 2 Ad. & El. 204.

(f) Davis v. Stringer, Carth. 355; Tidd, 9th ed. 631. See the precedents, *post*, vol. ii. 268.

(g) The King v. Johnson, 6 East, 600, 601; and see the precedents, 1 Wentw. 51, 60, 61, 78; *post*, vol. ii. 268.

(h) Bac. Abr. Pleas, E. 2; Cadman v. Grendon, Latch, 178; Bowyer v. Cook, 5 Mod. 146; Bro. Jurisdiction, pl. 17; 2 Saund. 209; Rast. Ent. 101, 419; Herne, 351; Lampley v. Thomas, 1 Wils. 193; Wentworth v. Squib, Lutw. 45, 639; 2 Rich. C. P. 10; Lil. Ent. 9.

(i) *Ib.*; but the plea of an attorney sued by latitat in his own court might have concluded *si curia cognoscere velit*. Chatland v. Thornley, 12 East, 544; and see the precedent form, *post*, vol. ii. 268.

the plea were to conclude in bar to the action, the jurisdiction would thereby in general be admitted. (*k*)

In support of a plea to the jurisdiction there must in general be an *affidavit* of the truth of its contents. (*m*) And where ancient *Affidavit. (l)* demesne is pleaded, the affidavit must state that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the lessor of the plaintiff has a freehold interest. (*n*)

To the plea of ancient demesne the plaintiff may *reply* that the land is pleadable at common law, and traverse that the manor is ancient demesne, or he may reply without a traverse. (*o*) The replication to * a plea to the jurisdiction in general commences with a statement that the writ ought not to be quashed, or that the court ought not to be ousted of their jurisdiction, because, &c.; (*p*) and concludes to the country, if the replication merely deny the subject-matter of the plea. (*q*) Where the plaintiff demurs to the plea, he states that he is not bound to answer the plea, and that the same is not sufficient to prevent the court from having consueance of the action; (*r*) the language of the joinder in demurrer corresponds with that of the demurrer. (*s*) The judgment in these cases is, that the writ shall abate, or *respondet ouster*. (*t*)

II. OF PLEAS IN ABATEMENT. (*u*)

Whenever the subject-matter of the plea or defence is that the plaintiff cannot maintain *any* action *at any time* whether present or future in respect of the supposed cause of action, it may, and usually must be pleaded in *bar*; (*u*¹) but matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, should in general be pleaded in *abatement* (from the French *abatre*). (*x*) The criterion or leading distinction

II. OF PLEAS IN ABATEMENT.

- (*k*) Vin. Abr. Courts, Jurisdiction, N. a.
- (*l*) As to the time of swearing the affidavit, see 3 Chitty's Gen. Prac. by Lush, 599.
- (*m*) 4 Ann. c. 16, s. 11; Bac. Abr. Courts, D. 4. See *ante*, 441; [Teesdale v. The Ramblers, Bee, 9.
- (*n*) Doe dem. Rust v. Roe, 2 Burr. 1046.
- (*o*) Com. Dig. Abatement, D. 1.
- (*p*) Thomp. Ent. 2; Rast. Ent. 101; Clift. Ent. 17.
- (*q*) *Ib.*
- (*r*) Rast. Ent. 419; Lampley v. Thomas, 1 Wils. 194. See form of demurrer, Dundalk Railway Company v. Tapster, 1 G. & D. 657.
- (*s*) *Ib.*
- (*t*) Vin. Abr. Courts, Jurisdiction, N. a.; Com. Dig. Abatement, I. 14.
- (*u*) Although pleas in abatement of the

writ in respect of variance, &c. have now been virtually abolished by the modern practice of the courts not permitting *oyer* of the writ so as to disclose that variance, and although pleas of *misnomer* have been expressly abolished by the 3 & 4 W. 4, c. 42, s. 11, and pleas of *non-joinder* are much limited, yet there are still many instances in which pleas in abatement may still be usefully pleaded, and students and practitioners should examine the subject. See, in general, Com. Dig. Abatement; 1 Wentw. and post, vol. ii. As to pleas in abatement in courts of equity, see Beames's Pl. Eq. 53, 54, 57, 220, &c.

- (*u*¹) [Ruddock v. Gordon, Quincy, 58.]
- (*x*) Evans v. Stevens, 4 T. R. 227; Bac. Abr. Abatement, N.; Com. Dig. Abatement, B.; Harman v. Kingston, 3 Campb. 132; Stewart v. Greaves, 12 L. J. R. N. S. 82

tion between a plea in *abatement* and a plea in *bar* is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action; or in technical language *must give the plaintiff a better writ.* (y) There are, however, some matters which may be pleaded either in abatement or in bar; as in replevin for goods, the defendant may plead property in himself or in a stranger, (y¹) either in abatement or in bar. (z) So outlawry for felony, alien enemy (z¹) at the time of the contract, (a) and attainder, by either of which the cause of action was *forfeited*, may be pleaded in abatement or in bar; (b) and when the defendant has omitted to plead such matter in abatement in due time, he must plead in bar. (c)

There were instances in which the right of action, and even the present suit, was *suspended* only, and not destroyed, and when the matter could only be pleaded in abatement, and the plea should conclude *si responderi debet quousque*, &c. and when the disability is removed the suit will proceed. (d) Of that description was *parol demurrer*; the meaning of which was, that the *pleading* should be *stayed*. That occurred where an *infant* heir was sued on the specialty debt of his ancestor, and pleaded his nonage, not as a bar or defence, but merely in *suspension* of the existing proceedings until he arrived at his full age. (e) A plea of this nature was termed, and was for most purposes, a plea in abatement; but in this respect it was dissimilar, that it operated only as a *temporary suspension* of the present suit, and did not, like the generality of pleas in abatement

Parol demurrer abolished by 1 W. 4, c. 47, s. 10.

109. [Matter in abatement which only delays the right to sue by defeating the particular action, cannot be pleaded in the same plea or answer with matter in bar of all right of action; but must be pleaded, if then existing, before answering to the merits, else it is deemed to have been waived. Gray J. in *Morton v. Sweetser*, 12 Allen, 137; *Pratt v. Sanger*, 4 Gray, 88. Where there is no return day, or an erroneous one, advantage of such error can only be taken by motion or plea in abatement. Pleading the general issue is a waiver of the defect. *Pattee v. Low*, 35 Maine, 121; *Ames v. Weston*, 16 Maine, 266; *Barker v. Norton*, 17 Maine, 416.]

(y) See 1 Saund. 274, note (3); 385, note (4); [Wilson v. Nevers, 20 Pick. 20; *Wadsworth v. Woodford*, 1 Day, 28; *Kempton v. Savings Institution*, 53 N. H. 587. A plea in abatement, alleging that there are others liable with the defendant, does not admit the existence of any contract whatever, the new parties being conditionally named, to enable the defendant to connect them with whatever contract may be proved; but it operates no further than to preclude an objection for want of parties the second time, and the

plaintiff is bound to prove his case against all who are named, as if there had never been a proceeding to ascertain them. *Witmer v. Schlatter*, 2 Rawle, 359.]

(y¹) [Ilkley v. Stubbs, 5 Mass. 285; *Harrison v. McIntosh*, 1 John. 380.]

(z) *Presgrave v. Saunders*, 1 Salk. 5.

(z¹) [See *Bell v. Chapman*, 10 John. 183; *Russell v. Skipwith*, 1 Serg. & R. 310.]

(a) *Harman v. Kingston*, 3 Campb. 152, 153.

(b) Bac. Abr. Abatement, N.; Com. Dig. Abatement, K.; Co. Litt. 128 b, 129 b; *Facquire v. Kynaston*, 2 Ld. Raym. 1249; *Bro. Vade Mecum*, 252; *Gillb. C. P.* 200; *Tidd*, 9th ed. 634. But a defendant cannot plead his own attainder. *Forst. C. L.* 61-63. As to pleas of these matters in equity, see *Beames's Pl. Eq.* 100, 109, 112.

(c) Bac. Abr. Pleas, C. 3.

(d) *Lady Faulkland v. Stanion*, 12 Mod. 400; *Le Bret v. Papillon*, 4 East, 504.

(e) See Com. Dig. Infant, D.; *Rast.* 360, 362, 379; *Bro. Red.* 195; *Demisley v. Custance*, 4 T. R. 77; *Plasket v. Beeby*, 4 East, 485; *Steph.* 2d ed. 68; *parol, i. e. loquela Demur* is from "demorror," to stay.

allege matter, which, although it gave another and a better action, had the effect of destroying altogether the suit in which it was pleaded. The right, however, of parol demurrer was taken away by the stat. 1 W. 4, c. 47, sect. 10, which enacts that where any action, suit, or other proceeding for the payment of debts or any other purpose shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of that act have been carried on or prosecuted by or against any infant where according to law the infant did not demur.

Pleas in abatement, we have already seen, (*f*) are divided into those relating

1st. *To the disability of the person suing or being sued ; as,*

1st. *Of the plaintiff ;*

2dly. *Of the defendant.*

2dly. *To the count or declaration.*

3dly. *To the writ. (g)*

1st. *To the form of the writ.*

1st. *Matter apparent on the face of it.*

2dly. *Matter dehors.*

2dly. *The action of the writ.*

* The subject will be considered in reference to the above division, and will be concluded by some observations on the *form* and *qualities* of a plea in abatement, on the *affidavit* of its truth, and on the *replication* and *other proceedings*.

Pleas to the *ability of the plaintiff* show that he is incapable of com-

I. RELATING
TO THE PER-
SON.

mencing or continuing his suit by denying his existence, (*g*¹) as that he, or one of the plaintiffs, at the time of the com-

(*f*) *Ante*, 456; Com. Dig. Abatement, C.; Steph. 2d ed. 70; 5th ed. 475.

(*g*) Mr. Serjeant Stephen observes (2d ed. Pleading, 71, note (c)) that these divisions of pleas in abatement to the writ seem to be more subtle than useful, and do not, in modern practice, often come under consideration. Still, however, as the ancient forms of commencement and conclusion depended in some measure on the classification of the plea, the student may find it useful to keep in view the arrangement. There is always great danger in departing from old forms or even arrangements.

(*g*¹) [The existence of the plaintiff (corporation) can be contested only by a special plea in abatement or bar. Boston Type

Foundry v. Spooner, 5 Vt. 93; Proprietors &c. v. Call, 1 Mass. 485; Monumoi v. Rogers, 1 Mass. 159; Sutton v. Cole, 3 Pick. 245; Conard v. Atlantic Ins. Co. 1 Peters, 450; Society &c. v. Pawlet, 4 Peters, 501; Plymouth v. Macomber, 3 Met. 235; Litchfield Bank v. Church, 29 Conn. 148; School District v. Blaisdell, 6 N. H. 197; Concord v. McIntire, 6 N. H. 527; Brown v. Illias, 27 Conn. 84; West Winstead Sav. Bk. v. Ford, 27 Conn. 282; Whittington v. Farmers' Bank, 5 Harr. & J. 489; Taylor v. Bank of Illinois, 7 Monroe 584; Methodist Church v. Cincinnati, 5 Ohio, 286; Prince v. Com. Bank of Columbus, 1 Ala. 241; Angell & Ames Corp. § 633; *post*, 467, note (i); Campbell v. Galbreath, 5 Watts, 428; Jones

mencement of the suit, was a *fictitious* person, (*h*) or by alleging that he is dead. (*i*) So, where a *sole plaintiff dies* pending the suit, such death may be pleaded in abatement; (*k*) but in the case of several plaintiffs or defendants, the death of one does not abate the suit, if the cause of action survive to or against the survivors. (*l*) So, the defendant may plead in abatement, or, as we have just seen, (*m*) in bar, that the plaintiff is an *alien enemy*, (*n*) attainted of treason or felony; (*o*) or outlawed upon mesne or final process. (*p*) So, the defendant may plead in abatement that the plaintiff is under a pre-munire; (*q*) or excommunicated; (*r*) or that the plaintiff (unless he sue with others as executor) is an infant, and has declared by attorney, (*s*) and this is the proper mode of taking advantage of the objection in the case of plaintiffs. (*t*) The effect of the bankruptcy of

v. Cincinnati & C. Co. 14 Ind. 89; *Bank of Manchester v. Allen*, 12 Vt. 306; *Greenwood v. Lake Shore R. R. Co.* 10 Gray, 373; *Phoenix Bank v. Curtis*, 14 Conn. 437; *Heaton v. Cincinnati & C. Co.* 16 Ind. 278. But in some of the American states it has been held that when a corporate body institutes legal proceedings, either on a contract or to recover real property, it must, at the trial under the general issue, prove the fact of corporate existence. *Holloway v. Memphis R. Co.* 23 Texas, 465; *Angell & Ames Corp. v. Hills*, 632, and cases cited; *Vernon Society v. Hills*, 6 Cowen, 25; *Wood v. Jefferson Co. Bank*, 9 Cowen, 205; *Williams v. Bank of Michigan*, 7 Wend. 540; *Wolf v. Goddard*, 9 Watts, 544; *Agnew v. Bank of Gettysburgh*, 2 H. & Gill, 478; *Rees v. Conococheague Bank*, 5 Rand. 326; *Jackson v. Bank of Marietta*, 9 Leigh, 240; *Dutchess Cotton Manuf. v. Davis*, 14 John. 245; *Bank of Auburn v. Weed*, 19 John. 303. In an action against an association, in Massachusetts, denial of incorporation may be made by answer. *Greenwood v. Lake Shore R. R. Co.* 10 Gray, 373; *Gott v. Adams Express Co.* 100 Mass. 320. An averment of the incorporation of defendants is met and put in issue by the denial, in the answer, of each and every allegation in the declaration. *Boston Relief & Submarine Co. v. Burnett*, 1 Allen, 410; *Gott v. Adams Express Co.* 100 Mass. 321.]

(*h*) *Com. Dig. Abatement, E. 16*; *Bac. Abr. Abatement, F.*; *Anon.* 1 Wils. 302; *Gilb. C. P.* 248. See the precedents, *Rast. Ent.* 10; 3 *Inst. Cl.* 89; 1 *Went.* 50; and *Index*, 11; [*Doe v. Penfield*, 19 John. 308; *Boston Type Foundry v. Spooner*, 5 Vt. 93; *Campbell v. Galbreath*, 5 Watts, 423.]

(*i*) *Rast. Ent.* 8; 3 *Inst. Cl.* 75, &c.; 1 *Wentw. Index*, 11; *Bac. Abr. Abatement, L.*; *Com. Dig. Abatement, E. 17*; [*Alexander v. Davidson*, 2 *McMullan*, 49; *Camden v. Robertson*, 2 *Scam.* 507; *Humphreys v. Irvine*, 6 Sm. & M. 205; *Frier v. Jackson*, 8 John. 495; *Judges v. Phillips*, 2 Bay, 519.]

(*k*) *Bac. Abr. Abatement, F.*; *Com. Dig. Abatement, H.* 32, 33.

(*l*) 8 & 9 W. 3, c. 11, s. 7; *Chit. Col. Stat.* 1, 2.

(*m*) *Ante*, 462.

(*n*) *Com. Dig. Abatement, E. 4*; *Bac. Abr. Abatement, B. 3*; 1 *Doc. Plac.* 8. See the forms, 3 *Inst. Cl.* 16; *Openheimer v. Levy*, 2 *Stra.* 1082; *Pie v. Cooper*, 2 *Ld. Raym.* 1243; *Bowler v. Spathurst*, *Lutw.* 34; 1 *Wentw. Index*, 8; *Gilb. C. P.* 205; [*Bell v. Chapman*, 10 *John.* 133; *Jackson v. Decker*, 11 *John.* 418; *Hutchinson v. Brock*, 11 *Mass.* 119; *Levine v. Taylor*, 12 *Mass.* 8; *Parkinson v. Wentworth*, 11 *Mass.* 26; *Russell v. Skipwith*, 6 *Binn.* 241; *Bagwell v. Babe*, 1 *Rand.* 272; *Clarke v. Morey*, 10 *John.* 69; *Coxe v. Gulick*, 4 *Halst.* 528; *Brinley v. Avery*, *Kirby*, 25; *Sewall v. Lee*, 9 *Mass.* 363; *Martin v. Woods*, 9 *Mass.* 377.] See the precedents in bar, *post*, vol. ii. 297.

(*o*) *Bisse v. Harecourt*, *Carth.* 137, 138; *Com. Dig. Abatement, E. 3*. See the form, 1 *Wentw.* 7; *Bullock v. Dodds*, 2 *B. & Ald.* 258.

(*p*) *Gilb. C. P.* 196, 197; *Com. Dig. Abatement, E. 3*; *Bac. Abr. Abatement, B. 1*. See the form, *Gawen v. Surby*, *Lutw.* 6; *Ford v. Edgecome*, *Lutw.* 1529; 3 *Inst. Cl.* 23; 1 *Wentw. Index*, 7; *Nowlan v. Geddes*, 1 *East*, 634.

(*q*) *Co. Litt.* 129 *b*; *Com. Dig. Abatement, E. 7*.

(*r*) *Bradley v. Glynne*, *Lutw.* 17; 3 *Inst. Cl.* 18; *Cro. Jac.* 82; *Bac. Abr. Abatement, B. 2*; 1 *Wentw. Index*; *Gilb. C. P.* 202. In equity, *Beames's Eq. Pl.* 9, 106, &c.

(*s*) *Bro. R.* 475, 476; 3 *Inst. Cl.* 19, 55. *Clift.* 11; 1 *Mod. Ent.* 20; 1 *Wentw.* 58. *Wentw. Index*, 10. See the form, 2 *Saund.* 209 *a*; [*Schermerhorn v. Jenkins*, 7 *John.* 373; *Young v. Young*, 3 *N. H.* 345; *Blood v. Harrington*, 8 *Pick.* 552; *Smith v. Van Houten*, 5 *Halst.* 381; *Trask v. Stone*, 7 *Mass.* 241; *Long v. Whidden*, 2 *N. H.* 435; *Drago v. Moso*, 1 *Speer*, 212.]

(*t*) 2 *Saund.* 212, note (5). [Demurrer, that the plaintiff has no legal capacity to sue cannot be sustained, unless it appears on the face of the complaint that he has not such capacity. *Barclay v. Quicksilver*, 6

the plaintiff pending the suit has already been noticed. (u) When a *feme covert* has no interest whatever in the subject-matter of the action and consequently ought not to be made a party, and she sues either with or without her husband, the defendant will obtain a nonsuit on a plea in bar of her coverture, or a plea in replevin that she had no property in the goods. (x) But where the feme was legally interested before or during her coverture in the subject-matter of the action, and might properly join with the husband, but sues alone, her coverture can only be *pleaded in abatement*, and cannot be given in evidence under the *general issue, or pleaded in bar; (x¹) at least this rule obtains in actions for torts. (y) If the plaintiff take husband after suing out the writ, and before the declaration, the defendant *cannot give the coverture* in evidence under the general issue, but must plead it in abatement, (z) as matter arising before plea or pending the suit. (a)

Pleas in abatement to the person of the *defendant* (b) are coverture; (b¹) and formerly infancy before parol demurrer, now abolished, but a defendant could not avail himself of his own attainder. (c) *Coverture* at the time when the supposed contract was entered into must be pleaded in *in bar*, (c¹) though before the Reg. Gen. Hil. T. 4 W. 4, it might have been given in evidence under the general issue *non assumpsit* or *non est factum*; (d) but where the objection does not go to the *liability* of the feme, but is merely that the husband ought to have been *sued jointly* with her, as where, *since* entering into the contract, or committing the tort, she has married, she must, when sued alone, plead her coverture in abatement, and aver that her husband is living. (e) If the defendant marry after the commencement of the suit, such coverture cannot be pleaded even in abatement. (f) To the plea of coverture the plaintiff may reply any matter which affords him a right to sue the defendant alone, although she be a married woman. (g) *Infancy* might formerly be pleaded in

Lansing, 25; Hudson v. Poindexter, 42 Miss. 304.]

(u) *Ante*, 27.

(x) *Ante*, 32-38.

(x¹) [Hubert v. Fera, 99 Mass. 199. Coverture, as a disability to sue, must be pleaded in abatement. Hayden v. Attleborough, 7 Gray, 338.]

(y) *Ante*, 32-38, 82-85; [Foster J. in Dutton v. Rice, 53 N. H. 499.]

(z) Morgan v. Painter, 6 T. R. 265; [Haines v. Corliss, 4 Mass. 659; Wilson v. Hamilton, 4 Serg. & R. 238; Guphill v. Isbell, 1 Bailey, 369; Bates v. Stevens, 4 Vt. 545; Swan v. Wilkinson, 14 Mass. 295; Templeton v. Clary, 1 Blackf. 288; Chirac v. Reinicker, 11 Wheat. 303; Northum v. Kellogg, 15 Conn. 569; Newell v. Marcy, 17 Mass. 341.]

(a) Le Bret v. Papillon, 4 East, 502; [Wilson v. Hamilton, 4 Serg. & R. 238.]

(b) In equity, Beames's Pl. Eq. 129.

(b¹) [Surtell v. Brailsford, 2 Bay, 333; Simmons v. Thomas, 43 Miss. 31.]

(c) *Ante*, 462, note (b).

(c¹) [Steer v. Steer, 14 Serg. & R. 379.]

(d) James v. Fowks, 12 Mod. 101; Marshall v. Rutton, 8 T. R. 545. *Quære*, whether it cannot now be given in evidence under *non assumpsit*. Moss v. Smith, 1 M. & Gr. 232, note (a).

(e) *Ante*, 67, 105. See Lovell v. Walker, 9 M. & W. 299.

(f) Bac. Abr. Abatement, G.; King v. Jones, 2 Stra. 811; *et vide* Anon. Loft, 27; King v. Jones (in error), 2 Ld. Raym. 1325; [Crockett v. Ross, 5 Greenl. 445; Commonwealth v. Phillipsburg, 10 Mass. 56; Henderson v. McClure, 2 McCord Ch. 469.]

(g) See *ante*, 65-67; [Tracy v. Keith, 11 Allen, 215; Dutton v. Rice, 53 N. H. 496.]

abatement in an action upon a specialty, when the defendant was sued as heir on the obligation of his ancestor, in which case the parol was to *demur*, or proceedings be stayed till he comes of age; (*h*) but that privilege did not extend to an infant devisee, (*i*) and was finally altogether abolished by 1 W. 4, c. 47, s. 10. (*k*)

The uniformity of process act, 2 W. 4, c. 39, subjects *peers* and *members of parliament* to a writ of summons, in the same form as ordinary persons, and therefore there cannot be a plea in abatement as a peer, merely on account of his having been served with that process. A plea of *privilege* by a peer is therefore more limited than heretofore; and a peer cannot now plead *misnomer* any more than any other subject. (*l*)

Pleas in abatement to the count could only be pleaded in actions by original writ. The first act of the parties after appearance and admission of the jurisdiction of the court over the subject-matter of * the cause, and of the ability of the plaintiff to sue and the defendant to be sued, is the declaration or count, after which formerly the defendant might demand oyer of the writ, and then the same being set forth on the roll, if there were any variance between the count and the writ, or between the writ and a record, specialty, &c. mentioned in the count, the defendant might plead such variance in abatement or demur, move in arrest of judgment, or sustain error. (*n*) But as a variance between the writ and count could in no case be pleaded without craving oyer of the writ, (*o*) and the defendant cannot now have such oyer, (*p*) the variance or defect is no longer pleadable in abatement, and if it be pleaded, the plaintiff may sign judgment, or move the court to set it aside. (*q*) We have already considered how a variance between the writ and declaration is to be taken advantage of. (*r*)

Pleas in abatement to the writ are so termed rather from their effect than from their being strictly such pleas, for as oyer of the writ can no longer be craved, (*r*¹) no objection can be taken by plea to matter which is merely contained in the writ. (*s*)

(*h*) *Supra*.

(*i*) *Plasket v. Beeby*, 4 East, 485.

(*k*) See the enactment, *ante*, 493.

(*l*) 3 & 4 W. 4, c. 42, ss. 11 & 12, *post*, 457. [See *King v. Coit*, 4 Day, 129. It is good cause for abating a writ, that the defendant was arrested at a time when he was privileged from arrest. *Hubbard v. Sanborn*, 2 N. H. 468; *Grand v. Bedinger*, 4 Monroe, 539; *Grove v. Campbell*, 9 Yerger, 7. Or that he was served with process in any way while privileged from suits. *Van Alstyne v. Dearborn*, 2 Wend. 586; *Halsey v. Stewart*, 1 South. 366; *Greening v. Sheffield*, Minor, 476.]

(*n*) *Hole v. Finch*, 2 Wils. 394, 395; Com. Dig. Abatement, G. 8; 3 Inst. Cl. 62; Reg. Pl. 277, 278.

(*o*) *Hole v. Finch*, 2 Wils. 394, 395.

(*p*) See *ante*, 446.

(*q*) *Murray v. Hubbard*, 1 B. & P. 646, 647; *Gray v. Sidneff*, 3 B. & P. 395; *Deshons v. Head*, 7 East, 383; *Tidd*, 9th ed. 636; *Steph*. 5th ed. 55.

(*r*) *Ante*, 265-270.

(*r*¹) [*Tucker v. Perley*, 5 N. H. 345.]

(*s*) *Ante*, 446. [However it may have been at common law, under the statute of Vermont (Genl. St. 33, § 9) the writ and declaration are blended and made one instru-

II. RELATING TO THE COUNT, &c.

III. RELATING TO THE WRIT.

But if the mistake in the writ *be carried also into the declaration*, or rather if the declaration, which is *presumed* to correspond with the writ, be incorrect in respect of some *extrinsic* matter, it is then open to the defendant to plead in abatement to the writ; (t) and there is no plea to the *declaration* alone but in bar. (u) Pleas in abatement of the writ are to the *form* or to the *action* thereof: (x) those of the first description were formerly either matter apparent on the face of the writ or bill, (y) or matter *dehors*. (z) Formerly a defect in the

ment, and in pleading, the writ may be referred to, to help out a defective averment, or the want of a material averment, in the declaration. *Church v. Westminster*, 45 Vt. 380.

(t) *Murray v. Hubbard*, 1 B. & P. 648; *Johnson v. Altham*, 10 Mod. 210, 211; [*Schenck v. Schenck*, 5 Halst. 274; *Chirac v. Reinicker*, 11 Wheat. 302. Variance between the writ and declaration is matter of abatement or special demurrer. *Newlin v. Palmer*, 11 Serg. & R. 98; *Giles v. Perryman*, 1 H. & Gill, 164; *Duval v. Craig*, 2 Wheat. 45; *White v. Walker*, 1 Monroe, 35; *Haney v. Townsend*, 1 McCord, 207; *Garland v. Chatile*, 12 John. 530; *Palmer v. McGinnis*, *Hardin*, 505; *Prince v. Lamb*, 1 Breese, 298; *Bank of New Brunswick v. Arrowsmith*, 4 Halst. 284; *Young v. Gray*, 1 McCord, 211; *Stoddard v. Cockran*, 6 N. H. 160.]

(u) *Johnson v. Altham*, 10 Mod. 210; 2 Saund. 209 d.

(x) Com. Dig. Abatement, H. 1, 17.

(y) Com. Dig. Abatement, H. 1. [In Massachusetts, when the declaration was, in all cases, a necessary part of the writ, it was cause of abatement in every case that when the writ was served it contained no declaration. *Brown v. Seymour*, 1 Pick. 32; *Brigham v. Este*, 2 Pick. 420; *Rathbone v. Rathbone*, 5 Pick. 221. But now, under the practice act, in actions of contract and actions of tort, unless there is an arrest made, the writ need not contain any declaration. Genl. Sts. (Mass.) c. 129, § 7. A writ must have the seal of the court from which it issues. *Hall v. Jones*, 9 Pick. 446; *Governor v. M'Rea*, 3 Hawks, 226; *Smith v. Alston*, 1 Rep. Const. Ct. 104; *Brewer v. Sibley*, 13 Met. 175. Where a blank writ has been used but not served, it may be altered and made returnable at another term: *Dearborn v. Twist*, 6 N. H. 46. But a seal cannot be torn from one writ which has been filled up, and attached to another. *Filkins v. Brockway*, 19 John. 170. A writ which has been served and returned cannot be used again. *Towner v. Phelps*, 1 Root. 250. As to writs with no teste, or a wrong one, see *Hawkes v. Kennebec*, 7 Mass. 461; *Ripley v. Warren*, 2 Pick. 592; *Buchanan v. Kennon*, Cam. & N. 476; *Dudley v. Carmolt*, 1 Murph. 339; may be amended in Massachusetts in any stage of the cause. *Nash v. Brophy*, 13 Met. 476. Defective service or process can be objected to only by motion or plea in abatement. It

is too late after pleading to the merits. *Frankfort Bank v. Anderson*, 3 Marsh. 1; *M'Crea v. Starr*, 1 Murph. 339; *Payne v. Grim*, 2 Munf. 297; *Pollard v. Pickett*, 4 Cranch, 421; *Farrar v. United States*, 3 Peters, 459; *Litton v. Parker*, 4 N. H. 142; *Morse v. Calley*, 5 N. H. 223; *Carliale v. Weston*, 21 Pick. 535; *Simonds v. Parker*, 1 Met. 508. It is otherwise with void process; *Coleen v. Figgins*, 1 Breese, 3; and service, *Hart v. Huckins*, 6 Mass. 399. So, if judgment has been rendered on default in a case where there was no sufficient service upon the defendant to authorize the rendition of judgment against him, it may be reversed on error. *Smith v. Paige*, 4 Allen, 94; *Johnson v. Thaxter*, 12 Gray, 198, 200; *Arnold v. Tourtellot*, 13 Pick. 172; *Gay v. Richardson*, 18 Pick. 417; *Tilden v. Johnson*, 6 Cush. 354; *Bodurtha v. Goodrich*, 3 Gray, 508. As to defective service of a writ, see *Brewer v. New Gloucester*, 14 Mass. 216; *Sutton v. Cole*, 8 Mass. 96; *Brown v. Gordon*, 1 Greenl. 165; *Wood v. Ross*, 11 Mass. 271; *Hearsay v. Bradbury*, 9 Mass. 95; *Gardner v. Barker*, 12 Mass. 36; *Guild v. Richardson*, 6 Pick. 364; *Tingley v. Bateman*, 10 Mass. 343; *Cavendish v. Turnpike Co.* 2 Vt. 531; *United States Bank v. Taylor*, 7 Vt. 116; *Sill v. Bank of United States*, 8 Conn. 102; *Nelson v. O'Mally*, 6 Greenl. 218; *Wheeler v. Lampman*, 14 John. 481; *Derr v. Esel*, 4 Hayw. 162; *Gilbert v. Nantucket Bank*, 5 Mass. 93; *Foster v. Haddock*, 6 N. H. 217. By a provision of the Massachusetts practice act, no judgment shall be arrested for any cause existing before the verdict, unless the same affects the jurisdiction of the court; and when the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court. Genl. Sts. c. 129, § 79. As to defective indorsements, and the effect of writ not being indorsed, see *Whiting v. Hollister*, 2 Mass. 102; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Grosvenor v. Danforth*, 16 Mass. 74; *Robbins v. Hill*, 12 Pick. 569; *Clarke v. Paine*, 11 Pick. 66; *Stevens v. Getchell*, 3 Fairf. 443; *Clapp v. Balch*, 3 Greenl. 216; *Harmon v. Watson*, 8 Greenl. 286; *Steward v. Riggs*, 9 Greenl. 51; *Stratton v. Foster*, 2 Fairf. 467; *Tracy v. Perry*, 5 N. H. 172.]

(z) Com. Dig. Abatement, H. 17.

form of the writ, *apparent* on the face of it; as repugnancy, variance from the record or specialty, want of sufficient time between the teste and return, (a) or in actions by original, the omission or mistake in the writ of the defendant's addition, (b) either of estate, degree, mystery, or place of abode, (c) were pleadable in abatement; *but as oyer of the writ can no longer be had*, an omission of the defendant's addition, which is not necessary to be stated in a *declaration*, can in no case be pleaded in abatement; and if it be, the plaintiff may sign judgment or apply to the court to set the plea aside. (d)

* Pleas in abatement to the *form* of the writ therefore of late years have been principally for matter *dehors*, (e) existing at the time of suing out the writ or arising afterwards, (f) such as ^{To the form of the writ.} *misnomer* of the plaintiff or the defendant in his Christian or surname. The misspelling a name was not material if the two names were of the same sound. (g) But the reversing or transposing the order of Christian names, as "Richard John," instead of "John Richard," was considered a *misnomer*, and might have been pleaded in abatement. (h) Such pleas of *misnomer* have been abolished by 3 & 4 W. 4, c. 42, s. 11, but still it may be advisable concisely to notice the subject.

It was once doubted if a mistake of the *plaintiff's* Christian or surname were not ground of *nonsuit*, but it was afterwards settled that the mistake must have been *pleaded* in abatement ^{Misnomer.} (h¹) even in the case of a corporation; (i) and this objection

(a) *Naers v. Ld. Huntington*, 1 Lutw. 25; 3 Inst. Cl. 49, 54, 66, &c.

(b) 1 Hen. 5, c. 5; 3 Inst. Cl. 92; Lil. Ent. 5; 2 Rich. C. P. 5, 8; Jones v. Pearle, 1 Stra. 556; Smith v. Mason, 2 Ld. Raym. 1541; 2 Inst. 668.

(c) *Gray v. Sidneff*, 3 B. & P. 395.

(d) 1 Saund. 318, note (3); *ante*, 446.

(e) Com. Dig. Abatement, H. 17, &c.; Gilb. C. P. 51.

(f) Com. Dig. Abatement, H. 17, 32.

(g) 10 East, 83; 16 East, 110; 2 Taunt. 401.

(h) 5 T. R. 195.

(h¹) [See *Chappell v. Proctor*, 1 Harper, 49; *Seely v. Boon, Coxe*, 138; *Labat v. Ellis*, 1 Taylor, 148; *Smith v. Bowker*, 1 Mass. 76; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Jewett v. Burroughs*, 15 Mass. 469; *Pate v. Bacon*, 6 Munf. 219; *Porter v. Cresson*, 10 Serg. & R. 257; *Melvin v. Clark*, 45 Ala. 285; *Handley v. Ludington*, 4 W. Va. 53; *First National Bank v. Jagers*, 31 Md. 38.]

(i) *Mayor, &c. of Stafford v. Bolton*, 1 B. & P. 40; *Gardner v. Walker*, 3 Anstr. 935; *Boughton v. Frere*, 3 Campb. 29; *Dickinson v. Bowes*, 16 East, 110; [*Traver v. Eighth Avenue R. R. Co.* 4 N. Y. App. Dec. (Abb.) 422, 433; *Sunapee v. Eastman*, 32 N. H. 472; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360. But under the New York Code of Procedure, the only way to take advan-

tage of a mere *misnomer*, e. g. — the bringing of an action by a married woman in her maiden name — is by answer; if not set up by answer, advantage cannot be taken of it on the trial. *Traver v. Eighth Avenue R. R. Co. supra*. In the *Bank of Havana v. Magee*, 20 N. Y. 355, it was held that although there was no such corporation as the plaintiff, and that it was only a name assumed by Charles Cook for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, amendable in the courts of original jurisdiction, and to be disregarded in the court of appeals. But a plea of no such corporation is a plea in bar; and such plea, or a brief statement or answer to that effect, puts in issue the fact whether there is any such corporation as the plaintiff. *Eastman J. in Sunapee v. Eastman*, 32 N. H. 473; *School District v. Aldrich*, 13 N. H. 139; *School District v. Blaisdell*, 6 N. H. 198. A plea of the general issue to an action by a corporation admits the corporate existence of the plaintiff. *Orono v. Wedgewood*, 44 Maine, 49; *Portland & Ken. R. R. Co. v. Dunn*, 39 Maine, 587. So far as its power to sue and be sued is concerned; *Oldtown & Lin. R. R. Co. v. Veazie*, 39 Maine, 571; at the time of the institution of the suit. *Freeman v. Machias Water Power & Mill Co.* 38 Maine, 343; *Penobscot Boom Corp. v. Lamson*, 16 Maine, 224; *Roxbury v. Hus-*

could not have been *pleaded* unless the misnomer also appeared in the declaration, (*j*) for the plaintiff might have declared in his right name, though the name had been mistaken in the process. (*j*¹) The misnomer of one of several plaintiffs was pleadable in abatement. (*k*) Misnomer of the *defendant* must also have been pleaded in abatement. (*l*) But misnomer of *another* defendant could not have been pleaded by his companion; (*m*) and if the declaration were against the defendant in his right name, though varying from that in the writ, he could not have pleaded in abatement. (*n*) In an action for a *tort*, the misnomer of one defendant could only abate the suit as to him, and not as to his companions. (*o*) The consequences of a *misnomer* of the defendant, and the course he should pursue in order to take advantage of the error, have before been explained. (*p*)

Pleas in abatement of *misnomer* were abolished by 3 & 4 W. 4, c. 42, s. 11, and another remedy for misstatement of names is invented by that act. Sect. 11 enacts, "that no plea in *abatement* for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for that act have been by law pleadable *in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by

ton, 37 Maine, 42. The same doctrine is applicable to corporations when sued as defendants. *Freeman v. Machias Water Power & Mill Co.* 38 Maine, 343.]

(*j*) *Murray v. Hubbard*, 1 B. & P. 645.

(*j*¹) [But see *Willard v. Missani*, 1 Cowen, 37.]

(*k*) *Jowett v. Charnock*, 6 M. & Sel. 45.

(*l*) *Bac. Abr. Abatement*, 9; *Misnomer*, F.; *Com. Dig. Abatement*, F. 17, 18; and 2 Bl. Rep. 120. See the forms, *post*, vol. ii. 268; *Walford v. Savil*, *Lutw.* 10; *Lil. Ent.* 6; 2 *Rich. Prac.* 4; [Rich v. Boyce, 39 Md. 314; *Hubbard J. in Fitzgerald v. Salentine*, 10 Met. 438; *Thompson v. Elliott*, 5 *Missou.* 118; *Carpenter v. State*, 8 *Missou.* 291; *Commonwealth v. Lewis*, 1 Met. 151; *Christian Society v. Macomber*, 3 Met. 235; *Salisbury v. Gillett*, 2 *Scam.* 290; *Lynes v. State*, 5 *Porter*, 236. A defendant corporation must plead misnomer in abatement. *Gilbert v. Nantucket Bank*, 5 *Mass.* 97; *Methodist E. Church v. Tryon*, 1 *Denio*, 451; *Gray v. Monongahela, Nav. Co.* 2 *Watts & S.* 156.]

(*m*) *Shovel v. Evans, Lutw.* 36; [*Atkinson v. Clapp*, 1 *Wend.* 71.]

(*n*) *Murray v. Hubbard*, 1 B. & P. 645; *Oakley v. Giles*, 3 *East*, 167. [A defendant cannot plead in abatement because of an *alias dictus* subjoined to his name. *Reid v. Lord*, 4 *John.* 118. Where a name appears to be a foreign one, which according to the pronunciation of that language, does not vary the sound, is not a misnomer, as *Petris* for *Petrie*. *Petrie v. Woodworth*, 3 *Caines*, 219. As to the omission of the middle letter of the

name of a party, see *Franklin v. Talmadge*, 5 *John.* 84; *Bowen v. Medford*, 5 *Halst.* 230; *Commonwealth v. Perkins*, 1 *Pick.* 388; *Commonwealth v. Hall*, 3 *Pick.* 262; *Bull v. Franklin*, 2 *Spear*, 46; *Taylor v. Rossiter*, 2 *Miles*, 355; *Hyde v. Watson*, 1 *Denio*, 670. As to the omission of "junior" to the name of a party, see *Fleet v. Young*, 11 *Wend.* 522; *Kincaid v. Howe*, 10 *Mass.* 203; *Commonwealth v. Perkins*, 1 *Pick.* 388. Reply that party is known as well by one name as the other. *Petris v. Woodworth*, 3 *Caines*, 219; *Goodenow v. Tappan*, 1 *Ham.* 61. *Administrator* sued as *executor*, see *Rattoon v. Overacker*, 8 *John.* 126.]

(*o*) *Wade v. Stiff*, 1 M. & P. 26.

(*p*) *Ante*, 266. Where to an action of *assumpsit* the defendant as acceptor of a bill of exchange for 45*l.* pleaded, after setting out the 51 G. 3, c. 124, that the plaintiff sued out a writ of *capias ad respondendum* against him by the name of "*Joseph*" for 45*l.* on an affidavit of debt made by the plaintiff's clerk, under which the defendant was arrested, and afterwards allowed to go at large by the sheriff; that the writ was afterwards altered by inserting the name of "*Robert*" (the real name of defendant) instead of "*Joseph*," under which he was again arrested under a fresh affidavit of debt, as required by that statute; the plea was held bad on special demurrer, as it did not go to the merits of the action, and as the defendant might either have pleaded in abatement or moved to set aside the proceedings for irregularity. *Warmaley v. Macey*, 5 *Moore*, 168.

inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit." (q)

Section 12. "That in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such person by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full."

Other pleas to the *form of the writ* are, that the *plaintiffs* or *defendants* suing, or being sued, as husband and wife, are not married; (r) or that one of the *plaintiffs* or defendants was fictitious or dead at the time of issuing the writ, (s) or any other plea for want of proper parties, (t) as a joint contractor, (u) or another executor, (v) or administrator, (x) or other person, (y) not joined, who ought to have been made a party to the suit.

Other pleas
of this nature.

The plea in abatement of *non-joinder* must always have averred that the party omitted *is still living*. (z) We have already seen, when considering the parties to the action, that in actions on *contracts* the *non-joinder* of a party who ought to be made *co-plaintiff* will in general be the ground of nonsuit, and need not, though it *may*, be pleaded in abatement; (a) but that in the case of executors and others suing *jure representationis* (except assignees of a bankrupt (b)), the omission can only be pleaded in abatement; (c) and that the *non-joinder* of a person who ought to be made *co-plaintiff* in an action in form *ex delicto*, as case, trover, trespass, &c. can only be pleaded in abatement. (d) And we have seen that with regard to *defendants*, the omission of a joint contractor *must* be pleaded in abatement; (e)

Non-joinder.

(g) The court refused, on application by the plaintiff, to amend the proceedings on account of a *misnomer* after issue joined. *Moody v. Aalatt*, 1 Cr., M. & R. 771; 5 Tyr. 492, S. C.

(r) Com. Dig. Abatement, E. 6; 3 Inst. Cl. 69; 1 Wentw. Index, 12. *Sed quære* if this can be pleaded. See *Sinclair v. Hervey*, 2 Chit. Rep. 642. [See *Coombs v. Williams*, 15 Mass. 243.]

(s) 1 Doct. Plac. 12; Bac. Ab. Abatement, L.

(t) *Ante*, chap. I. Parties to the action, *per totum*.

(u) *Davies v. Esam*, 6 C. & P. 619.

(v) Com. Dig. Abatement, E. 8, F. 4, &c.; 3 Inst. Cl. 51; Rast. Ent. 325 a; 1 Wentw. 9; Reg. 140; *Swallow v. Emberson*, 1 Lev. 161; 1 Sid. 242, S. C.

(x) 3 Inst. Cl. 53; Rast. Ent. 324; [Harwood v. Roberts, 5 Greenl. 441; *Osgood v. Spencer*, 2 H. & Gill, 131.]

(y) 3 Inst. Cl. 53, 119; *Sayor v. Clayton*, 1 Lutw. 696; *Nowlan v. Geddes*, 1 East, 634; 1 Wentw. 10, 11; Index, 12.

(z) 1 Saund. 291 a, note (2).

(a) *Ante*, 14.

(b) *Ante*, 26; *Snelgrove v. Hunt*, 1 Chit. Rep. 71; 2 Stark. 424, S. C.

(c) *Ante*, 23; 2 Saund. 291 g; *Smith v. Goddard*, 3 B. & P. 465.

(d) *Ante*, 75. And the non-joinder in this case is only ground for plea in abatement, although the declaration show that there is another party interested jointly with the plaintiff. *Addison v. Overend*, 6 T. R. 766.

(e) *Ante*, 53; [Storey v. M'Neil, 1 Harper, 173; *Horton v. Cook*, 2 Watts, 40;

and that in actions for *torts* no advantage whatever can in general be taken of the non-joinder of a defendant. (*f*)

* A most important and salutary check on pleas in abatement of non-joinder was introduced by 3 & 4 W. 4, c. 42, s. 8, which enacts that no plea in abatement for the *non-joinder* of any person as a *co-defendant* shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. (*g*)

Pleas by *attorneys* heretofore sued in their own court by improper process, as by *latitat* in the queen's bench, or by a common *capias* in the common pleas, instead of a *bill* against them as such attorneys, may also be classed under pleas in abatement to the form of the writ. (*h*) But as the uniformity of process act, 2 W. 4, c. 39, now subjects attorneys to be sued by the same form of writ of summons as other persons, a plea of that description is now abolished. There are two ways of pleading an *attorney's privilege*; first, with a *profert* of a writ of privilege, or of an exemplification of the record of his admission; upon which the plaintiff must reply *nul tiel record*, and cannot otherwise deny the defendant's being an attorney; secondly, as a mere matter of fact, without a *profert*; and then a *certiorari* shall be awarded, to certify whether he be an attorney or not. (*i*) The *present* form of a plea of privilege to be sued in his own court will be found in the second volume. The plea of privilege to be sued in his own court must be verified by affidavit. (*j*) A person sued as an attorney may plead that he is not one, if such be the fact. (*k*)

Pleas in abatement to the *action* of the writ, are, that the action is misconceived, as that it is in the case when it ought to have been in trespass, (*l*) or that it was *prematurely brought*; (*m*) but as these matters are the ground of *demurrer* or *nonsuit*, (*m*¹)

Moore v. Russell, 2 Bibb, 443; Winslow v. Merrill, 2 Fairf. 127; Brown v. Warran, 3 Harr. & J. 572; Powers v. Spear, 3 N. H. 35; Gay v. Cary, 9 Cowen, 44; Coffee v. Eastland, Cooke, 159; Mackall v. Roberts, 3 Monroe, 130; M'Arthur v. Ladd, 5 Ham. 517; Conley v. Good, 1 Breese, 96; Allen v. Sewall, 2 Wend. 327; M'Gregor v. Balch, 17 Vt. 562; Nealley v. Moulton, 12 N. H. 486; Harrow v. Dugan, 6 Dana, 341.]

(*f*) *Ante*, 97.

(*g*) See Wheatley v. Golney, 9 Dowl. 1019.

(*h*) Camfield v. Warren, Lutw. 639; Chatland v. Thornley, 12 East, 544; Davidson v. Chilman, 1 Bing. N. C. 297.

(*i*) Tidd, 9th ed. 635; Stokes v. Mason, 9 East, 424.

(*j*) Davidson v. Chilman, 1 Bing. N. C. 297; *post*.

(*k*) 1 Went. 6; Prac. Reg. 8. *Quære*.

(*l*) 3 Inst. Cl. 120, &c.; Com. Dig. Abatement, G. 5.

(*m*) Com. Dig. Abatement, G. 6, Action, E.; Walford v. Savil, Lutw. 8; Marshall v. Burnet, Lutw. 13; 3 Inst. Cl. 56; Pickering v. Simonds, Fortesc. 334; Clift. Ent. 10, 18, 19; [Amoskeag Mannf. Co. v. Barnes, 48 N. H. 25; Benthall v. Hildreth, 2 Gray, 288, 289. An action cannot be commenced before the cause of it has accrued, or the demand has become due. Church v. Clark, 21 Pick. 310; Swift v. Crocker, 21 Pick. 341; Halsey v. Jewett, 2 Met. 168; Nickerson v. Babcock, 29 Ill. 497; Bradford v. Marbury, 12 Ala. 520; Archibald v. Argall, 53 Ill. 307;] *sed quære*, Facquire v. Kynaston, 2 Ld. Raym. 1249.

(*m*¹) [Benthall v. Hildreth, 2 Gray, 288, 289.]

it is now very unusual to plead them in abatement. (*n*) It may also be pleaded that there is *another action depending* for the same trespass (*o*) or other cause of action, in the same or in any other superior court at Westminster; (*p*) but the pendency of another suit in the sheriff's or other inferior court, it is said cannot be pleaded. (*q*) In general the pendency of a former *action must be pleaded in abatement, (*q*¹) but in a penal action, at the suit of a common informer, the priority of a pending suit for the same penalty in the name of a third person, may be pleaded *in bar*, because the party who first sues is entitled to the penalty. (*r*) In the latter case the plea should show

(*n*) See the instances of misjoinder, *ante*, 221.

(*o*) *Boyce v. Bayliffe*, 1 Campb. 60, 61.

(*p*) Com. Dig. Abatement, H. 24; Bac. Abr. Abatement, M. See the forms, *post*, vol. ii.; [*Parker v. Colcord*, 2 N. H. 36; *Tracy v. Reed*, 4 Blackf. 56; *James v. Dowell*, 7 Sm. & M. 333; *Dewey J. in Colt v. Partridge*, 7 Met. 574. An action pending in a foreign court; *Lyman v. Brown*, 2 Curtis, 559; *White v. Whitman*, 1 Curtis, 494; *Cox v. Mitchell*, 7 C. B. N. S. 55; or in a court of another of the United States, or in a court of the United States in another circuit or district, cannot be pleaded in abatement in a state court. *Burrows v. Miller*, 5 How. Pr. 51; *Bowne v. Joy*, 9 John. 221; *Cook v. Litchfield*, 5 Sandf. 330; S. C. 9 N. Y. 279; *Williams v. Ayrault*, 31 Barb. 364; *Walsh v. Durgin*, 12 John. 99; *Strong v. Stevens*, 4 Duer, 668; *Newell v. Newton*, 10 Pick. 470; *Salmon v. Wooton*, 9 Dana, 422; *McJilton v. Love*, 13 Ill. 486; *Trenton Bank v. Wallace*, 4 Halst. 88; *Lyman v. Brown*, 2 Curtis, 559, and cases cited. The pendency of an action in the state court is not a good ground for a plea in abatement of an action in a United States court. *Loring v. Marsh*, 2 Clifford, 311. But the pendency of another action for the same cause in the circuit court of the United States, having jurisdiction, has been held to be a good plea in abatement in the state court for the same district. *Smith v. Atlantic Mut. Fire Ins. Co.* 22 N. H. 21. As to whether foreign attachment pending in another state, or in the same state, at the suit of a third person against the subject-matter of the action, may be pleaded in abatement, see *Embree v. Hanna*, 5 John. 101; *Bowne v. Joy*, 9 John. 221; *Engle v. Nelson*, 1 Pennsylv. 442; *Scott v. Coleman*, 3 Litt. 349; *Winthrop v. Carlton*, 8 Mass. 456; *Morton v. Webb*, 7 Vt. 124. The pendency of a statutory arbitration is a good plea in abatement of a subsequent action between the same parties to recover a demand included in the submission. *Faby v. Brannagan*, 56 Maine, 42. A plea in abatement of another action pending is bad, if it does not allege the pendency of the first suit at the time of putting in the plea. *Pew v. Yoare*, 12 Mich. 16. But see *Commonwealth v. Church*, 5 Mass. 174. It was held in *Smith v. Atlantic Mut. Fire Ins. Co.*

22 N. H. 21, that a plea of another action pending must be accompanied with an enrolment, or recital of the writ and declaration in the action pleaded as pending; otherwise the plea will be bad on demurrer. See, as to the tendency of modern practice upon the general subject of abatement in consequence of the pendency of a prior action for same cause, *State v. Dougherty*, 45 Missou. 294; *Wilson v. Murphy*, 45 Missou. 409; *Clark v. Clark*, 7 Rob. (N. Y.) 276.] In an action by the assignees of a bankrupt, the defendant cannot plead the pendency of an action by the bankrupt. *Biggs v. Cox*, 4 B. & C. 920.

(*q*) 5 Co. 62; *White v. Willis*, 2 Wils. 87; *Dudfield v. Warden*, Fitzgib. 313; Bac. Abr. Abatement, M.; Com. Dig. Abatement, H. 24; *Seers v. Turner*, 2 Ld. Raym. 1102; *sed quare*, if it were alleged that the inferior court had jurisdiction. *Dudfield v. Warden*, Fitzgib. 314. [It does not appear that any such distinction has been observed in the American states. It would, doubtless, here, be a good cause of abatement, that a former action was pending for the same cause, although in an inferior tribunal, where the inferior tribunal had full jurisdiction of the parties and the subject-matter. See *Thomas v. Freelon*, 17 Vt. 138; *Slyhoof v. Flitcart*, 1 Ash. 171; *Boswell v. Tunnell*, 10 Ala. 958; *Johnston v. Bower*, 4 H. & M. 487; *Perley J. in Smith v. Atlantic Mut. Fire Ins. Co.* 22 N. H. 21.]

(*q*¹) [*Davis v. Granger*, 3 John. 259; *Perceival v. Hickey*, 18 John. 257; *Smock v. Graham*, 1 Blackf. 214; *Logs of Mahogany*, 2 Sumner, 489; *Buffum v. Tilton*, 17 Pick. 510; *Rogers v. Hoskins*, 15 Geo. 270; *Bernecker v. Miller*, 44 Missou. 102; *Williams v. Rawlins*, 33 Geo. 117; *Welchel v. Thompson*, 39 Geo. 559; *Near v. Mitchell*, 23 Mich. 382; but see *Groshon v. Lyon*, 16 Barb. 461; *Harris v. Johnson*, 65 N. C. 478. To constitute a good answer of another cause pending, it must appear that the suit pending is for the same identical cause of action as that in which the answer is interposed; *Kelsey v. Ward*, 16 Abb. Pr. 98; S. C. 32 How. Pr. 618; *Haine v. Baker*, 5 N. Y. 357; and between the same parties or their privies. *Goddard v. Benson*, 15 Abb. Pr. 191; *Bourland v. Nixon*, 27 Ark. 315.]

(*r*) *Baines v. Blackburne*, *Sayer's Rep.* 216; and *post*, vol. ii. 268; [*Gray J. in Morton*

the precise day or time when the prior suit was commenced. (s) The plaintiff cannot, after a plea in abatement of the pendency of a prior suit, avoid the effect of the plea by discontinuing the first action which was pending at the time of the plea. (t)

The *form of a plea in abatement* before the pleading rules of Hil. T. 4 W. 4, was as follows, excepting that the *commencement* and, *conclusion* varied when the plea was of privilege to be sued in a particular court, and in some other respects, as will be seen on examination of the forms of pleas in abatement in the second volume. (u)

Form of plea in abatement.	In the queen's bench [or "C. P." or "exchequer of pleas]."
	On the — day of —.
Commence- ment.	C. D. } And the defendant [or "C. D.,"], by Y. Z. his attorney, [or "in person," ats. } or "by E. F. admitted by the said court here as guardian of the de- A. B. } fendant to defend for him, he being an infant within the age of twenty- one years,"] prays judgment of the said writ and declaration, because he says that [here state the subject-matter of the plea in abatement as set forth in the second vol- ume, <i>post</i> .]
Body.	
Conclusion.	And this the defendant is ready to verify, wherefore [or <i>sometimes as in pleas of non-joinder, are here inserted</i> "wherefore inasmuch as the said O. P. is not named in the said writ and declaration together with the defendant"] he prays judgment of the said writ and declaration and that the same may be quashed, &c.

John Hulme.

[The signature of the counsel.]

From a very cursory observation of the above form, it will be seen that pleas in abatement are to be considered with reference to, 1st, The title of the *court*; 2dly, The title as to *date*; 3dly, The title as to the marginal statement of the parties; 4thly, the *commencement of the plea*, showing whether the defendant appears and *pleads in person* or by *attorney*, or by *guardian*; 5thly, The *body* or substance of the

v. Sweetser, 12 Allen, 137; Engle v. Nelson, 1 Pennsylv. 442; Anderson v. Barry, 2 J. J. Marsh. 281; Beadestone v. Sprague, 6 John. 101; Commonwealth v. Churchill, 6 Mass. 174; Kempton v. Savings Institution, 53 N. H. 581.]

(s) Combe v. Pitt, 3 Burr. 1423; 1 Bl. Rep. 437, S. C.; Hutchinson v. Thomas, 2 Lev. 141; Jackson v. Gising, 2 Stra. 1169. [Two suits were brought on a promissory note payable to B. who, at the execution of such note, was the wife of A.; one of the suits was brought by A. in his individual capacity, the other by A. as the administrator of B. then deceased; process in both suits was served at the same time and returned to the same court, and the suits were pending therein contemporaneously. The defendant pleaded these matters in abatement of each suit; and it was held that the pleas were good, and the pendency of each suit was good ground of abatement of the

other. Beach v. Norton, 8 Conn. 71; Davis v. Dunklee, 9 N. H. 545. See Morton v. Webb, 7 Vt. 124.]

(t) Knight's case, 1 Salk. 329; 2 Ld. Raym. 1014, S. C.; Doct. Pla. 11; [Frogg v. Long, 3 Dana, 157; Parker v. Colcord, 2 N. H. 36; Commonwealth v. Churchill, 5 Mass. 174; but see Marston v. Lawrence, 1 John. 397; Averill v. Patterson, 10 How. Pr. 85; S. C. 10 N. Y. 500; Swart v. Borst, 17 How. Pr. 69; Clark v. Clark, 7 Rob. 276. It seems to be otherwise, where the first suit was so defective that the second was necessary to secure the demand. Durand v. Carrington, 1 Root, 355; Rogers v. Hoskins, 15 Geo. 270; Langham v. Thomason, 5 Texas, 127. It is not enough to avoid the plea, that the plaintiff, before commencing the second, gave the defendant notice that he discontinued the first suit. Gramsby v. Ray, 52 N. H. 513.]

(u) *Post*, vol. ii. 268.

plea with or without any and what certainty as to *time* or *place*; 6thly, The *conclusion*, with any and what prayer of judgment; 7thly, When any and what *affidavit of the truth* of the plea is *requisite*.

1st. *Title of court*. No statute or rule requires a plea in abatement to be intituled at the top or otherwise of any court; indeed it * would seem that unless there were several actions depending between the same parties in *different* courts at the same time, no ambiguity about the proper court can well arise.

1st. *Title of pleas in abatement as to the court.*

2dly. *As to the date*. Formerly all pleas, excepting those pleaded *puis darrein continuance*, pleaded at the sittings of nisi prius or at the assizes, must have been intituled in or as of a *term* when the court were supposed to be sitting; and as pleas to the *jurisdiction* of the court and in *abatement* ought then to be pleaded before a *general imparlance*, (*u*¹) and within four days *inclusive* after the delivery or filing and notice of the declaration, (*x*) all such pleas must have been intituled, and in general of the term in which the writ was returnable. But if the declaration were delivered or filed in vacation, or so late in the term that the defendant was not bound to plead to it of that term, the defendant might, within the first four days inclusive of the next term, plead to the *jurisdiction of the court*, or in abatement, (*y*) or a tender, (*z*) intituling, however, his plea of the preceding term; (*a*) or he might plead to the jurisdiction as of the second term, *general* with a *special imparlance*, which was we have seen with a saving of all advantages and exceptions whatsoever, (*b*) or he might plead in *abatement* in the second term with a *special imparlance*, which is as a saving of all exceptions to the writ, bill or count. (*c*) And where a bill was filed in the vacation against an attorney as of the preceding term, with a *special memorandum* showing that the bill was filed in vacation, and the defendant's plea in abatement was intituled of the following term without a special imparlance, it was held regular. (*d*) If a plea in abatement was improperly intituled of a subsequent term to the declaration, without the proper special imparlance, the plaintiff might either sign judgment, (*e*) or apply to the court by motion to set aside the plea, (*f*) or he might demur generally

2dly. *As to the date.*

(*u*¹) [*M'Carney v. M'Camp*, 1 Ash. 4.]

(*x*) *Ante*, 452; Tidd, 9th ed. 638, 639; Lloyd v. Williams, 2 M. & Sel. 484; *post*, 472.

(*y*) *Ib*.

(*z*) Reg. Gen. Hil. T. 2 W. 4, Reg. 45.

(*a*) *Ante*, 460; *Blackmore v. Flemyng*, 7 T. R. 447, note (*d*); Anonymous, 1 Salk. 367; Gilb. K. B. 344.

(*b*) *Ante*, 453; Com. Dig. Abatement, I.; 19; 2 Saund. 2 a, note (2). See the form, *post*, vol. ii. 268.

(*c*) *Ante*, 453; Bac. Abr. Abatement, C.; 2 Saund. 2 a, note (2); Com. Dig. Abate-

ment, 1, 20; [*Coates v. M'Camp*, 2 Browne, 176; *Purple v. Clark*, 5 Pick. 206.]

(*d*) *Holme v. Dalby*, 1 Chit. Rep. 704; 3 B. & Ald. 259, S. C.

(*e*) *Blackmore v. Flemyng*, 7 T. R. 447, note (*d*); 2 Saund. 2 b, note (2); [*M'Carney v. M'Camp*, 1 Ash. 4. A plea in abatement is too late after a general imparlance. *Witmer v. Schlatter*, 15 Serg. & R. 150; *Coffin v. Jones*, 5 Pick. 61; *Jennison v. Hapgood*, 2 Aiken, 31; *Chambers v. Haley*, Peck, 159; *Wyman v. Dorr*, 3 Greenl. 186; *Hinckley v. Smith*, 4 Watts, 433; *Chamberlain v. Hite*, 5 Watts, 173.]

(*f*) *Buddle v. Willson*, 6 T. R. 373.

to it, (*g*) or might allege the imparlance in his replication by way of estoppel; (*h*) but if the plaintiff replied to the plea, instead of demurring or alleging the estoppel, the fault was aided. (*i*)

According to the present practice all pleas in abatement must be pleaded *within four days*, exclusive of the first and inclusive of the *last, from the day of delivering the declaration, (*k*) but in some cases further time may be obtained, as in the instance of a non-joinder of a defendant, (*l*) or where two actions are depending for the same cause. (*m*)

As the pleading Reg. Gen. Hil. T. 4 W. 4, reg. 1, orders, "that every pleading shall be *intituled* of the day of the month and year when the same was pleaded, and shall bear *no other time* or date," and that rule applies to pleas in abatement as well as pleas in bar, it seems now to be settled that every plea in abatement should be intituled on the very day it is pleaded. (*n*)

3dly. *As to the names of the parties in the margin.* Although it is the constant practice in the *margin* of a plea in abatement to state the surnames of the parties, as thus, C. D. ats. A. B., yet no statute or rule expressly requires that form, and if omitted, the plea would no doubt be considered as pleaded in the *proper action*. When one of *several* defendants pleads separately, it is usual to state his Christian and surname in the margin as sued "*together with others*," and afterwards throughout the plea carefully to limit it to him distinct from the others.

4thly. *The commencement* should always expressly state whether the defendant appears and pleads in person or by attorney. Pleas to the jurisdiction must be pleaded *in person*, because the appointment of an attorney of the court admits its jurisdiction; (*o*) but pleas in abatement in general may be pleaded by

(*g*) Lloyd v. Williams, 2 M. & Sel. 484; Biddle v. Willson, 6 T. R. 369; Brewster v. Cassper, 1 Wils. 261; Onslow v. Smith, 2 B. & P. 384; 3 Inst. Cl. 40; 2 Saund. 2 b, note (2); [Adams v. Hodsdon, 33 Maine, 225.]

(*h*) 2 Saund. 2 b, note (2). See the form of estoppel. Barcelot v. Burton, 1 Lutw. 23; 1 Wentw. Index, 13; 3 Inst. Cl. 39; Clift. Ent. 18, pl. 46; 19, pl. 50; 20 pl. 53, 54.

(*i*) 2 Saund. 2 b, note (2); Dacres v. Duncomb, 1 Vent. 236.

(*k*) Reg. Gen. H. T. 2 W. 4; Ryland v. Wormald, 2 M. & W. 393.

(*l*) 3 Chit. Gen. Prac. by Lush, 592.

(*m*) Sowter v. Dunston, 1 Man. & Ryl. 508, 810.

(*n*) If the title be omitted or misstated, it is not ground even of special demurrer.

Neal v. Richardson, 2 Dowl. 89. [A plea speaks as of the time when it is pleaded; an averment in a plea is referred to the time of plea pleaded and not to the time when the suit was commenced. Perley C. J. in Parker v. McKean, 34 N. H. 377; Barker v. Remick, 43 N. H. 235. Pleas in abatement cannot be put in after pleas in bar, unless under special circumstances of which the court must judge. Riddle v. Stevens, 2 Serg. & R. 537; Palmer v. Everton, 2 Cowen, 417; Meggs v. Schoffer, Hardin, 65; Clapp v. Balch, 3 Greenl. 216; Stone v. Proctor, 2 Chip. 114; Ripley v. Warren, 2 Pick. 593; Burnham v. Webster, 5 Mass. 266; Wilson v. Oliver, 1 Stewart, 46; Davis v. Dickson, 2 Stewart, 370.]

(*o*) Ante, 444, 460; 2 Saund. 209 b; Summary Treat. on Pleading, 51; Tidd, 9th ed. 631.

attorney, because the jurisdiction of the court in the latter case is not disputed. (*p*) The principle to be extracted from the cases is stated to be, that a defendant cannot plead by attorney in those cases where the doing so would contradict the import of the warrant of attorney. (*q*) Coverture should be pleaded in person; (*r*) and where an infant pleads, it must be by guardian, and not by attorney or *prochein ami*; (*s*) and this, though he be sued in a representative character, as administrator, &c. (*t*) and an infant defendant may avail himself of the objection on writ of error, though the plaintiff could not. (*u*)

* The nature of *defence* has already been stated. (*s*) Pleas to the jurisdiction and in abatement must have been pleaded after *half*, but *before full* defence. (*a*) It was advisable to make ^{Of defence.} the former defence, though it seems questionable whether the plaintiff could demur for the omission, or object otherwise than by refusing to accept the plea. (*b*) But now the Reg. Gen. Hil. T. 4 W. 4, expressly orders that no *formal defence shall be required in a plea, and it shall commence as follows, "the said defendant by — his attorney (or 'in person, &c.')* says that, &c." And that rule seems to extend to every description of plea whether in *abatement* or in *bar*. (*b*¹)

5thly. *Of the body of the plea, and general requisites.* As pleas in abatement do not deny and yet tend to delay the trial of the merits of the action, great accuracy and precision are required in framing them. (*c*) They should be certain to every intent, (*d*) and be pleaded without any repugnancy. (*e*) They must in general, as before explained, (*f*) give the plaintiff a better writ, (*g*) and if it do not give a better writ but tend to show that the plaintiff can maintain no action at all, a plea pleaded

5thly. *Of the body of the plea; and general requisites.*

(*p*) *Ante*, 444, 460; 2 Saund. 209 *b*. A plea of an attorney's privilege may be pleaded by attorney. *Hunter v. Neck*, 3 M. & Gr. 181.

(*q*) Summary Treat. on Pleading, 50, &c.

(*r*) 2 Saund. 209 *b*.

(*s*) *Ante*, 443. See the precedents, *post*, vol. ii.

(*t*) *Hindmarsh v. Chandler*, 1 Moore, 250; 7 Taunt. 488, S. C.

(*u*) 2 Saund. 212, note (4); *Bird v. Orms*, Cro. Jac. 289; *Bird v. Pegg*, 5 B. & Ald. 418.

(*a*) *Ante*, 444.

(*b*) *Ante*, 444.

(*b*¹) *Ib.*; Com. Dig. Abatement, 1, 16; *Stevens v. Squire*, Skinn. 582.

(*c*¹) [See *Morton v. Sweetser*, 12 Allen, 187.]

(*c*) *Hixon v. Binns*, 3 T. R. 186; *Alexander v. Mawman*, Willes, 42; *Grant v. Lord Sondes*, 2 Bl. Rep. 1096; 2 Saund. 209 *a*, note (1); Com. Dig. Abatement, 1, 11;

[*Wadsworth v. Woodford*, 1 Day, 28; *Clark v. Warner*, 6 Conn. 355; *Haywood v. Chestney*, 13 Wend. 495; *Nixon v. Southwestern Ins. Co.* 47 Ill. 444; *Faby v. Brannagan*, 56 Maine, 42; *Clark v. Latham*, 25 Ark. 16. Pleas in bar and in abatement stand on the same footing in this respect in Alabama. *Hall v. Brazleton*, 46 Ala. 359. So, in Georgia. *Gill v. Mizell*, 43 Geo. 589.]

(*d*) As to this, see *ante*, 257. [The degree of certainty required in a plea in abatement is such as to exclude all such supposable matter, as would, if alleged on the opposite side, defeat a plea. Gould's Pl. c. 3, § 57; *Tweed v. Libbey*, 37 Maine, 49; *Adams v. Hodsdon*, 33 Maine, 225.]

(*e*) Co. Litt. 303; *Baker v. Gough*, Cro. Jac. 82; *Chetham v. Sleight*, 3 Lev. 67; *Hixon v. Binns*, 3 T. R. 186; *Alexander v. Mawman*, Willes, 42.

(*f*) *Ante*, 462.

(*g*) *Turtle v. Lady Worsley*, Tidd, 689; [Wilson v. Nevers, 20 Pick. 20.]

as in abatement is bad ; (*h*) and therefore a plea of misnomer in the Christian name, before the 3 & 4 W. 4, c. 42, s. 11 (abolishing pleas of misnomer), must have stated what was the real name, and also the defendant's surname, even though the latter had been already truly stated in the declaration. (*i*) For the same reason, a plea in abatement of the defendant's privilege to be sued as a peer should show how the defendant derived his title, and that he is a peer of the United Kingdom. (*k*) And a plea in abatement of the non-joinder as a defendant of a co-executor, must show that the latter became liable to be sued as *such*, as that he had administered, &c. (*l*) This rule, as regards all matters peculiarly in the knowledge of the defendant pleading, and which would tend to give a better writ, is obviously well founded on principle, but as applying to matter within the knowledge of the plaintiff ought not to be extended. Where the action is by an administrator, stating a grant of administration from a bishop of a peculiar diocese, a plea of *bona notabilia* * should be *in bar* and not in abatement, because it shows that the plaintiff, at least at present, has no right to sue *at all* in the character of administrator. (*m*)

Duplicity in a plea of this description is as objectionable as in a plea in bar ; thus the defendant cannot plead two outlawries or two excommunications in abatement, for one would be sufficient to abate the writ ; (*n*) though formerly misnomer of Christian and surname might have been pleaded in one plea as essential to give the plaintiff a better writ. (*o*) The court will not permit a defendant to plead at the same time in abatement and in bar to the *same* matter, as *non est factum*, and overture of the plaintiff since making the bond ; (*p*) but in an action against two defendants, each may plead distinct matter in abatement of the same suit, (*q*) or one may plead in abatement and the other in bar. (*r*)

As dilatory pleas rarely affect the merits of the suit, and object mere matter of form, they constitute an exception to the general principle of pleading, that a plea must either traverse or confess and avoid the alleged cause of action.

(*h*) *Evans v. Stevens*, 4 T. R. 227.

(*i*) *Haworth v. Spraggs*, 8 T. R. 515, 516 ; *Bac. Abr. Misnomer, F.* ; *Docker v. King*, 5 Taunt. 653.

(*k*) *The King v. Cooke*, 4 D. & R. 592 ; and see *Digby v. Lord Stirling*, 8 Bing. 55 ; *Cantwell v. Earl of Stirling*, 8 Bing. 174 ; *Digby v. Alexander*, 8 Bing. 416 ; *Coates v. Lord Hawarden*, 7 B. & C. 388 ; 1 M. & Ry. 110, S. C. ; and *Earl of Stirling v. Clayton*, 1 Cr. & M. 241.

(*l*) See *Swallow v. Emberson*, 1 Lev. 161 ; *Douglas v. Forrest*, 1 M. & P. 678.

(*m*) 1 Saund. 274, note (3). See *Stokes v. Bate*, 5 B. & C. 491.

(*n*) *Bac. Abr. Abatement, P.*

(*o*) *Ib. Misnomer, F.* ; *Read v. Mattem*, Rep. temp. Hardw. 286, 287.

(*p*) *Holt v. Mabblerley*, Rep. temp. Hardw. 135.

(*q*) *Com. Dig. Abatement, 1, 6. Abiter*, it seems, where husband and wife are defendants. *Ib. Pleader, 2 A. 3* ; *Walsh v. Bishop*, Cro. Jac. 239.

(*r*) *Com. Dig. Abatement, 1, 7.* [A defendant cannot plead in bar the same matter which he has previously pleaded in abatement and which has been overruled. *Coxe v. Higbee*, 5 Halst. 395.]

It was not necessary, even before Reg. Gen. Hil. T. 4 W. 4, reg. 8, in a plea in abatement to lay *any venue* in stating even material facts, because they were to be tried in the county laid in the declaration; (s) and if it were pleaded that another person who ought to have been sued with the defendant was alive, "to wit, in Spain," the place was surplusage, and the plea would be considered as pleaded without any venue. (t)

A writ is divisible and may be abated *in part* and remain good as to the residue; and therefore the defendant may plead in abatement to part, and demur or plead in bar to the residue of the writ. For the rule seems to be, that if the plaintiff in his action, brought either upon a general writ, such as debt, detinue, account, or the like, or on a certain and particular one, as assumpsit, trespass, case, &c. demand two or more things, and it appear from his own showing that he cannot have an action or better writ for one of them, the writ shall not abate in the whole, but stand for so much as is good; but if it appear upon his own showing that he has a cause of action for all the things demanded, but the writ is not proper for one of them, and *that he might have another for it in a different form, then the whole writ shall abate. (u) It is said to be a rule, that if the plaintiff himself acknowledge his writ false in the whole or in part, the *whole* writ shall abate. (x) But where the plaintiff declared in trespass for injuring a ship, and even showed in his declaration that he was only a part owner, it was held that as the non-joinder in tort is only a ground for a plea in abatement, the defendant could not in any other shape impugn the declaration, though the defect appeared on the face of it. (y) And *à fortiori* where the non-joinder of a party or other matter, even if pleaded in abatement, could not abate the writ, it cannot have that effect from the mere circumstance of its being disclosed in the declaration; and therefore the position in a book of high authority, (z) that "if in *trespass* against A. only, the plaintiff declare that the defendant, *together with* B., committed the trespass, the writ shall abate; for by his own showing he has falsified his writ," appears to have been very properly disputed. (a) Formerly it was the practice to plead in abatement, when upon the face of the plaintiff's declaration it appeared that a part of the plaintiff's cause of action was not well founded, but now it is most usual to demur to the whole declaration if there be a misjoinder, or if there be no misjoinder then only to the

Of pleading
in abate-
ment to
part, and in
bar to the
residue.

(s) Neale v. De Garay, 7 T. R. 243; 1 Saund. 8 a; Bac. Abr. Abatement, P.

(t) Ib.

(u) 2 Saund. 209 c, and 210, note (1). See Phillips v. Claggett, *infra*, note (c).

(x) 2 Saund. 210 c, note; 396, note (1).

(y) Addison v. Overend, 6 T. R. 766; 2 Saund. 396, note (1).

(z) 2 Saund. 210 c.

(a) 2 Saund. 210 c, note (k), 5th ed.

defective part. (b) Where the matter goes only to defeat a *part* of the plaintiff's cause of action, the plea in abatement should be confined to that part, and if the defendant were to plead to the whole his plea would be defective. (c) So where there were several defendants in an action of tort, and one of the defendants pleaded a misnomer, which then abated the action as to himself only, the plea was holden defective on general demurrer, if it concluded by praying judgment of the writ (or bill) generally, instead of praying judgment that it might be quashed as against himself only. (d) Where a declaration in debt contained two counts, and to the first the defendant pleaded *non est factum*, and to the second he pleaded in abatement the non-joinder of another person, and his plea commenced and concluded with praying judgment "of the said writ" * (not stating as it regarded the *second* count), "and of the said declaration as to the second count thereof," the court held the plea was good, and that they might abridge the petition of the plea by quashing the writ as well as the declaration, as to the matter in the second count. (e)

6thly. *Of the conclusion.* The general rule which prevails in pleading *in bar*, is, that a mere prayer of judgment, without pointing out *what* judgment, or the appropriate judgment, is sufficient; because the facts being shown, the court will of course pronounce the proper judgment. (f) Upon this principle it has been held that if a plea which contains matter *in bar* of an action conclude in *abatement*, it is a plea *in bar* notwithstanding the wrong conclusion, and final judgment should be given upon it, for if the plaintiff have no cause of action he can have no writ. (g) The same rule applies, if in a plea containing matter *in bar* there be a right prayer of judgment in the conclusion, although the commencement be improper. (h) On the other hand, the commencement and conclusion so far give the character of the

6thly. The conclusion of pleas in abatement as respects verification and prayer of judgment.

(b) See the cases, 2 Saund. 210, in notes; Kingdon v. Nottle, 1 M. & Sel. 355, 360; *ante*, 228.

(c) Herries v. Jamieson, 5 T. R. 557; Hill v. White, 6 Bing. N. C. 26; 8 Dowl. 13, S. C. In an action for work and labor against three defendants, they pleaded in abatement that the promises alleged in the declaration were made jointly with one M. A. G. It was found that there was no sum separately due from all the defendants jointly, but that one sum, far short of the amount claimed, was due from the defendants jointly with M. A. G., and it was held that the defendants were entitled to a verdict. Hill v. White, 8 Dowl. 63. Where a declaration contained counts in trover and also counts on a bailment, and the defendant pleaded in abatement to the whole, that the goods were the property of the plaintiff and other persons, it was held that the plea was not appli-

cable to the latter counts, and that the court could not quash the writ as to so much of the declaration as the plea answered; but that the plaintiff was entitled to judgment of *respondeat ouster* generally. Phillips v. Claggett, 2 Dowl. N. S. 258.

(d) Wade v. Stiff, 1 M. & P. 26.

(e) Powell v. Fullerton, 2 B. & P. 420; 2 Saund. 210 b, c, note, *sed quere*. See Worley v. Harrison, 1 Harr. & Woll. 426.

(f) Le Bret v. Papillon, 4 East, 502, 509; The King v. Shakespeare, 10 East, 87; 1 Saund. 97, note (1). See Hixon v. Binns, 3 T. R. 186; Attwood v. Davis, 1 B. & Ald. 172; Wade v. Stiff, 1 M. & P. 26; and Vivian v. Jenkin, 3 Ad. & El. 748.

(g) 2 Saund. 209 c, note; [Hargis v. Ayres, 8 Yerger, 467.]

(h) Talbot v. Hopwood, Fortesc. 335; Steph. 5th ed. 445.

plea, that if a plea commencing and concluding in abatement show matter in bar, it is to be considered a plea in abatement and not in bar; (i) and the converse to this, *viz.* a plea containing matter sufficient only to abate the writ, but with the beginning and conclusion of the plea in bar, has been decided the same way. (k) The anxiety of the courts to discourage dilatory pleas probably first induced them to depart, in construing *such* pleas, from the relaxed rule which applies to pleas in bar, in respect of the prayer of judgment; (l) and if a plea which contains matter in *abatement* conclude in *bar*, and be found against the defendant, it is a plea in bar, (n) and final judgment shall be given upon it, because by praying judgment if the plaintiff shall *maintain his action*, the defendant admits the *writ* to be good. (m) So a plea which *begins* in *bar*, though it contain matter in *abatement*, and *conclude* * in abatement, is nevertheless considered to be a plea in bar, and final judgment shall be given. (n)

Pleas to the jurisdiction, and of personal privilege to be sued in another court, usually *commence* without any prayer of judgment, and *conclude*, "and this he the plaintiff is ready to verify; wherefore he prays judgment if the said court of our said lady the queen here will or ought to take cognizance of the said plea," or "whether he ought to be compelled to answer;" (o) but sometimes these pleas commence also with a similar prayer. (p)

In pleading to the *person* of the plaintiff or defendant, in respect of *disability* to sue or be sued, and not merely on account of the non-joinder of another party, the plea should *conclude* with a prayer, "if the plaintiff ought to be answered," or "whether the defendant ought

(i) *Medina v. Stoughton*, 1 Ld. Raym. 593; 2 Saund. 209 c, note.

(k) *Godson v. Good*, 6 Taunt. 587; 2 Marsh. 299, S. C.; [*Shaw v. Dutcher*, 19 Wend. 222.] This was an action against an administratrix on a contract entered into by the intestate; the plea began and concluded in abatement; the substance of it *was in bar*, *viz.* that the intestate made the contract with others, against whom the action survived. The plaintiff took issue on this; and at the trial it appeared that the contract was in fact joint, but that others besides *those named in the plea* joined in it and were alive. If then the plea was to be considered as one in abatement, such proof was an answer to it, *because the plea failed to give the plaintiff a better writ*, and as the court held the plea to be a plea in abatement, the defendant failed in his defence.

(l) *The King v. Shakespeare*, 10 East, 87; *Attwood v. Davis*, 1 B. & Ald. 172.

(n) [*See Jenkins v. Pepoon*, 2 John. Cas. 312; *Schoonmaker v. Elmendorf*, 10 John. 49.]

(m) *Nowlan v. Geddes*, 1 East, 636; 2 Saund. 209 d; *Crosse v. Bilson*, 2 Ld. Raym. 1018, 1019; *Slaney v. Slaney*, 1 Ld. Raym.

694; *Godson v. Good*, 2 Marsh. 303; 6 Taunt. 587, S. C.

(n) 2 Saund. 209 c, note; Bac. Abr. Abatement; *Slaney v. Slaney*, 1 Ld. Raym. 694; *The King v. Shakespeare*, 10 East, 87, 88; [*M'Laughlin v. De Young*, 3 Gill & J. 4. But if a matter, which ought to be pleaded in abatement, be pleaded in the form of a bar, the plaintiff may treat it as a plea in abatement, by proceeding to judgment for want of a plea, if it be not properly verified. *Robinson v. Fisher*, 3 Caines, 99, 100. See, also, *Engle v. Nelson*, 1 Pennsylv. 442. And if there has been an order for the defendant to plead issuably, such plea is not a compliance with the order, and the plaintiff may treat it as a nullity. *Davis v. Grainger*, 3 John. 259. The plaintiff may demur to the plea either in bar or abatement. A plea in abatement cannot be amended. *Trinder v. Durant*, 5 Wend. 72.]

(o) 2 Saund. 209 d; Com. Dig. Abatement, I. 12; Bac. Abr. Abatement, P., *Chadland v. Thornley*, 12 East, 544; *ante*, 461.

(p) See the precedent, *Wilkes v. Williams*, 8 T. R. 631.

to be compelled to answer;" (q) and these pleas frequently begin with a similar prayer, as alien enemy, &c.; (r) and a plea of this description concluding merely to the writ would be bad; (s) but pleas in abatement of coverture of the plaintiff or defendant, as the objection goes rather to the non-joinder of the husband than to the disability of the feme, conclude with a prayer of judgment as to the writ. (t) If the defendant plead that the plaintiff is excommunicated, or any other *temporary* disability, the plea should conclude with praying that the suit may remain without day until, &c.; (u) and where the death of the plaintiff since the issuing of the writ is pleaded, it should conclude if the court will *further* proceed, &c. (x)

Where the defendant pleads in abatement to the *writ* for matter *apparent* on the face of it, it is said that he should begin as well as conclude his plea, by "*praying judgment of the writ, and that the same may be quashed.*" (y) But where the plea is for matter *dehors* as misnomer when that matter was pleadable, the plea should only conclude with that prayer. (z) The courts having now established a rule that oyer of the writ cannot be allowed, *a variance between the writ and count, or declaration, can be no longer pleaded*, (a) and many of the decisions in the books as to the form of the plea are no longer applicable; and now in general a plea in abatement of the writ must *be pleaded of the writ *and declaration*, when the latter *continues* and discloses the *objection* to the writ, and it must be so where it is intended to plead in abatement only of *part* of the writ, and the cause of abatement arises only on *one* of the counts in the declaration. (b) If the action were by *bill*, the plea must have concluded by praying judgment of the bill, and not of the declaration only, which was only a conclusion in bar; (c) and it should not have concluded by praying judgment of the "*bill and declaration*," (d) and if a plea in abatement to the *writ* were to conclude, "*if the defendant ought to answer to the said bill*," it would be insufficient. (e)

(q) 2 Saund. 9, note (10); 209 d; Cadman v. Grendon, Latch, 178; Lil. Ent. 1.

(r) Lil. Ent. 1; Powis v. Williams, Lutw. 1601; Rast. Ent. 11.

(s) Com. Dig. Abatement, I. 12.

(t) Post, vol. ii.; Lil. Ent. 1, 123; Rast. Ent. 9; 3 Inst. Cl. 70; 1 Wentw. 47.

(u) Lady Faulkland v. Stanion, 12 Mod. 400; Lord Sturton v. Pierpont, 3 Lev. 208; Bradley v. Glynn, Lutw. 19; Curwen v. Fletcher, 1 Stra. 521; 3 Inst. Cl. 18; 2 Saund. 209 e, note. See The King v. Shakespeare, 10 East, 86.

(x) Com. Dig. Abatement, I. 12; Hallows v. Lucy, 3 Lev. 120; Le Bret v. Papillon, 4 East, 502; 2 Saund. 209 e, note.

(y) 2 Saund. 209 a, d, note (1); Com. Dig. Abatement, I. 12; Walford v. Savil, Lutw. 11; [Baker v. Brown, 18 N. H. 551.]

(z) Ib.; The King v. Shakespeare, 10 East, 87.

(a) Ante, 466.

(b) 2 Saund. 210 b, c, note. See Hill v. White, 6 Bing. N. C. 26; and ante, 475, note (c).

(c) 2 Saund. 209 d; Attwood v. Davis, 1 B. & Ald. 172; Lloyd v. Williams, 2 M. & Sel. 484; Moffatt v. Van Mullingen, 2 Chitty's Rep. 539.

(d) Ib.; Lee v. Barnes, 5 Mod. 144; Mainwaring v. Newman, 2 B. & P. 124, note (e); Hixon v. Binns, 3 T. R. 185. See, however, Com. Dig. Abatement, I. 12.

(e) See preceding note; 2 Saund. 209 d; 3 Bl. Com. 303; The King v. Shakespeare, 10 East, 87; [Harwood v. Chestney, 13 Wend. 495; Hsley v. Stubbs, 5 Mass. 280.]

Great accuracy is necessary in the form of all pleas in abatement as well in the *commencement* as in the *conclusion*, for it is said, "*they make the plea.*" (*f*) A plea which concluded with praying judgment "if" (instead of "of,") the plaintiff's bill was held bad on demurrer, though the words, "and that the same may be quashed," were also added. (*g*) So in the traverse at the end of the plea, a misstatement of the name by which the defendant was called in the declaration was considered fatal on demurrer. (*h*) The mode of concluding the plea when pleaded to *part* only of the action, has been already observed upon. (*i*) Upon a plea in abatement of pendency of another action in another court for the same cause, *concluding* with a *prout patet per recordum*, it is sufficient to satisfy the plea if writ be produced. (*k*)

7thly. *As to the affidavit.* At common law, when the defendant pleaded a *foreign* plea, (the nature of which has already been stated,) (*l*) he was obliged to make oath of the truth of the matter therein alleged, but that was not necessary in the case of a plea to the *jurisdiction*, or any plea in *abatement*. (*m*) But by 4 & 5 Anne, c. 16, s. 11, "*no dilatory* plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the court, (*n*) to induce them to believe that the fact of such dilatory plea is true." (*n*¹) This statute extends to *criminal as well as civil cases; (*o*) and not only to pleas in abatement, but to *all dilatory* pleas, which, if found untrue, would not determine the action, and are only in delay of it, as aid prayer in a real action; (*p*) or a plea in *scire facias* against terretenants, that there is another terre-tenant not named; though these pleas are not strictly in abatement. (*q*) But such pleas in bar as are usually termed sham pleas, are not dilatory pleas within the meaning of this statute. The statute extends only to such matters as are *dehors* the record, and not to such matters as would appear to the court on inspection of their own proceedings, (*r*) as the want of addition in

(*f*) *Cadman v. Greendon*, Latch, 178; 2 Saund. 209 *c, d*; *Crosse v. Bilson*, 2 Ld. Raym. 1019; *The King v. Shakespeare*, 10 East, 87. But see the entries referred to in *Hixon v. Binns*, 3 T. R. 186.

(*g*) *Hixon v. Binns*, 3 T. R. 185; and see 2 Saund. 209 *a*; *Haworth v. Spraggs*, 8 T. R. 515; *Docker v. King*, 5 Taunt. 652, 653.

(*h*) *Holme v. Dalby*, 1 Chit. Rep. 705, note. [See *Nixon v. Southwestern Ins. Co.* 47 Ill. 444.]

(*i*) *Ante*, 474, 475.

(*k*) *Kirby v. Siggers*, 2 Dowl. 659; [*Commonwealth v. Churchill*, 5 Mass. 174; *Clifford v. Cony*, 1 Mass. 495.]

(*l*) *Ante*, 458; 1 Saund. 98, note (1).

(*m*) 1 Saund. 98, note (1); *Cholmondely v. Broom*, Carth. 402; 5 Mod. 435, S. C.;

Anon. Sty. 435; [*Smith v. Atlantic Mut. Fire Ins. Co.* 22 N. H. 21. See *Robinson v. Fisher*, 3 Caines, 99.]

(*n*) In case of a plea of bankruptcy *puis darrein continuance*, see *Sharp v. Witham*, 1 M'Clel. & Y. 350. A plea in abatement to an action of debt, of the defendant's coveture, is a dilatory plea within the statute. *Lovell v. Walker*, 9 M. & W. 299.

(*n*¹) [*Trenton Bank v. Wallace*, 4 Halst. 83; *Bass v. Stevens*, 17 Geo. 573; *Knoefel v. Williams*, 30 Ind. 1; *Whittenburg v. Newton*, 31 Texas, 474.]

(*o*) *Rex v. Grainger*, 3 Burr. 1617.

(*p*) 2 Saund. 210.

(*q*) 2 Saund. 210 *d, e*.

(*r*) *Gray v. Sidneff*, 3 B. & P. 397; *Pr Reg.* 5; *Hughes v. Alvarez*, 2 Ld. Raym. 1409; *Pearce v. Davy*, Say. Rep. 293.

an original writ, when that matter was pleadable in abatement; (s) or privilege as an attorney of the *same court* to be sued by bill; (t) because in the first instance the defect in the writ was apparent on the face of it; and in the latter, the court, by examination of their own record, might ascertain the truth of the plea; but where the defendant pleaded after *oyer* of the original that it was not returned, the court set aside the plea for want of an affidavit. (u) And where to an action in C. P. the defendant pleaded his privilege as an attorney of K. B. to be sued *there* without making an affidavit of the truth, it was held that the plaintiff might sign judgment, because the court of C. P. could not by examination of their own records know that the defendant was an attorney of another court. (x)

The *affidavit* required by 4 & 5 Anne, c. 16, s. 11, may be made by the defendant or a *third person*; (y) and although formerly supposed otherwise, (z) it has been held that it must be sworn after the declaration is delivered, and that if it be sworn *before* the declaration was delivered the plaintiff may treat the plea as a nullity and sign judgment. (a) It must be properly and exactly intitled in the cause, (b) and be positive (b¹) as to the truth of every fact contained in the plea, and should leave nothing to be collected by inference; (c) it should be stated that the plea is true "in substance and fact," and not merely that the plea is a true plea; (d) and if there be no affidavit, or it be defective in any particular, the plaintiff may treat the * plea as a nullity and sign judgment, (e) or move the court to set it aside. (f)

Where *misnomer* either of the plaintiff or defendant was *truly*

(s) *Hughes v. Alvarez*, 2 Ld. Raym. 1409; *Prac. Reg.* 5.

(t) *Claridge, gent. one, &c. ats. Macdougall*, Trinity Term, 47 Geo. 3, K. B.; 3 B. & P. 397. But see *Stiles v. Mead*, 2 Stra. 738; and *Com. Dig. Abatement*, D. 6. If the plea be untrue, or the defendant has ceased to be an attorney, the plea may be set aside. *Prac. Reg.* 8.

(u) *Sherman v. Alvarez*, 1 Stra. 639; *Hughes v. Alvarez*, 2 Ld. Raym. 1409.

(x) *Davidson v. Chilman*, 1 Bing. N. C. 297.

(y) *Lumley v. Foster*, Barnes, 344; *Pr. Reg.* 6.

(z) *Lang v. Comber*, 4 East, 348; *Baskett v. Barnard*, 4 M. & Sel. 332; *Hopkinson v. Henry*, 13 East, 170.

(a) *Bower v. Kemp*, 1 Cr. & J. 287.

(b) *Bac. Abr. Abatement*, O.; *Rex v. Jones*, 2 Stra. 1161; *Clixby v. Dinas*, Barnes, 348.

(b¹) [*Day v. Hamburgh*, 1 Browne, 77.]

(c) *Pearce v. Davy*, Say. Rep. 293.

(d) *Onslow v. Booth*, 1 Stra. 705.

(e) 2 Saund. 210 d; *Jennings v. Webb*, 1 T. R. 277; *Brandon v. Payne*, 1 T. R. 689; *Harbord v. Perigal*, 5 T. R. 210; *Hutchinson v. Brown*, 7 T. R. 298; *Bray v. Haller*, 2 Moore, 213; *Lovell v. Walker*, 9 M. & W. 299; [*Richmond v. Talmadge*, 16 John. 307; *Robinson v. Fisher*, 3 Caines, 99; *Young v. Stringer*, 5 Hayw. 32; *Rapp v. Elliott*, 2 Dall. 184; *Marston v. Lawrence*, 1 John. Cas. 397.] The plaintiff cannot sign judgment after a plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. *Horsefall v. Mathewman*, 3 M. & Sel. 154.

(f) *Pocklington v. Peck*, 1 Stra. 638; *Cunningham v. Johnson*, Say. Rep. 19; *Pearce v. Davy*, Say. Rep. 293; *Rex v. Grainger*, 3 Burr. 1617; *Tidd*, 9th ed. 640; *sed quare*, see *Bray v. Haller*, 2 Moore, 213; *The King v. Cooke*, 2 B. & C. 618; [*Smith v. Atlantic Mut. Fire Ins. Co.* 22 N. H. 21, 25.]

pleaded, the plaintiff might in general *amend* his declaration on payment of costs, or without subjecting himself to the payment of the defendant's costs he might enter a *cassetur villa* or *breve*. (g) But where the *non-joinder* of one of several co-contractors was pleaded, the plaintiff could not nor can amend, but must enter a *cassetur*, and commence a fresh action, in order that the other parties may in due course be brought by fresh process into court. And when the plea is true, and the plaintiff is not at liberty to amend, he should enter his *cassetur* before he commence a fresh action, for otherwise the defendant may plead in abatement the pendency of the first action. (h) If the plea be untrue in fact, the plaintiff should *reply*; or if it be insufficient in point of law, he may *demur* and in some cases *sign judgment* as for want of a plea; (i) though if the plea were merely defective in form, the plaintiff should demur. (k) And where the defendant had appeared in the name by which he was sued, such appearance might have been replied by way of an *estoppel*. (l) When the plea consists of matter of fact, which the plaintiff denies, the replication may begin without any allegation that the writ ought not to be quashed. (m) It must not commence as to a plea in bar, (n) because that would be a discontinuance, but should conclude to the country; and which was proper where to a plea of misnomer the plaintiff replied that the defendant was known as well by the one name as the other. (o) There are, however, precedents in which the * plaintiff concluded with a formal traverse and verification. (p) It was laid down by Lord Holt, that if the plaintiff took issue upon a plea in abatement, he ought to pray damages, because if it were found against the defendant, the jury must assess the plaintiff's damages, and final judgment was to be given; but that where the plaintiff confessed the defendant's plea, and avoided it by other new matter, he should not pray damages, but must maintain his writ. (q) If a replication to a plea in abatement of the *writ* begin "that the said dec-

REPLICATION
AND OTHER
PROCEEDINGS
ON A PLEA IN
ABATEMENT
IN GENERAL.

(g) *Owens v. Dubois*, 7 T. R. 698; *Gardner v. Walker*, 3 Anstr. 935; *Mayor &c. of Stafford v. Bolton*, 1 B. & P. 40. It was the practice not to permit such amendment if the defendant had previously made a tender.

(h) *Bac. Abr. Abatement, M.*

(i) *Gray v. Sidneff*, 3 B. & P. 395; *The King v. Cooke*, 2 B. & C. 618; 4 D. & R. 114, S. C. If plea be no plea at all, party may move to quash it.

(k) *Hixon v. Binns*, 3 T. R. 185; *Earl of Stirling v. Clayton*, 1 Cr. & M. 242; 3 Tyr. 157. The plaintiff cannot move to quash it. *The King v. Cooke*, 4 D. & R. 114; 2 B. & C. 618, S. C.

(l) *Meredith v. Hodges*, 2 New Rep. 453.

(m) *Sabine v. Johnstone*, 1 B. & P. 61.

(n) *Carter v. Davis*, Carth. 187; *Com. Dig. Abatement, I. 15*; *Sabine v. Johnstone*, 1 B. & P. 61. *Aliter*, if the plea commence

or conclude improperly in bar. *Bac. Abr. Abatement, 8*; *Com. Dig. Abatement, I. 15*.

(o) *Sabine v. Johnstone*, 1 B. & P. 60; *Bowen v. Shapecott*, 1 East, 542; *Eichorn v. Le Maitre*, 2 Wils. 367. Where the plaintiff declared as Earl of Stirling, and the defendant pleaded in abatement, that the plaintiff was not Earl of Stirling, it was held that the plaintiff in his replication was bound to show *how* he claimed the dignity. *Earl of Stirling v. Clayton*, 1 Cr. & M. 24; 3 Tyr. 157, S. C.

(p) *Lil. Ent. 1, 2*; *Co. Ent. 160*.

(q) *Bonner v. Hall*, 1 *Ld. Raym.* 338; *Medina v. Stoughton*, 1 *Ld. Raym.* 594; *Crosse v. Bilson*, 2 *Ld. Raym.* 1022; 2 *Saund.* 211, note (3); *Bac. Abr. Abatement, P.*; *Com. Dig. Abatement, I. 12*; *post*, see the precedents, 1 *Wentw. Index*.

laration" ought not to be quashed, but conclude properly, it is sufficient; for such words may be rejected as surplusage; and it is not necessary in the *beginning* of the replication to say that the writ ought not to be quashed; for in favor of the plaintiff the court would give judgment according to the fact, without reference to the prayer of the judgment. (r) If an *issue in fact* be joined upon the replication, and found for the plaintiff, the jury should assess the damages, and the judgment is peremptory for the delay, *quod recuperet*, and not *quod respondeat*; (s) and the same rule prevails in indictments for misdemeanors, though in cases of felony in *favorem vitæ* it is otherwise. (t)

If the plaintiff *demur* (u) it is *not necessary to assign any special causes*, (u¹) for it has been decided on the statute of Elizabeth, (the language of which is similar to that of the statute 4 Anne, c. 16,) that the statute only applies to pleas *in bar*; (v) however it may be most advisable to demur specially where the plea is merely informal. (w) Where the plea demurred to properly commences and concludes as in abatement, but is insufficient in some other respects, the demurrer should pray judgment that the writ may be adjudged good, and that the defendant may answer further thereto, or merely with the latter words, and should not conclude with a prayer of damages; for the plaintiff ought not to conclude in bar, but only affirm his writ. (x) So, where the plaintiff *replies* to a plea in abatement, and the defendant demurs to the replication, the plaintiff should not conclude his joinder in demurrer with a prayer of judgment of his debt or damages, but should merely *pray that the defendant may answer over*. (y) And where the plaintiff demurred to a plea in abatement, as in bar, praying * judgment and damages, and the defendant joined as in bar, it was held to be a discontinuance, because the demurrer in bar was no answer to the plea in abatement, and a discontinuance of part is a discontinuance of the whole; (z) the plaintiff, however, may amend, and the mistake would be aided by a verdict. (a) But where the plea in abatement improperly commences or concludes as a plea in bar, the plaintiff may demur either in bar or abatement; (a¹) and if he adopt the former, which is most advisable,

(r) *Sabine v. Johnstone*, 1 B. & P. 60.

(s) *Bowen v. Shapcott*, 1 East, 544; *Eichorn v. Le Maitre*, 2 Wils. 368; *Com. Dig. Abatement*, I. 14, 15; 2 Saund. 211, note (3); [*McCarter v. Chambers*, 6 Wend. 549. See *Marston v. Lawrence*, 1 John. Cas. 397.]

(t) *The King v. Gibson*, 8 East, 107; *The King v. Taylor*, 3 B. & C. 513-515; 5 D. & R. 433, S. C.

(u) See the precedents referred to in 2 Saund. 210 e, note (2); *post*, vol. ii. 25, 26, and joinder thereto. *Ib.*

(u¹) [*Hoppin v. Jenckes*, 9 R. I. 102.]

(v) *Lloyd v. Williams*, 2 M. & Sel. 484, 485; *Walden v. Holdman*, 2 Ld. Raym.

1015; and see *Bonner v. Hall*, 1 Ld. Raym. 337; *Thomas v. Lloyd*, 1 Salk. 194; *Tidd*, 9th ed. 638. See *Reg. Gen. Hil. Term*, 4 W. 4, reg. 2, as to the causes of demurrer being stated in the margin, &c.; *post*, Appendix.

(w) *Hixon v. Binns*, 3 T. R. 186.

(x) 2 Saund. 210 e, note.

(y) *Ib.*; Anonymous, 1 Wils. 302.

(z) *Carter v. Davis*, 1 Show. 255; 1 Salk. 218, S. C.; *Bowen v. Shapcott*, 1 East, 542; 2 Saund. 210 e, f, note.

(a) Anonymous, 1 Wils. 302; *Carter v. Davies*, 1 Salk. 218.

(a¹) [*Roberts v. Stewart*, 1 Yerger, 390.]

he may conclude his demurrer as in bar, and with a prayer of damages, and the judgment will be final. (b) On the argument of a demurrer to a plea in abatement, or to a replication thereto, *the defendant cannot* (as usual on argument after a plea in bar) take any objection to the declaration, for nothing but the writ is then in question, (c) unless where matter has been pleaded in abatement which might also be pleaded in bar, (d) and the court will not in general give leave to amend a plea in abatement. (e) But a plaintiff has been allowed to withdraw his demurrer to a plea in abatement and to reply. (f)

If the plaintiff succeed on an issue in fact, the judgment, as before observed, (g) is final; (g¹) but if he succeed on demurrer to a plea in abatement, or to a replication thereto, the judgment is in general only interlocutory, *quod respondeat ouster*. (h)

Judgment
on plea in
abatement.

Where, however, a plea containing matter which can only be pleaded in abatement, improperly commences or concludes in bar, the judgment on demurrer may be final; (i) and the same rule prevails where matter in abatement is pleaded after the last continuance, (k) or since Reg. Gen. Hil. T. 4 W. 4, since the last pleading. After judgment of *respondeat ouster* no other plea in abatement in the same degree (l) will be allowed. (m) The judgment for the defendant on a plea in abatement, whether it be on an issue in fact or in law, is, that "the writ be quashed;" (n) or "if a temporary disability or privilege be pleaded, that 'the plaint remain without day, until, &c.'" (o)

(b) Bac. Abr. Abatement, P.; Com. Dig. Abatement, I. 15. See post, as to the present form of demurrer.

(c) *Hastrop v. Hastings*, Salk. 212; *Belasyse v. Hester*, Lutw. 1592; *Rich v. Pilkington*, Carth. 172; *Bullythorpe v. Turner*, Willes, 478; Bac. Abr. Abatement, P.; Com. Dig. Abatement, I. 14; 1 Saund. 285, note (e), 5th ed.

(d) *Powis v. Williams*, Lutw. 1604; Com. Dig. Abatement, I. 14; *Dundalk Western Railway Company v. Tapster*, 1 G. & D. 657; 1 Q. B. Rep. 667, S. C.

(e) *Cas. Pr. C. P.* 29; Tidd, 9th ed. 638; *The King v. Cooke*, 2 B. & C. 871; [*Trinder v. Durant*, 5 Wend. 72. Under the practice act of Massachusetts "the defendant may have leave to amend an answer in abatement, or to answer over by special order of the court, for good cause shown, and not otherwise." Genl. Sta. c. 129, § 40.]

(f) *Atkinson v. —*, 2 Chitty's Rep. 5.

(g) *Ante*, 481; Tidd, 9th ed. 641.

(g¹) [*Hollingsworth v. Duane*, Wallace, 57; *Moore v. Morton*, 1 Bibb, 234; *M'Cartee v. Chambers*, 6 Wend. 649; *Dodge v. Moore*, 3 N. H. 232; *Jewett v. Davis*, 6 N. H. 518; *Mehaffy v. Share*, 2 Pennsylv. 361.]

(h) 2 Saund. 211, note (3); Com. Dig. Abatement, I. 14; *Bowen v. Shapcott*, 1 East, 144; *Eichorn v. Le Maitre*, 2 Wils. 367. See the forms, Tidd's Appendix, 4th ed. 263; 10 Went. 61; Tidd, 9th ed. 641; *sed vide The King v. Taylor*, 3 B. & C. 502; 5 D. & R. 422, S. C.; [*Trow v. Messer*, 32 N. H. 361; *Fitch v. Lothrop*, 1 Root, 192; *Baker v. Fales*, 16 Mass. 147, 157; *Lambert v. Lagow*, 1 Blackf. 388; *Gibson v. Laughlin*, Minor, 182.]

(i) *Nowlan v. Geddes*, 1 East, 636; *Wallis v. Savil*, Lutw. 41; Com. Dig. Abatement, I. 15; Bac. Abr. Abatement, P. As to the prayer of judgment in general, see *The King v. Shakespeare*, 10 East, 87; *ante*, 476; [*Leather v. Meglasson*, 2 Monroe, 63.]

(k) Com. Dig. Abatement, I. 15.

(l) See Tidd, 9th ed. 641; Com. Dig. Abatement, I. 3; *ante*, 457.

(m) Bac. Abr. Abatement, O.; Com. Dig. Abatement, I. 4; 2 Saund. 40, 41.

(n) Bac. Abr. Abatement, P.; Gilb. C. P. 52; *Mestaer v. Hertz*, 3 M. & Sel. 453. See the precedents, 10 Wentw. Index, 61.

(o) *Bradley v. Glynne*, Lutw. 19; Clift. Ent. 3; 2 Saund. 209 e; Tidd, 9th ed. 642.

If the plaintiff succeed on *demurrer* to a plea in abatement, and the judgment be interlocutory, *respondeat ouster*, there is no judgment for *costs*, because the statute of *Gloucester* only gives costs where *damages* are recovered; (*p*) but when the defendant's plea is on *issue* found to be untrue, the judgment is final, and the plaintiff will recover costs. (*q*) If the plaintiff enter a *cassetur billa* or *breve*, he is not liable to costs. (*r*) On an issue found for the defendant he is entitled to costs, but not if he succeed on demurrer; (*s*) nor is he entitled to the costs of a judgment of *non pros.* obtained by reason of the plaintiff having omitted to enter the issue on record, after issue joined on a demurrer to a plea in abatement. (*t*)

Costs on
pleas in
abatement.

OF PLEAS OF NON-JOINDER IN PARTICULAR.

Before the 3 & 4 W. 4, c. 42, s. 8, 9, 10, pleas in abatement of the non-joinder, although in some cases just, in order to compel a plaintiff to sue all persons liable to pay jointly, so as to make them liable on the record to pay their proportions of the debt or damages to be recovered, had become the source of vexatious delay, especially as each omitted party might in a second action plead in abatement that still another party who ought to be joined had been omitted, and so on; (*u*) and if an omitted partner were abroad, or not to be found, a plaintiff could not declare against those forthcoming until he had *first* outlawed the absent party, and the delay as well as difficulties in proceeding to outlawry not unfrequently rendered that proceeding abortive. To put an end to these grievances, the 3 & 4 W. 4, c. 42, s. 8, enacted, "that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

S. 9. "That to any plea in abatement in any court of law of the * non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

S. 10. "That in all cases in which after such plea in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in

(*p*) *Garland v. Extend*, 2 Ld. Raym. 992; 1 Salk. 194, S. C.; Tidd, 9th ed. 642; and Appendix. But now by the law amendment act, 3 & 4 W. 4, c. 42, s. 34, where judgment is given either for or against the plaintiff or defendant, on any demurrers, the party in whose favor such judgment is given is entitled to costs.

(*q*) *Ib.*; *Bowen v. Shapcott*, 1 East, 544; *Eichorn v. Le Maire*, 2 Wils. 368.

(*r*) *Ib.*; Tidd, 9th ed. 683; *Hullock*, 145.

(*s*) *Thomee v. Lloyd*, 1 Ld. Raym. 337; *Garland v. Extend*, 2 Ld. Raym. 992; 1 Salk. 194, S. C.; *Hullock*, 145; Tidd, 9th ed. 642.

(*t*) *Michlam v. Bate*, 8 B. & C. 642; 3 M. & R. 91, S. C. [See *Condit v. Neighbor*, 7 Halst. 320.]

(*u*) See *Govett v. Radnidge*, 3 East, 62.

the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement are not liable, as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

Since this enactment a plea in abatement of *non-joinder* of a co-defendant must state not only that the omitted party is *still living*, but that *he is* resident within the jurisdiction of the court, and the affidavit of its truth must state the place of residence with *convenient certainty*, and thus the plea and affidavit, according to the true principle of a plea in abatement, point out to the plaintiff an effectual better writ, and also enable the plaintiff in his second action, commenced in consequence of such plea, effectually to proceed against such defendants as he shall on the trial prove to have been liable. (^u) The forms of the thus regulated plea of non-joinder and of the peculiar affidavit to be now annexed will be found in the second volume.

The ninth section we have above seen enables the plaintiff to reply to such plea the bankruptcy and certificate of the omitted party, or his discharge under an insolvent act.

The Reg. Gen. Hil. T. 4 W. 4, reg. 20, gives the form of commencing a *declaration* in a second action after a plea of non-joinder in abatement, and which form will be found in the second volume. The above sections it will be observed in terms only apply to pleas in abatement of *non-joinder*, and it would seem that a plea by a feme defendant of her *coverture* and non-joinder of her husband, though it prays an abatement of the present writ on account of such non-joinder, is not affected by the statute either as to the *allegation* or affidavit of residence of the omitted party, although such plea of

(^u) [In an answer alleging a defect of parties, the defendant must state precisely and truly who were the parties, and an error wholly vitiates the answer. To sustain the answer, it must appear that there is nei-

ther a greater nor less number of parties than is set up in the answer. Weigand v. Sickel, 4 Abb. App. Dec. 592, 594; Hawks v. Munger, 2 Hill, 300.]

*coverture seems to be equally within the mischief intended to be prevented.

The statute of limitations, 9 G. 4, c. 14, s. 2, enacts, "that if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or that act (*i. e.* the want of a written promise by the omitted party), or either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same." So that where several parties have originally jointly contracted, but the statute of limitations has barred the remedy against some of them, but the other has signed a written promise or acknowledgment within six years, the action may be properly brought against him only; and if he plead the non-joinder of the other parties so discharged from liability, the plaintiff may safely take issue on the plea, on the ground that the action was properly brought only against the single party *continuing* liable.

OF PLEAS IN BAR.

PLEAS in *bar* go to the *merits* of the case, and deny that the plaintiff has *any* cause of action, (a) and do not like pleas in abatement, give a better writ. (b) They either conclude the plaintiff by matter of *estoppel* (which however rarely occurs in a plea (c)), or they show that the plaintiff *never had* any cause of action; or admitting that he once had, insist that it has been determined by *some subsequent matter*. They are also either to the whole or to a part of the declaration; and where there is only a defence to a part it is advisable, on account of costs, to confine the plea to that part. (d)

We have seen that pleading is in general a mere statement of *facts*, (e) and pleas in bar state the various *defences* of which under the circumstances of each particular case, the defendant is at liberty to avail himself in a court of *law*. Matter of defence in *equity only*, (f) or founded solely on *the rules or practice* even of a court of law, or being mere irregularity, is not in general pleadable; (g) thus bail cannot plead that the principal is a bankrupt, and that he has obtained his certificate; (h) for although the court might on *summary application* relieve the bail, yet the matter of defence constitutes no *pleadable bar*; and *bail* to the sheriff cannot *plead* the giving of time to their principal as a defence to an action on bail bond. (i) But where the matter of defence depends not merely upon the *established practice* of the court, but also upon a *general rule of*

OF PLEAS IN BAR.

What facts can or not be pleaded in bar.

(a) See the definition, Co. Litt. 303 b; Heath's Maxims, and 6 Co. 7; Steph. 5th ed. 57.

(b) *Ante*, 462.

(c) Bac. Abr. Pleas, I. 11; 5 Hen. 7, c. 14; Zouch & Bamfield's case, 1 Leon. 77. As pleading matter of estoppel more frequently occurs in replications and subsequent proceedings, the points relating to it will be hereafter considered. It should be relied upon and specially pleaded as such. Vooght v. Winch, 2 B. & Ald. 662; Hooper v. Hooper, M'Clel. & Y. 509.

(d) Postan v. Stanway, 5 East, 261; Stead v. Gamble, 7 East, 325. See pleas which were held bad, as they might have been pleaded in abatement, or the proceedings might have been set aside for irregularity. Warmaley v. Macey, 5 Moore, 168.

(e) *Ante*, 235.

(f) Scholey v. Mearns, 7 East, 153;

Braddick v. Thompson, 8 East, 344; O'Kelly v. Sparkes, 10 East, 377. Misconduct of arbitrators not pleadable. Braddick v. Thompson, 8 East, 344; Riddell v. Sutton, 2 M. & P. 345; 5 Bing. 200, S. C. See Rex v. Peto, 1 Y. & J. 37.

(g) Sampson v. Brown, 2 East, 442; Scholey v. Mearns, 7 East, 153; Hayward v. Ribbans, 4 East, 311; Wright v. Walmsley, 2 Campb. 396; Dudlow v. Watchorn, 16 East, 39; Elliott v. Lane, 1 Wils. 334; Sandon v. Proctor, 1 D. & R. 50; 7 B. & C. 800; [Nichols v. Nichols, 9 Wend. 264; Thompson J. in Sprigg v. Bank of Mount Pleasant, 10 Peters, 257, 266; 17 Wend. 62.]

(h) Donnelly v. Dunn, 2 B. & P. 45; Scholey v. Mearns, 7 East, 153, 154.

(i) Bulteel v. Jarrold, 8 Price, 467; Heath v. Key, 1 Y. & J. 437; and see Davey v. Prendergrass, 5 B. & Ald. 187.

law, as that bail above shall not be proceeded against until a *capias ad satisfaciendum* has been issued against the principal, such matter is pleadable. (k) It would be in vain to attempt to state all the various *defences in personal actions; those which most usually occur in practice are given in their natural order, in the following analytical table in the action of *assumpsit*; (l) and the mode in which they should be taken advantage of are afterwards more fully stated, and precedents of the appropriate pleas are collected in the second volume.

(k) *Dudlow v. Watchorn*, 16 East, 39; but see *Sandon v. Proctor*, 7 B. & C. 800.

(l) See, also, *Com. Dig. Pleader*, as to the different defences and pleas in each particular action.

* ANALYTICAL TABLE

OF THE

Defences to Actions on Contracts not under Seal.

- 1st. Deny that there ever was cause of action.
 - 1st. Deny that a sufficient contract was ever made.
 - 1st. That no contract was in fact made.
 - 2dly. Incompetency of plaintiff to be contracted with.
 - Plaintiff an alien enemy at time of contract.
 - 3dly. Defendant incapable to contract.
 - 1st. Infancy.
 - 2dly. Lunacy, drunkenness, &c.
 - 3dly. Coverture.
 - 4thly. Duress.
 - 4thly. Insufficiency of consideration.
 - 1st. Inadequacy of consideration.
 - 2d. Illegality of consideration.
 - 1st. At common law.
 - 2d. By different statutes.
 - 5thly. Contract obtained by *fraud*.
 - 6thly. The act to be done illegal or impossible.
 - 7thly. The form of contract insufficient.
 - 1st. At common law.
 - 2d. By statute.
 - 2dly. Admit a sufficient contract, but show that *before breach* there was —
 - 1st. A release.
 - 2dly. Parol discharge.
 - 3dly. Alteration in terms of contract by consent.
 - 4thly. Non-performance by plaintiff of a condition precedent, alteration, &c.
 - 5thly. Performance, payment, &c.
 - 6thly. Contract become illegal or impossible to perform.
- 2dly. Admit that there *was* cause of action, but avoid it by showing subsequent or other matter.
 - 1st. Plaintiff no longer entitled to sue.
 - 1st. Alien enemy.
 - 2dly. Attainted.
 - 3dly. Outlaw.
 - 4thly. A bankrupt, insolvent debtor, &c.
 - 2dly. Defendant no longer liable to be sued.
 - 1st. A certificated bankrupt.
 - 2dly. An insolvent debtor.
 - 3dly. Debt recoverable only in a court of conscience.
 - 4thly. Cause of action discharged.
 - 1st. By payment.
 - 2dly. Accord and satisfaction.
 - 3dly. Foreign attachment.
 - 4thly. Tender.
 - 5thly. Account stated, and a negotiable security taken by plaintiff.
 - 6thly. Arbitrament.
 - 7thly. Former recovery.
 - 8thly. Higher security given.
 - 9thly. A release.
 - 10thly. Statute of limitations.
 - 11thly. Set-off.
 - 5thly. Pleas by executors, &c.

* From these subdivisions, which are nearly the same in each form of action, we may perceive that pleas in bar, as well in actions on contracts as for torts, are of two descriptions: first, they *deny* that the plaintiff *ever* had the cause of action complained of; or, secondly, they *admit* that he *once had* a cause of action, but insist that it *no longer subsists*.

In the *ancient course* of pleading there appear to have been three descriptions of pleas in bar, by one of which the above defences were to be taken advantage of, — 1st, The general issue. 2dly, A denial of a *particular* allegation in the declaration. And, 3dly, A special plea of *new matter not apparent* on the face of the declaration. *General issues*, it is said, were framed in words calculated to deny the *whole of the facts* alleged in the declaration, (a) and were considered proper and indeed necessary, when the defence merely denied the plaintiff's allegations, and referred the matter in dispute to the *jury*, the proper judges whether or not the *fact* complained of was committed. (b) In *assumpsit*, before the pleading rules, Hil. T. 4 W. 4; almost every matter *might* be given in evidence under the general issue non assumpsit, on the ground, as was said, that as the action is founded on the contract, and the *injury* is the *non-performance* of it, evidence which disaffirms the *continuing obligation* of the contract *at the time when the action was commenced*, goes to the gist of the action. (c) In *debt* on simple contract also, under the plea of *nil debet*, the defendant was at liberty to prove most matters which showed that there was no *existing debt*; (d) but in debt or covenant founded on a *deed*, on account of the solemnity of the instrument under seal, (e) and which in general must be dissolved *eo ligamine quo ligatur*, the plea of *non est factum* merely put in issue the existence of the deed, and the defendant was not at liberty to plead *nil debet*, unless where the deed was mere inducement to the action, and the debt accrued by subsequent enjoyment, &c. (f) In *case* or *trover*, under the *general issue*, "*not guilty of the premises*," almost any matter of defence might be given in evidence, though any plea admitting the plaintiff's property and the act committed, but justifying it, *might* be pleaded. (g) In *replevin*, the general issue *non cepit modo et forma*, merely put in issue the act complained of as stated in the declaration. In *trespass*, whether to the person, personal property, or real property, the general issue was *not guilty*. (h) In injuries to the *absolute* rights of persons, this only put in issue the act complained of; but in injuries to the *relative* rights, and to personal

(a) Gilb. C. P. 57, 63, 64; [Dudley v. Sumner, 5 Mass. 438; McConnico v. Stallworth, 43 Ala. 389.]

(b) Ib. 63.

(c) Ib. 65; Darby v. Boucher, 1 Salk. 279; Burrows v. Jemino, 2 Stra. 733; Brennan v. Egan, 4 Taunt. 165; *sed vide post*.

(d) Gilb. C. P. 58.

(e) Plowd. 308.

(f) Gilb. C. P. 57, 58, 61, 62.

(g) Ib. 64, 65.

(h) Ib. 57.

and real property, it put in * issue the existence of the *right*, as well as the *commission* of the act complained of, though in the two latter cases possession would be sufficient against the defendant, unless he could show a better title.

Formerly, however, it was not unusual, even in actions of assumpsit, for the defendant to deny a *particular allegation in the declaration*, instead of pleading the general issue, which denied the whole; (i) and it is said that this was permitted, in order to bring a *single* point to issue, and that if the jury gave a corrupt verdict they might be more easily attainted, which was not so readily done on a *general issue*, where the matter was more complicated. (k) Thus, in assumpsit it was usual to traverse in particular the *consideration* of the contract, &c. or the contract itself, or the *plaintiff's performance* of a condition precedent, &c. but in *assumpsit* this practice had long before the pleading rules become obsolete. In debt for rent due by deed, the defendant might plead *non est factum*, or nothing in arrear; or if not by deed, *non dimisit*, or nothing in arrear; though those matters might have been given in evidence under the plea of *nil debet*. (l)

Of pleas of partial denial.

From the history of our ancient law, it appears that in all personal actions the defendant was at *liberty* to show specially to the court matters of defence, not merely consisting in a *denial* of a material part of the plaintiff's declaration, but introductory of *new matter not apparent therein*; (m) such as coverture, infancy, &c. which, though they were in effect negations of the plaintiff's declaration, yet being matters of *law*, as to their sufficiency in defence, were considered as properly referable to the *court* in the first instance, (n) though if traversed, the existence in *fact* of such defence was then properly to be tried by a jury. (o)

What matters of defence allowed to be pleaded specially.

So in general whatever ground of defence rendered the fact complained of *lawful*, being matter of *justification*, was to be shown to the court, as a license, &c. because the court are judges what is the law, and how far the fact, if it had occurred or existed, was lawful, and the jury were only to find the existence of the fact. Anciently the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him; and when he meant to distinguish away or palliate the charge, it was usual to set forth the par-

(i) Gilb. C. P. 60, 61; Doct. Plac. 203.

(k) Gilb. C. P. 61, 139, 148; Kirlee & Lee's case, 3 Leon. 66.

(l) Gilb. C. P. 61, 62.

(m) Ib. 62, 66.

(n) Ib.; Hussey v. Jacob, 1 Ld. Raym. 88.

(o) Ib. [Matters of defence, not coming within any known plea, may be set forth spe-

cially. Bonaffe v. Woodbury, 12 Pick. 456. Matters arising after an action is commenced must be pleaded specially. Andrews v. Hooper, 13 Mass. 572. Matters going only in mitigation of damages should not be specially pleaded. Pope v. Davidson, 5 J. J. Marsh. 400; Joy v. Hull, 4 Vt. 455.]

ticular facts in a special plea, which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. But the legislature in many cases have expressly permitted the *general issue to be pleaded, and have allowed special matter to be given in evidence under it at the trial. (*o*¹) These were originally confined to certain *public officers*, such as *justices of the peace*, constables, overseers, custom house and excise officers, who in fulfilling their arduous duties were frequently drawn into peril of liability to an action for mistake or informality in the *bond fide* execution of their respective offices. It was observed by Sir Wm. Blackstone, that though it should seem much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet that experience had shown it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other. (*p*) That supposition for a long time prevailed, but recently a different policy has prevailed, and which induced the courts to promulgate the general rules of Hil. T. 4 W. 4.

Division of
the subject
of pleas in
bar.

It may be most convenient to arrange the observations respecting pleas in bar under the following divisions :

(*o*¹) [As to notices of special matter under the general issue, and what they must contain, see *Kane v. Sanger*, 15 John. 89; *Shepard v. Merrill*, 13 John. 475; *Bissell v. Cornell*, 24 Wend. 534; *Chamberlain v. Gorham*, 20 John. 746; *Brooks v. Bemiss*, 8 John. 455; *Fuller v. Rood*, 3 Hill, 258; *Edwards v. Clemons*, 24 Wend. 480; *Washburn v. Mosely*, 22 Maine, 160; *Chase v. Fisk*, 16 Maine, 132; *Bricket v. Davis*, 21 Pick. 404; *Lowry v. Hall*, 1 Hill, 663; *Ripley v. Burgess*, 2 Hill, 360; *Van Epps v. Harrison*, 1 Denio, 246. The notice should contain the substance of a good defence; *M'Clintock v. Inskip*, 13 Ohio, 21; stated with as much certainty as if inserted in a special plea. *Washburn v. Mosely*, 22 Maine, 160; *Potter v. Titcomb*, 16 Maine, 423; *Appleton v. Donaldson*, 3 Barr, 381; *Thompson v. Bowens*, 1 Douglas, 321. Where the general issue is pleaded, admissions made in the notice filed with the plea, of matters which will be set up in defence, cannot be taken advantage of by the plaintiff to excuse him from proving everything necessary to support his action. *Sutiff v. Gilbert*, 8 Ohio, 405; *Bump v. Smith*, 11 N. H. 48; *Vaughan v. Havens*, 8 John. 109; *Van Steenberg v. Bigelow*, 3 Wend. 42. The filing of a brief statement, under the statute of Maine, entitles the defendant to the same rights as he would have had at common law before the statute, by pleading the same matter specially, and no more. *Williams College v. Mallet*, 16 Maine, 84. For decisions in Massachusetts, show-

ing what was required in a brief statement, under St. 1836, c. 273, by which special pleas in bar were abolished, while that statute was in force, see *Plymouth v. Macomber*, 3 Met. 235; *Newburyport v. Currier*, 3 Met. 417; *Washington Bank v. Brown*, 2 Met. 296; *Parker v. Green*, 8 Met. 137; *Robinson v. Wadsworth*, 8 Met. 67; *Webb v. Steele*, 13 N. H. 231. Pleading and practice in Massachusetts are now governed by St. 1852, c. 312, incorporated with the Genl. Sts. c. 129; and the decisions in which this act has been interpreted. Pleading and practice in New York are regulated by the Code of 1848, with the changes and amendments to it, which have been made from time to time since that period. This code, with the amendments, and the decisions interpreting them are elaborately set forth by Mr. Wait, in his learned work on the code. This Code of New York is the foundation of codes in several other states, by which their pleading and practice are, in whole or part, regulated. See Iowa, Revision of 1860, Part III.]

(*p*) 3 Bl. Com. 305, 306; *Boote's Suit at Law*, 93, 231; *sed vide Hussey v. Jacob*, 1 Ld. Raym. 88; *Brown v. Cornish*, 1 Ld. Raym. 217; *Paramore v. Johnson*, 1 Ld. Raym. 566; and see 12 Mod. 377, S. C.; and see the observations on the use of a special plea as opposed to the general issue, 1 vol. Ld. Erskine's Speeches, 275-278; Sir William Jones's Speeches of Isæus, vol. iv. 4to ed. 94; vol. ix. 8vo. ed. 50; and *post*.

I. OF THE SEVERAL PLEAS IN BAR IN EACH ACTION, AND WHEN OR NOT THE PLEA MUST BE SPECIAL.

1. On contracts.

In assumpsit.

In debt.

In covenant.

In account.

In detinue.

In actions by and against executors.

In actions by and against heirs or devisees.

2. For torts.

In case.

In trover.

In replevin.

In trespass.

3. In ejectment.

4. When or not it is advisable to plead specially or only the general issue.

5. Estoppel.

6. All defences to be pleaded.

7. Of suffering judgment by default as to part.

* 8. Of sham and issuable pleas.

9. Instances where general issue given by statutes.

II. THE QUALITIES AND REQUISITES OF PLEAS.

III. THE CONSTRUCTION OF PLEAS.

IV. OF THE FORMS AND PARTS OF PLEAS IN BAR.

V. OF SEVERAL PLEAS IN BAR.

VI. OF PLEAS BY SEVERAL DEFENDANTS.

VII. OF SET-OFF AND MUTUAL CREDIT.

I. OF THE SEVERAL PLEAS IN BAR, AND WHEN OR NOT TO PLEAD SPECIALLY.

IN ASSUMPSIT.

Before the pleading rules of Hil. T. 4 W. 4, the most comprehensive plea in an action of *assumpsit* was *non assumpsit* (i. e. "that the defendant did not undertake or promise as alleged in the declaration"), and on that account was called the *general issue* although *improperly* so. When the allegations in the declaration, whether *indebitatus assumpsit* or *special assumpsit*, are considered, it will be obvious that a plea that the defendant did not undertake or promise, *naturally* and *in terms* only puts in issue the allegation of the *promise*, and not the allegation that the defendant

IN ASSUMPSIT.
Non as-
sumpsit.

was indebted in an *indebitatus count* (unless, as has been insisted, the previous debt or consideration is parcel of the promise), (*q*) nor is it any grammatical answer to the inducement, consideration, averments of performance, and a breach or breaches in a special count, (*r*) except as to the statement of the *promise*, and yet in modern times, and until the pleading rules above referred to came into operation, the plea of non assumpsit was considered not only as putting in issue every allegation in the declaration, as well the promise as the inducement, consideration, and all averments in fact, but also as enabling the defendant to give in evidence every description of defence which showed that the promise was void or voidable, or that it had been performed, (*r*¹) so that very frequently the pleadings on the record entirely misled the plaintiff and the court and jury as to the real point to be tried, and upon the trial the defendant might even show that he or she was *under age* or *covert* at the time of the contract. (*r*²) The inconvenience resulting from this illogical and uncertain state of pleadings led to the improvements introduced by the rules alluded to, and which will now be fully stated. (*r*³)

* The language of the plea of non assumpsit is, that the defendant "*did not promise in manner and form as in the declaration is alleged,*" and concludes to the country.

(*q*) *Passenger v. Brookes*, 1 Bing. N. C. 587; 1 Hodges, 123.

(*r*) See the form of special count, *ante*, 277.

(*r*¹) [See *Hulet v. Stratton*, 5 Cush. 539; *Dixie v. Abbott*, 7 Cush. 610; *Granger v. Hsley*, 2 Gray, 521; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 542; *Myers v. Carr*, 12 Mich. 63; *Falconer v. Smith*, 18 Penn. St. 130; *Wilt v. Ogden*, 13 John. 56; *Dawson v. Tibbs*, 4 Yeates, 349; *Booth v. Smith*, 3 Wend. 66; *Boyd v. Hitchcock*, 20 John. 76; *Hughes v. Wheeler*, 8 Cowen. 79.]

(*r*²) [*Wailing v. Toll*, 9 John. 141; *Stansbury v. Marks*, 4 Dall. 130; *Vasse v. Smith*, 6 Cranch, 231; or that the defendant was *non compos* when the promise was made. *Mitchell v. Kingman*, 5 Pick. 431; *Webster v. Woodford*, 3 Day, 90; 1 Chitty Contr. (11th Am. ed.) 187; or was drunk, especially if the intoxication arose from the contrivance of the plaintiff. 1 Chitty Contr. (11th Am. ed.) 192, and notes; *Rutherford v. Ruff*, 4 Desaus. Ch. 364; *Arnold v. Hickman*, 6 Munf. 15; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Duncan v. McCullough*, 4 Serg. & R. 438. So any matter which showed that the plaintiff never had any cause of action. *Wilt v. Ogden*, 13 John. 56; *Young v. Black*, 7 Cranch, 565; *Edson v. Weston*, 7 Cowen, 278; *Craig v. Missouri*, 4 Peters, 426; *Boyd v. Weeks*, 5 Hill, 393; *Young v. Rummell*, 2 Hill, 478; *Boyd v. Weeks*, 5 Hill, 393; *Hills v. Bannister*, 8 Cowen, 33; *Sill v. Rood*, 15 John. 230;

Taft v. Montague, 14 Mass. 282. Want of consideration or illegal consideration. *Craig v. Missouri* 4 Peters, 436; *Hilton v. Burley*, 2 N. H. 193. Failure of consideration. *Talbert v. Cason*, 1 Brevard, 298. Deceit in a sale. *Sill v. Rood*, 15 John. 230. Breach of warranty. *Robinson v. Windham*, 9 Porter, 397. Matters of discharge which showed that, at the commencement of the suit, there was no subsisting cause of action. *Smart v. Bough*, 3 J. J. Marsh. 163; *Wilt v. Ogden*, 13 John. 56; *Edson v. Western*, 7 Cowen, 278; *Craig v. Whips*, 1 Dana, 375; *Cook v. Vimont*, 6 B. Mon. (Ky.) 284; *Osgood v. Spencer*, 2 H. & Gill, 433; *Baylies v. Fettyplace*, 7 Mass. 325. Payment. *Drake v. Drake*, 11 John. 531; *Dingee v. Letson*, 15 N. J. (Law) 259; *McDonald v. Faulkner*, 2 Ark. 472; *Britton v. Bishop*, 11 Vt. 70; *Skeets v. Baldwin*, 12 Ohio, 120. Release. *Dawson v. Tibbs*, 4 Yeates, 439; *Offutt v. Offutt*, 2 H. & Gill, 178. Accord and satisfaction. *Chappell v. Phillips, Wright*, 372; *Stewart v. Saybrook, Wright*, 374. Former recovery. *Carvill v. Garrigues*, 5 Penn. St. 152; *Young v. Rummell*, 2 Hill (N. Y.), 478; *Young v. Black*, 7 Cranch, 565; *Offutt v. Offutt*, 2 H. & Gill, 178; *Lonsdale v. Brown*, 3 Wash. C. C. 404; *Arnold v. Paxton*, 6 J. J. Marsh. 503; *Wright v. Butler*, 6 Wend. 289; *Kilheffer v. Herr*, 17 Serg. & R. 325; *Prescott v. Hall*, 17 John. 234; *Taylor v. Phelps*, 1 H. & Gill, 492.]

(*r*³) [*See Cavene v. McMichael*, 8 Serg. & R. 441.]

The Reg. Gen. Hil. T. 4 W. 4, (s) directs that "*in all actions of assumpsit (except on bills of exchange and promissory notes), the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.*"

This plea therefore puts in issue the *contract or promise* as stated in the declaration, and enables a defendant to insist that he never in fact contracted *at all*, and also that he *did not contract in the manner stated* in the declaration, and thus to take advantage of any material variance, as of the non-joinder of a person who ought to have been a co-plaintiff, (s¹) which is a ground of nonsuit in respect of the *variance*. (t) So, under this plea, the defendant may show that the contract was conditional, and part not performed by the plaintiff, where he had declared on the contract as having been absolute. (u) And although a plea of non assumpsit in terms seems merely to deny the promise, and not the debt in respect of which the promise to pay was actually made or implied; yet by the above rule, this plea in the case of an indebitatus count puts in issue whatever in fact, and not merely as matter of law, negatives the premises or consideration, from which the alleged promise is to be inferred.

A broad distinction is made in the rule between actions of assumpsit on *express* contracts or promises, and actions of assumpsit on *implied* contracts or promises; non assumpsit putting in issue, in actions on express contracts or promises, the fact only of the contract or promise; and in actions on implied contracts or promises, the matters of fact from which the contract or promise may be implied. (x)

We will consider the application and effect of this plea in the particular branches of assumpsit, and first, in regard to its application to the common counts, in the order in which those counts are placed in the rule of T. T. 1 W. 4.

In indebitatus assumpsit for goods sold and delivered, or bargained and sold, the rules of Hil. T. 4 W. 4, by way of illustration or example of the effect of the above rule state that "*in an action of indebitatus assumpsit for goods sold and delivered, the plea of non assumpsit will operate as a denial of the sale and delivery in point of fact*; and the defendant is therefore entitled under this

INDEBITATUS
ASSUMPSIT.
Goods sold.

(s) "Pleadings in particular Actions," Assumpsit, 1. These rules will be found collected in the Appendix.

(s¹) [Mitchell v. Dall, 2 H. & Gill, 159; Baker v. Jewell, 6 Mass. 460; Converse v. Symmes, 10 Mass. 377.]

(t) Eliot v. Morgan, 7 C. & P. 334. See, also, post, 499; [Henrickson v. Mudd, 33 Ill. 436; Hoffar v. Dement, 5 Gill, 132. Where an agent declares in the common counts, on a promise made to him for the

benefit of his principal, the plea of non assumpsit puts in issue the rights of the agent to maintain the action in his own name. Nabors v. Shippey, 15 Ala. 293.]

(u) Alexander v. Gardener, 5 M. & Scott, 281; 1 Bing. N. C. 671; 3 Dowl. 146, S. C.; [The Manchester Iron Manufacturing Co. v. Sweeting, 10 Wend. 164.]

(x) Per Tindal C. J. Martin v. Smith, 4 Bing. N. C. 439.

plea to show either that * there was no sale or delivery, or none such as to make him liable on the contract, (y) or that the goods delivered were not such as were contracted for, and therefore that he is not liable for the full price agreed to be given for them, but only for the actual value of the goods delivered. (z)

Where in *assumpsit* for trees bargained and sold, to be taken up and delivered by the plaintiff, the defendant pleaded that the trees which he bargained for and bought of the plaintiff were trees growing at a particular place, and that the trees taken up and tendered were not the same which the defendant bargained for and bought, nor were they trees which at the time of the bargain were growing at such place; the plea was held bad as amounting to the general issue. (a)

It was at first supposed that if goods were sold on credit, and the time of payment had not arrived before the commencement of the action, that a special plea was necessary; (b) but it has since been decided that the defendant may avail himself of this defence under the general issue, because the plaintiff proves a *different contract* from that stated in the declaration, viz. to pay on request. (c)

The defendant, in an action for goods bargained and sold, may under *non assumpsit* compel the plaintiff to show a valid contract under the statute against frauds; (d) and a plea, that the price of the goods exceeded £10, and that the requisites of that statute were not complied with, is bad, as an argumentative denial of the facts alleged in the declaration. (e) The defendant may also under *non assumpsit* give in evidence that there was a special agreement with conditions, which not having been complied with, he refused to accept the goods. (f) In an action for a machine sold and delivered, the defendant under the general issue was allowed to show that the machine was manufactured on the condition that if it did not work, nothing should be paid for it, and that it could not be made to work, and was useless. (g) So under this plea, it may be proved that the goods were to be paid for in some other way than in money, since if that be the fact, the defendants never could have been indebted in *money* as alleged in the declaration, and *non assumpsit*, as before stated, puts in issue the allegations necessary to establish the promise. (h) In an action to recover £20 for a boat sold and delivered by the plaintiff to the defendant, the defendant pleaded as to £17 10s. parcel, &c. that the action as to the said sum of £17 10s. was brought to recover that * sum, as

(y) Per Parke B. *Cousins v. Paddon*, 2 Cr., M. & R. 556, 557; 5 Tyr. 535, S. C.

(z) *Ib.*; 2 Cr., M. & R. 547.

(a) *Smith v. Dixon*, 7 Ad. & El. 1.

(b) *Edmunds v. Harris*, 2 Ad. & El. 414; 4 N. & M. 182, S. C.

(c) Per Parke B. *Taylor v. Hillary*, 1 Gale, 23; 1 Cr., M. & R. 741, S. C.; *Broomfield v. Smith*, 1 M. & W. 542.

(d) See *post*, 500, 506, and note (u).

(e) *Leaf v. Tuton*, 2 Dowl. N. S. 300.

(f) *Alexander v. Gardener*, 5 M. & Scott, 281; 1 Bing. N. C. 671; 3 Dowl. 146, S. C.

(g) *Grounsell v. Lamb*, 1 M. & W. 352; 2 Gale, 28, S. C. See, also, *Hayelden v. Staff*, 5 Ad. & El. 153.

(h) *Collingbourne v. Mantel*, 5 M. & W. 289.

being the residue of a sum of £57 10s., the price of the said boat sold and delivered by the plaintiff to the defendant; that the plaintiff at the time of the sale warranted the boat sound, and that the defendant bought it, and then paid £40 on account. The plea then averred, that the boat at the time of the sale was unsound and not worth more than the £40 so paid and that the defendant had incurred an expense exceeding £17 10s. in putting her into a sound state; and on special demurrer the plea was held bad, as amounting to the general issue. (*i*)

The question has been raised, but not decided, whether in an action against a husband for goods supplied to his wife, he can under non assumpsit give in evidence the adultery of the wife; (*k*) but it certainly seems that in such a case a special plea would be unnecessary.

Under non assumpsit the defendant may prove a partnership between himself and the plaintiff. (*l*)

In indebitatus assumpsit for work and labor and materials, the defendant under non assumpsit may show that the work done or materials provided were not such as to render him liable ^{Work and labor.} to pay for them under the contract. (*m*) And where to indebitatus assumpsit for work and labor, the defendant pleaded that the work was done in endeavoring to prevent a chimney from smoking, and on the terms that the plaintiff should not be paid unless he prevented it from smoking, and that he had not prevented it, the plea was held bad on special demurrer, as amounting to the general issue. (*n*) In an action by an attorney for work and labor, the defendant, under a plea of the general issue to the whole demand except a certain sum paid into court, may prove that the business in respect of which the action was brought, was done in a cause upon the terms, that in the event of failure in the cause the plaintiff should make no charge except costs out of pocket, and that these did not exceed the amount paid into court. (*o*) The defendant may in an action for work show that it was done in an unworkmanlike manner; (*p*) which, although it may not defeat the plaintiff's claim altogether, will only entitle him to recover the real value of his labors; (*q*) and the same rule applies to an action for the value of personal services as a clerk, &c. (*r*) Negligence by an attorney is an admissible defence under non assumpsit to an action on his bill, provided the work became wholly useless in consequence of that negligence; (*s*) and a special plea in such a case

(*i*) *Dicken v. Neale*, 1 M. & W. 556; 5 Dowl. 176, S. C.

(*k*) *Symes v. Goodfellow*, 4 Dowl. 642.

(*l*) *Worrall v. Grayson*, 1 M. & W. 166; 4 Dowl. 718, S. C.; *Payne v. Hales*, 5 M. & W. 598; 7 Dowl. 859, S. C.

(*m*) *Per Parke B. Cousins v. Paddon*, 2 Cr., M. & R. 557.

(*n*) *Heyelden v. Staff*, 5 Ad. & El. 153.

(*o*) *Jones v. Reade*, 5 Ad. & El. 529; 1 N. & P. 12; 5 Dowl. 216, S. C.

(*p*) *Cousins v. Paddon*, 2 Cr., M. & R. 547.

(*q*) *Chapel v. Hickes*, 2 Cr. & M. 214.

(*r*) *Baillie v. Kell*, 4 Bing. N. C. 638.

(*s*) *Bracey v. Carter*, 12 Ad. & El. 373; *Randall v. Ikey*, 4 Dowl. 682; [2 Chitty Contr. (11th Am. ed.) 813.]

would be bad, as amounting to the general * issue. (u) The defendant may also under the general issue show the existence of a special contract, with conditions not complied with by the defendant; (x) or containing such terms as under the circumstances defeat the plaintiff's claim altogether. Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter of deduction, which may be proved under the general issue. (y)

The observations as to the effect of non assumpsit to a count for goods where the credit has not expired, will, of course be applicable to the case of work and labor. (z)

Where the plaintiff's claim is for money lent, the general issue will compel him to prove the loan of money and that it was advanced at the defendant's request, but if there were any illegality in the contract, either on account of usury, gaming, or otherwise, and this be relied on as a defence, it must be specially pleaded. (a) Where in an action for money lent and paid the defendant pleaded that the sums lent and paid were lent for the purpose of paying to J. R. for the repairs of a vessel, and not on the security or liability of the defendant, and that a bottomry bond was given to the plaintiff, whereby the vessel, freight, and cargo became responsible for the sum lent and advanced by the plaintiff, it was admitted that the plea would have been bad on special demurrer, as amounting to the general issue. (b)

The plea of non assumpsit to an action for money paid will render it necessary for the plaintiff to prove on the trial the payment of the money either at the express or implied request of the defendant; but if the money were applied for any illegal purpose, or the contract be void either by the statute or common law, it will be necessary to plead this fact specially, in order to have the benefit of it as a defence to the action. (a) Where in an action of assumpsit for money paid, the defendants pleaded as to £500 parcel, &c. that they were possessed of a bill of exchange drawn by them and accepted by a third party, payable six months after date, and that in consideration that the defendants, as a security for the repayment of the sum of £500, would indorse the bill to the plaintiffs, the plaintiffs promised to pay £500 to the defendant's use, and then averred the indorsement of the bill pursuant to the agreement, and that the sum of £500 claimed by the plaintiffs, was made up of payments made on account of the bill, * but did not allege that the bill was due, the plea was held bad, on the ground that it showed that the £500 was not payable on

(u) Hill v. Allen, 2 M. & W. 283.

(x) See Alexander v. Gardener, 5 M. & Scott, 281; 1 Bing. N. C. 671; 3 Dowl. 146, S. C.; Kemble v. Mills, 1 M. & Gr. 757,

(y) Turner v. Diaper, 2 M. & Gr. 241.

(z) See ante, 494.

(a) See post, 506, 507.

(b) Regl v. Green, 1 M. & W. 323.

request as alleged in the declaration, and therefore amounted to the general issue. (c) So where the defendant pleaded that the money was paid by the plaintiffs as a share of damages and costs recovered against the plaintiff as owner of a vessel, of which the defendant was a part owner, for the loss of goods, and which loss was alleged in the action to have happened through the negligence of the plaintiff by his mariners and servants, whereas the plaintiff, by his own personal and wilful misconduct, contributed to the loss; and the defendant also pleaded that he did not concur in the employment of the vessel in that voyage, but that it was undertaken without the defendant being concerned or in any way participating in the adventure: on special demurrer it was held that both pleas were bad as amounting to the general issue. (d) Where the money paid has failed in its object, and the defendant has received no benefit from it through the default of the plaintiff, such a defence is not the subject of a special plea, but is either admissible under the general issue, or ground for a cross-action. (e)

In *indebitatus assumpsit* for money had and received, the plea of non assumpsit will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff; (f) and therefore where the defendant, in an action of this nature, pleaded that the money was the proceeds of goods pledged to the defendant by persons who were allowed by the plaintiff to hold the goods as their own, but which in fact were the property of those persons and the plaintiff jointly, and that the defendant, not knowing that the plaintiff had any interest in the goods, advanced money to those third persons, and sold the goods under a power for that purpose, to repay himself; it was held that the plea amounted to the general issue, for it denied the plaintiff's sole right to the money said to be received to his use. (g)

In *indebitatus assumpsit* on an account stated the defendant under non assumpsit may show that accounts between the plaintiff and himself, the correctness of which he had admitted, were in fact incorrect; since the issue in such a case is not simply whether there was an account stated, but whether the defendant was indebted on an account stated or not. (h) It had, however, been previously held, that if the defendant wishes to rely on a subsequent account in

(c) *Mande v. Nesham*, 3 M. & W. 502.

(d) *Gregory v. Hartnol*, 1 M. & W. 183.

(e) *Francis v. Baker*, 10 Ad. & El. 642.

(f) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," 1. [The defendant may go into any equitable defence under the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself

by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it. *Fowler J.* in *Lockwood v. Kelsea*, 41 N. H. 188; *ante*, 362, note (z).]

(g) *Solly v. Neish*, 2 C., M. & R. 355; 5 Tyr. 625, S. C. See, also, *Moore v. Eddowes*, 7 C. & P. 203.

(h) *Thomas v. Hawkes*, 8 M. & W. 140.

his favor, he must plead that fact specially, and cannot give it in evidence under non assumpsit. (i)

* Where the plaintiff's claim is in respect of the use and occupation of premises, the defendant, under non assumpsit, may show *Use and occupation.* that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due *after* such notice, but the defendant cannot under that plea give evidence of a notice to pay rent *due before* such notice, the ground for this distinction being, that from the moment the mortgagee gives notice to the defendant that the future rents are to be paid to himself, the defendant ceases to occupy by the *permission and sufferance of the mortgagor*, and the subsequent holding is by *permission of the mortgagee*, and such holding by permission of the mortgagee is not a confession and avoidance that he held by permission of the mortgagor during the same time for which the rent became due, but an allegation inconsistent therewith and amounting to a denial of it; on the other hand, the same construction of the rule of pleading does not apply to arrears already due, for as to those arrears the occupation had already taken place, and such occupation was in fact by the sufferance and permission of the plaintiff; the evidence of the notice does not amount to a denial of the allegation that the occupation was by the plaintiff's permission, but to a confession and avoidance only. (i)

In this action also the defendant may, under the general issue, give in evidence that the premises were uninhabitable by reason of a nuisance; (k) and he may show under this plea, that he held the premises under a demise, at a certain rent payable at stated periods, and that before the rent became due the plaintiff evicted him from the possession. (l)

In an action of special assumpsit on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. (m)

Where, in an action for the breach of a warranty of a mare, the defendant pleaded that the mare was sent to a repository for the sale of horses and sold subject to certain rules agreed to by the parties, which were that "the warranty of soundness should remain in force until noon of the day after the sale, when it would be complete, and the responsibility of the seller terminate, unless in the

(i) Fidgett v. Penny, 1 C., M. & R. 108; 2 Dowl. 714.

(i) Waddilove v. Barnett, 2 Bing. N. C. 538.

(k) Smith v. Marrable, 2 Dowl. N. S. 810.

(l) Prentice v. Elliott, 5 M. & W. 606.

(m) Reg. Gen. Hil. T. 4 W. 4. "Pleadings in particular Actions," Assumpsit, 1.

mean time a notice and certificate of unsoundness were given," and that such notice and certificate were not given within the time limited, it was held that the facts were properly made the subject of a special plea, * as admitting the contract and the promise, but showing it to have been made subject to certain rules which had not been complied with. (n.)

So in an action on a policy of assurance, where the declaration stated that the plaintiff caused a policy of assurance to be effected with the defendants on 360 bales of cotton, lost or ^{Insurance.} not lost, whereby B. and Co., as well in their own name as in that of all other parties interested, were assured in £2,000, and in consideration thereof and that the plaintiff paid the defendants the premium, the defendants promised that they would become assurers to the plaintiff of the said sum of £2,000: that the plaintiff was during the voyage interested in the goods, and that the assurance was made for his use and benefit, and on his account, and that the goods were damaged by the perils of the sea during the voyage; and the defendants pleaded that the policy was not caused to be made by or on behalf of the plaintiff *modo et formâ*, and also as a separate defence that the plaintiff did not pay the premium or promise the defendants to observe the terms of the policy; these pleas were held bad, as amounting to the general issue. (o) Parke B. in delivering the judgment of the court, said, "An action on the policy is mentioned in the pleading rules only as an example, illustrating the general rule previously given, the object of which general rule is, to confine the operation of the plea of non assumpsit, which had before operated as a denial of all the facts and all the liabilities at the time the action was brought, to a denial of the contract, express or implied, alleged in the declaration. Every such contract imports that there are two parties to it, and a denial of the contract alleged is a denial of a contract with the plaintiff. Considering the example, therefore, as merely illustrating the rule, we think it clear, that in an action on the policy, the plea of non assumpsit, denying that the defendant ever contracted by such a policy with the plaintiff, puts in issue the fact that the plaintiff caused the policy to be made," and the first plea was therefore held bad. For the same reason, the other plea was also held bad; all the facts put in issue by it were only parts of one proposition, that is, that the defendants contracted with the plaintiff, and could have been put in issue by *non assumpsit*. (p)

"In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and ^{Carriers and other bailees.} in actions against agents for not accounting, the plea will oper-

(*) *Smart v. Hyde*, 8 M. & W. 723; 1 Dowl. N. S. 60, S. C.

(o) *Sutherland v. Pratt*, 2 Dowl. N. S. 813.
(p) *Ib.* 824.

ate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach." (q)

* It has been held that in an action against a carrier for the loss of a parcel the defendant cannot, under non assumpsit, avail himself of the fact that the parcel was above £10 in value, and that no notice of its value was given in compliance with the statute 11 G. 4 and 1 W. 4, c. 68. (r) But a plea to a similar action, that when the defendant received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen, but that he neglected and refused so to do, by reason whereof, and not by reason of any negligence of the defendant, the goods were lost, was held bad on special demurrer, as amounting to the general issue. (s)

It is now settled that the rules of Hil. T. 4 W. 4, do not interfere with the evidence required to be proved on the part of a plaintiff as a necessary part of his case. (t) Under non assumpsit, therefore, the plaintiff must show that the statute of frauds has been complied with, as that an agreement for the sale of an interest in land was in writing. (u) So in the case of a demise for three years a writing must be proved, not merely on a special traverse of the demise, but where the denial of a demise is included in the general issue; (x) so also that a contract within the 17th section, for the sale of goods above the value of £10, was in writing, (y) or that there was an acceptance of part. (z) So also in the case of an agreement to answer for the debt of another; (a) and a special plea of the statute is bad, as an argumentative denial of the facts alleged in the declaration. (b)

When a written agreement is declared upon, or must be proved, and a stamp is essential, this plea in effect puts in issue the sufficiency of the stamp, because the statute not only enacts that the agreement, unless duly stamped, shall be unavailable, but further, that it shall not be admissible in evidence; so that the plaintiff cannot prove the allegation that it was made if it be unstamped. If the question depend upon the preceding words, then it might have been necessary to plead specially the want of a stamp as rendering the

(q) Reg. Gen. Hil. T. 4 W. 4. "Pleadings in particular Actions," Assumpsit, 1.

(r) Syms v. Chaplin, 5 Ad. & El. 634; 5 Dowl. 429, S. C.

(s) Brind v. Dale, 2 M. & W. 775.

(t) Buttemere v. Hayes, 5 M. & W. 461.

(u) Ib. Ibid. 456, [506, note (u).]

(x) Ib. Ibid. 461, 462.

(y) Johnson v. Dodgson, 2 M. & W. 653.

(z) Elliott v. Thomas, 3 M. & W. 173; Fricker v. Thomlinson, 1 M. & Gr. 772.

(a) Eastwood v. Kenyon, 11 A. & El. 441; 3 P. & D. 276, S. C.

(b) Leaf v. Tuton, 2 Dowl. N. S. 300. [See post, 506, note (u); ante, 494.]

agreement "void in point of law," in compliance with the rule to be presently noticed. It has however been decided that a plea of a want of stamp is bad. (c) And if a statute expressly require a fact to be proved by the plaintiff as part of his case, as the apothecaries' act, requiring *proof of the plaintiff's certificate, or that he was in practice before a certain day, then the want of such qualification need not be pleaded specially to an action by the apothecary for the amount of his bill, (d) and the plaintiff in such case is equally bound to show his certificate or previous practice where the defendant has pleaded (in debt) as to part, *nunquam indebitatus*, and a tender to the residue. (e)

Where the plaintiff declared in special assumpsit that the defendant held lands under a lease from E. on certain terms set forth, and that the reversion came to the plaintiff, and that the defendant, in consideration of an abatement of rent, promised to hold of the plaintiff on the same terms in all other respects, but that the defendant broke the terms, and the defendant pleaded non assumpsit; the plaintiff not proving an express contract by the defendant with him, it was held that he could not show an *implied* contract without producing the original lease, which could not be used as such evidence unless properly stamped; for on this issue it lay on the plaintiff to prove the fact of the promise, or facts from which that promise might be implied; that the rules of Hil. T. 4 W. 4, did not dispense with the necessity of proving the original agreement, and that that view of the case would not be varied by calling the original agreement matter of inducement, for there being no express agreement, the plea of non assumpsit denied all matter of fact from which the agreement was to be implied, and it denied, therefore, the original agreement. (f)

A plea which in answer to the contract declared on sets up another contract incompatible with it, is ill, as amounting to the general issue. (g) Where the declaration stated that it was agreed that the plaintiff should sell and the defendant buy a certain messuage, farm, and lands for 5s., that the defendant, before the 29th of September, 1842, should pay for the fixtures, manure, &c. which should be left on the 29th of September, such sums as should be determined on by a valuation, in case such valuation should be made on or before that day, but if not so made, then a reasonable sum; and averring that no valuation was made on the 29th of September, and that the fixtures were left on the premises, and alleging a

Pleas varying or qualifying the contract alleged in the declaration.

(c) *Haward v. Smith*, 4 Bing. N. C. 684.

(e) *Wills v. Langridge*, 5 Ad. & El. 383.

(d) *Morgan v. Ruddock*, 1 Harr. & Woll.

(f) *Walliss v. Broadbent*, 4 Ad. & El.

305; 4 Dowl. 311, S. C.; *Shearwood v. Hay*,

877.

5 Ad. & El. 383; 6 N. & M. 831, S. C.;

Wagstaffe v. Sharpe, 3 M. & W. 521.

(g) *Morgan v. Pebrer*, 3 Bing. N. C. 457.

breach in non-payment of the reasonable sum, the defendant pleaded that the said agreement in the declaration was an agreement by which the plaintiff agreed to sell and the defendant to buy all that messuage, farm, and lands, as the same were comprised in a certain indenture of lease, for the residue of a term of fourteen years; that it was further agreed that the plaintiff, on receiving 5s., and such sum as should be the * reasonable value of the fixtures, &c. would execute an assignment of the indenture, and that upon the execution of such assignment and payment made as aforesaid the defendant should be put into possession of the premises, fixtures, &c.; and averred that the plaintiff did not nor was ready and willing to execute an assignment of the indenture, nor did he, nor was he ready and willing to put the defendant into possession of the premises, fixtures, &c., it was held on special demurrer that as the plea qualified the contract in the declaration it was bad, as amounting to non assumpsit. (*h*) Where a declaration in assumpsit describes the terms of the contract in language denoting that a particular act which the plaintiff has engaged to do is to be independent of or concurrent with acts to be done on the part of the defendant, and performance of which, therefore, is not averred in the declaration, if it were in fact a condition precedent, non assumpsit is the proper plea, and under it the special matter may be given in evidence. (*i*)

The pleading rules before alluded to order that "*in all actions upon bills of exchange and promissory notes the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, e. g. the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note.*" (*k*)

In an action by the indorsee of a bill of exchange against the acceptor the defendant may, under a plea of *non accepit*, take advantage of an alteration in the bill after acceptance in respect to date or mode of acceptance, whether the declaration describe the bill in its original or altered form. The defendant in that plea says, in substance, "The instrument on which you claim against me I never accepted." It cannot be said to be the *same* instrument if there has been any alteration. (*l*) The alteration may, however, be the subject of a special plea. (*m*)

But in an action by an indorsee against the indorser of a bill of exchange under pleas denying the indorsements, presentment, and

(*h*) *Nash v. Breeze*, 12 L. J. R., N. S., Exch. 305.

(*i*) Per Maule J. *Kemble v. Mills*, 1 M. & G. 770.

(*k*) Reg. Gen. Hil. T. 4 W. 4, "Pleading in particular Action," Assumpsit, 2.

(*l*) *Cock v. Coxwell*, 2 C., M. & R. 291; *Calvert v. Baker*, 4 M. & W. 417; 7 Dowl. 17, S. C.

(*m*) *Langton v. Lazarus*, 5 M. & W. 629; *Hemming v. Trenery*, 9 Ad. & El. 926.

due notice of dishonor, and alleging want of consideration, the plaintiff is not bound to explain an alteration appearing in the date, as the making of the bill is admitted upon the record. (n)

To a declaration by an executor on a promissory note given to the testator, and averring a promise to the plaintiff as executor, the defendant pleaded as to the supposed promise alleged to have been made to the plaintiff as executor, *non assumpsit*, and it was * held that this was a good plea, as the promise to pay the executor was not a promise implied by law, and there must have been an express promise proved to support the declaration. (o) The rule prohibiting the plea of *non assumpsit* is confined to cases where the action is *only* on the note, and on the promise to pay contained in or implied by law from it; it is to be read as if it were worded thus — “in all actions on bills of exchange and promissory notes *simpliciter*, without any other matter.” (p) But where in an action by the indorsee of a promissory note against the maker, the declaration, not alleging any promise by the defendant to the plaintiff, contained a count on an account stated on a day long after the note became due, and a general promise by the defendant on that day to pay the “said several moneys,” it was held that this was an action on the note within the meaning of the rule, and that the plea of *non assumpsit* was inadmissible. (q)

The sufficiency of the stamp on a promissory note or bill of exchange is put in issue by a plea denying the making or acceptance of the note or bill, and a plea that it was not duly stamped is bad; (r) and in an action on a bill of exchange by the indorsee against the acceptor, the court struck out a plea founded on the 3 & 4 W. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die, on the ground that the defence was admissible under the plea denying the acceptance. (s) So in an action on a banker's check the objections that it was post-dated, or issued more than ten miles from the bank, and therefore not exempt from the stamp laws, are available under a plea denying the drawing of the check. (t)

If the defendant, in contravention of the rule, pleads *non assumpsit*, or *nunquam indebitatus*, the plaintiff may sign judgment as for want of a plea, and if the declaration contain counts on the consideration of the bill or note, and the defendant pleads the general issue to the whole, the plaintiff may sign judgment on the count for the bill or note and enter a *nolle prosequi* as to the other counts. (u)

(n) *Sibley v. Fisher*, 2 N. & P. 430.

(o) *Timmis v. Platt*, 2 M. & W. 720.

(p) *Per Parke B.* 2 M. & W. 721, 722.

(q) *Donaldson v. Thompson*, 6 M. & W. 316; 8 Dowl. 209, S. C.

(r) *Haward v. Smith*, 4 Bing. N. C. 684; 6 Scott, 438, S. C.

(s) *Dawson v. Macdonald*, 2 M. & W. 26.

(t) *Field v. Woods*, 7 Ad. & El. 114; 2 N. & P. 117; *Jenkins v. Creech*, 5 Dowl. 293; *M'Dowell v. Lyster*, 2 M. & W. 52, S. P.

(u) *Fraser v. Newton*, 8 Dowl. 773; *Sewell v. Dale*, 8 Dowl. 309.

SPECIAL
PLEAS IN
ASSUMPSIT.

"In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, *accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded. (x)

We will consider the matters requiring special pleas under two heads, suggested by the above rule.

1. All matters in confession and avoidance by way of discharge.

1. By way of discharge. Of the examples given in the rule as requiring special pleas, release, payment, performance, mutual credit, and deviation, come under this class.

It was held under the rule of Hil. T. 4 W. 4, that payments which did not amount to a complete discharge, but operated merely in reduction of damages, need not be pleaded specially in assumpsit, (y) although it was otherwise in debt, (z) and the rule of T. T. 1 Vict. was therefore promulgated, ordering that payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar." (z¹)

But by the same rule it is also provided that payment need not be pleaded of any sum credited in the plaintiff's particulars of demand, and therein admitted to have been paid to the plaintiff. (a) The rule does not, however, apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. (b)

Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payment to that amount, independently of the sums credited in the particulars, he is entitled to a verdict. (c)

(x) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," Assumpsit, 3.

(y) Shirley v. Jacobs, 2 Bing. N. C. 88; 2 Scott, 157, S. C.

(z) Belbin v. Butt, 2 M. & W. 422.

(z¹) [Martin v. Pugh, 23 Wisc. 184. Unless the proceedings contain an averment of payment the presumption of payment cannot be raised. Fellers v. Lee, 2 Barb. 489; Henderson v. Henderson, 3 Denio, 314; Morey v. Farmers' Loan & Trust Co. 18

Barb. 401; S. C. 14 N. Y. 302; Martin v. Gage, 9 N. Y. 398; New York Life Ins. & Trust Co. v. Covert, 29 Barb. 436.]

(a) Reg. Gen. Tri. T. 1 Vict.

(b) Reg. Gen. Tri. T. 1 Vict. As to what is or is not a crediting within the terms of the rule, see Morris v. Jones, 1 G. & D. 13; Lamb v. Micklewaite, 1 G. & D. 136; and the notes to the forms of particulars of plaintiff's demand, *post*, vol. ii. 35 *et seq.*

(c) Eastwick v. Harman, 6 M. & W. 13.

Where there is a contract for the sale and delivery of goods for ready money, and ready money is paid, there is no *debt*, and such payment is therefore provable under the general issue. (*d*)

In an action for use and occupation, evidence to show an admission by the plaintiff that he has been paid, and that nothing is due, cannot be received under pleas of the general issue and set-off. (*e*)

Payment *before* breach may be pleaded without averring acceptance in satisfaction, but when pleaded after breach, the plea * must aver that the payment was made and accepted in satisfaction, and the plea must conclude with a verification. (*f*)

In *assumpsit* for money had and received, it appeared that the plaintiff, the acceptor of a bill of exchange, on the day it became due, sent the amount to the defendant, who was the holder, and requested to have the bill delivered up, and upon the defendant declining, the plaintiff demanded the bill or the money, the defendant did not give up either, but subsequently sent a paper signed by a third party, acknowledging the receipt from the defendant of the amount of the bill, and undertaking to bear the plaintiff harmless for the amount, if the bill, which he stated to have been lost, should be presented: the plaintiff kept the guarantee, but sued the defendant for money had and received, and it was held that as the right of action vested on the defendant's refusal to repay the money or give up the bill, the receipt by the plaintiff of the guaranty was in the nature of accord and satisfaction, and was no defence unless specially pleaded. (*g*)

If money be paid into court pending an action, it must be pleaded in a particular form, as prescribed by Reg. Gen. T. T. 1 Vict. (*h*) By a plea of payment into court and denial of ^{Payment into court.} damages *ultra*, the defendant does not admit the precise sum stated in a special count, where that sum is laid under a *videlicet*, and is not material. "The true test by which to try whether the defendant has admitted the amount, is whether the plaintiff in an issue on *non assumpsit* would have been bound to prove the amount, for it would not be fair that one party should be fast, and the other loose." (*i*)

(*d*) *Bunsey v. Barnett*, 9 M. & W. 312; 1 Dowl. N. S. 646, S. C. [See *M'Donald v. Faulkner*, 2 Ark. 472; *Drake v. Drake*, 11 John. 531; *Dingee v. Letson*, 15 N. J. (Law) 259; *Hendrickson v. Hutchinson*, 29 N. J. (Law) 180.]

(*e*) *Linley v. Folds*, 3 Dowl. 780. [Where a delivery of goods both by way of payment and in set-off is pleaded in answer, the defences are not inconsistent. *Wheaton v. Nelson*, 11 Gray, 15.]

(*f*) *Ansell v. Smith*, 3 Dowl. 193.

(*g*) *Alexander v. Strong*, 9 M. & W. 733.

(*h*) See Appendix. Where in *assumpsit*

by the payee against the drawer of a bill of exchange, the defendant pleaded payment into court of the amount of the bill against the further maintenance of the action, it was held that this rule applied to exclude evidence that the bill had in fact been paid before action, for the purpose of inducing the jury to give no interest by way of damages from the date of such payment. *Adams v. Palk*, 2 G. & D. 450.

(*i*) Per *Patteson J.* *Cooper v. Blick*, 2 G. & D. 299. [Under a plea of payment the defendant cannot give evidence tending to disprove the cause of action set forth in the

Where before the breach of an agreement a new agreement is entered into, varying the contract in an essential part, so that the second agreement becomes a substituted contract, the defendant must plead that fact specially as a defence. (*k*) And if a contract has been materially altered in its effect by interlineation, with or without the consent of the defendant, but the declaration describes it in its original form, such alteration must be specially pleaded. (*l*)

If a defendant in an action of indebitatus assumpsit for goods sold has given a bill of exchange for the amount, which is indorsed and outstanding, and for which the defendant is liable to be called upon * by the holder, he must plead the fact specially. (*n*) So where there exists a complete parol contract, antecedently to a deed, the merger of that contract in a subsequent engagement under seal must be the subject of a special plea; but if what is set up and declared upon as an independent contract was mere negotiation, preparatory to a contract under seal, the fact may be given in evidence under non assumpsit, for the defence in the latter case is that there never was any parol promise. (*o*)

The following defences, operating by way of discharge, must also be specially pleaded, and with the exception of the bankruptcy of the plaintiff (*p*) could not, even before the rules of Hil. T. 4 W. 4, have been given in evidence under the general issue: bankruptcy, (*q*) insolvency, or tender, (*r*) and the statute of limitations. (*s*)

2. *All matters in confession and avoidance, which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise.* The examples given of this class are, infancy, coverture, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, unseaworthiness, misrepresentation, and concealment.

declaration. *Hamilton v. Moore*, 4 Watts & S. 570. See *Hubbard v. Blow*, 4 Call. 224.]

(*k*) *Taylor v. Hilary*, 1 C., M. & R. 741; 1 Gale, 22; 3 Dowl. 461, S. C.

(*l*) *Hemming v. Trenery*, 9 Ad. & El. 926.

(*n*) Per Lord Denman, C. J. *Atkinson v. Hawdon*, 2 Ad. & El. 631; 1 Har. & Wol. 77, S. C.

(*o*) *Filmer v. Burnby*, 2 M. & G. 529; 2 Scott, N. R. 689, S. C. See, also, *Weston v. Foster*, 2 Bing. N. C. 693.

(*p*) *Webb v. Fox*, 7 T. R. 396; Bull. N. P. 153; *Lawes on Assumpsit*, 713.

(*q*) *Gowland v. Warren*, 1 Camp. 363; *Stedman v. Martinnant*, 12 East, 664.

(*r*) 1 Saund. 33.

(*s*) 1 Saund. 283, note (2); 2 Saund. 636 c; [*Ware v. Dudley*, 16 Ala. 74; *Young*

v. Rummell, 2 Hill, 478; *Boyd v. Weeks*, 5 Hill, 393; *Bradley v. Field*, 3 Wend. 372; *Kunzler v. Kohaus*, 5 Hill, 317; *Ware v. Webb*, 32 Maine, 41; *Petty v. Cleveland*, 2 Texas, 404; *Benoist v. Darby*, 12 Missou. 196; *Cook v. Kibbee*, 16 Vt. 434; *Brown v. Hemphill*, 9 Porter, 206; *Parker v. Irvin*, 47 Geo. 405; *Davenport v. Short*, 17 Missou. 24. It has been held that a petition, which shows on its face that the cause of action is barred by the statute of limitations, does not set forth a substantial course of action. *Winnemore v. Mathews*, 45 Ala. 449.] As the application of the general issue in each form of action has been restricted by the modern rules, it follows as a necessary consequence, that whenever a special plea was requisite under the old law, it is so still.

The meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, such as usury, fraud, &c.; and not to exempt the plaintiff from proving anything which he would formerly have been required to prove. (t) It is therefore improper to plead specially any matter of defence arising out of the statute of frauds, &c. (u)

It seems doubtful whether the rule applies to coverture arising after the contract only, or whether it extends to coverture existing at the time of the contract, when, in point of law, there would be either no contract at all, or a contract between the husband and the defendant. (x)

Coverture.

Illegality of consideration must be pleaded specially as a defence, (x¹) not only where the express contract on which the plaintiff sues was illegal, but also where illegal services having been performed, no * contract to pay for them can be inferred. (y) Thus where an attorney brought an action to recover his bill of costs for preparing an agreement, and also the costs of an action which failed on the ground that the agreement so prepared was void for maintenance, it was held that the objection, that the attorney could not recover for services rendered in transferring an illegal contract, and in conducting an action on such a contract, could not be taken advantage of under a plea of *non assumpsit* (z) So where a promissory note was substituted for a bill of exchange, the considera-

Illegality of consideration.

(t) *Buttemere v. Hayes*, 5 M. & W. 461.

(u) [*Ante*, 494, 500; *Buttemere v. Hayes*, 5 M. & W. 461; *Leaf v. Tuton*, 10 M. & W. 393; *Smith v. Fah*, 15 B. Mon. 443. But under the practice act of Massachusetts, it is necessary to set up the statute of frauds in the answer, if a party would avail himself of it in defence. *Middlesex Co. v. Osgood*, 4 Gray, 447; *Gardner v. Webber*, 17 Pick. 406. See *Boston Duck Co. v. Dewey*, 6 Gray, 446. So in Maine, if a party wishes to take advantage of the statute of frauds he must set it up in his defence, by plea or brief statement. *Lawrence v. Chase*, 54 Maine, 196. *Walton J.* in this case said: "The reasons for requiring such a special plea are, that the statute of frauds does not make contracts within its provisions illegal; it only secures to the defendant an immunity, which he may avail himself of or not, as he sees fit; and if he sees fit to avail himself of it he should say so, clearly and distinctly, at the outset, and not by a general traverse put the plaintiff to the trouble and expense of proving the promise set forth in his declaration, and then for the first time make his election not to abide by it. Under the statute of Maine requiring a written

specification of the grounds of defence, and the rule established, that the defendant shall, in all cases, be confined to the grounds therein set forth, if he desires to take advantage of the fact that his promise was not made within six years before the commencement of the suit, and is therefore barred by the statute of limitations, he must say so; if he desires to take advantage of the fact that his contract is not in writing, and is not therefore binding upon him, he must say so. He cannot omit all mention of these grounds of defence in his specification, go to trial upon the general issue, and then for the first time insist upon the benefit of them." See *Cahill v. Bigelow*, 18 Pick. 369; *Myers v. Morse*, 15 John. 425.]

(z) *Moss v. Smith*, 1 M. & Gr. 232, note (a).

(x¹) [*Stannard v. McCarty*, 1 Morr. (Iowa) 124; *Dickson v. Burk*, 6 Ark. 412; *Bradford v. Tinkham*, 6 Gray, 494; *Libby v. Downey*, 5 Allen, 299; *Suit v. Woodhall*, 116 Mass. 547, 549.]

(y) *Potts v. Sparrow*, 1 Bing. N. C. 594; 3 Dowl. 630, S. C.

(z) *Ib. Ibid.* See, also, *Triebnerr v. Duerr*, 1 Bing. N. C. 266.

tion for which was money lost at play, to an action on the promissory note, the illegality of the original consideration must be pleaded, and cannot even be taken advantage of under a plea that the *promissory note* was given for a gaming consideration. (a) And where the defendant having taken a share of £50 in a wager made by O. disposed of his interest in £20 to the plaintiff; and O. having won the wager and paid the £50 to the defendant, in an action by the plaintiff for money had and received, to recover the £20, it was held that under the general issue, the defendant could not set up the illegality of the original wager. (b)

In assumpsit for demurrage, the defendant cannot set up as a defence under the general issue, that the provisions of the customs regulation act, 3 & 4 W. 4, c. 52, s. 108, had not been complied with in the lading or unloading of goods. (c)

The illegality cannot be taken advantage of without a special plea, whether the evidence be offered on the part of the defendant, or the illegality appears in the evidence given by the plaintiff. (d) Thus, in debt for goods sold and delivered, the plea being *nunquam indebitatus*, it appeared on the evidence given by the plaintiff to prove his case, that the goods were fireworks, and it was held that without a special plea, no objection could be taken that the sale was of a prohibited subject-matter. (e)

Usury must be specially pleaded, at least unless the contract or deed declared on is on the face of it usurious. (f)

The pleading rules of Hil. T. 4 W. 4, are silent as to *pleading* the want of consideration, except in the case of accommodation bills and notes. In a common *indebitatus* count the want of consideration for the promise is necessarily admissible under the plea of non assumpsit, the consideration being, in the language of the rules, a matter of fact from which the promise alleged is *implied* by law, but it has *been decided that to a special count in assumpsit the want of consideration must be pleaded specially; (g) but in that case it was attempted to set up a prior agreement between the plaintiff and a third party, under which the plaintiff was bound to do the same act which the declaration alleged he had agreed to do as the consideration for the defendant's promise. That was collateral, not a denial of the consideration declared on; it was a sort of confession and avoidance of it. (h) And in a later case it was held that in assumpsit

(a) Bolton v. Coghlan, 1 Bing. N. C. 640.

(b) Martin v. Smith, 4 Bing. N. C. 436; 6 Dowl. 639, S. C.

(c) Alcock v. Taylor, 2 Harr. & Wol. 58.

(d) Fenwick v. Laycock, 1 G. & D. 27; 1 Q. B. Rep. 414, S. C.

(e) *Ib.* Ibid. See also Clutterbuck v. Coffin, 1 Dowl. N. S. 479.

(f) Ferguson v. Sprang, 1 Ad. & El. 576; 3 N. & M. 665, S. C. See *post*, 511.

(g) Passenger v. Brookes, 1 Scott, 560; 1 Bing. N. C. 587, S. C. [See Dickson v. Bark, 6 Ark. 412.]

(h) Per Parke B. in Bennisson v. Davison, 3 M. & W. 183.

on a guaranty, the defendant under the general issue may show that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument; (i) and the instance given in the above rules, that in an action on a warranty, the plea of non assumpsit will operate as a denial of the fact of a warranty *upon the alleged consideration*, seems to import that non assumpsit puts in issue, even in a special contract, as well the *consideration as the promise*. The failure of part of the consideration whereby the whole contract failed must be specially pleaded. (k)

A plea alleging the acceptance, &c. of a bill or note by way of accommodation, must in the terms of the rule allege that the defendant accepted, &c. for the accommodation of a named person; (l) and a plea of no consideration generally, for accepting or indorsing, without stating affirmatively *how* there was no consideration, or showing the facts why the defendant ought not to pay, and knowledge of them on the part of the plaintiff, is bad, first, because it amounts to the general issue, the law implying a consideration for an acceptance and indorsement; but principally because it does not confess and avoid, or state, as required by the new rules, with particularity, the facts which probably are more within the knowledge of the defendant than the plaintiff. (m) The plaintiff may therefore demur to such a general plea, (n) and after demurrer, leave to amend has been refused, (o) although it would probably be granted on a special affidavit of merits. (p) To such a general plea, however, the plaintiff, instead of demurring, may reply generally that there was a consideration, (q) as an issue on a general plea of no consideration *found for or against the defendant, will be good after verdict; (r) or the plaintiff may reply *more specially*, setting out a consideration under a videlicet, and yet concluding to the country. (s)

Fraud in obtaining a bill of exchange, &c. must of course be specially pleaded. (t) So to an action on a sale by auction, *puffing* must be the subject of a special plea. (u)

If a contract be void, as entered into on a Sunday, that objection

(i) *Raikes v. Todd*, 1 P. & D. 138; 8 Ad. & El. 846, S. C.

(k) *Head v. Baldrey*, 6 Ad. & El. 459; 2 N. & P. 217, S. C.

(l) *Lacey v. Forrester*, 2 C., M. & R. 59; *Easton v. Pratchett*, 3 Dowl. 472; 1 Gale, 30, S. C.; *Batley v. Catterall*, 1 M. & Rob. 379; *Graham v. Pitman*, 3 Ad. & El. 521; 5 N. & M. 37, S. C. See forms of pleas, *post*, vol. ii. 338.

(m) *French v. Archer*, 3 Dowl. 130; *Trinder v. Smedley*, 3 Ad. & El. 522.

(n) See the cases in the preceding notes, and *Law v. Chifney*, 1 Bing. N. C. 267; 1 Scott, 95; *Stoughton v. Earl of Kilmorey*, 1 Gale, 91; 3 Dowl. 705, S. C.; *Mills v. Oddy*,

2 C., M. & R. 111; 3 Dowl. 730, S. C.; *Reynolds v. Iremey*, 3 Dowl. 453.

(o) *French v. Archer*, 3 Dowl. 130.

(p) *Stoughton v. Earl of Kilmorey*, 3 Dowl. 705; 1 Gale, 91, S. C.; *Graham v. Pitman*, 3 Ad. & El. 521.

(q) *Lacey v. Forrester*, 2 C., M. & R. 59; *Bramah v. Roberts*, 1 Bing. N. C. 469.

(r) *Mills v. Oddy*, 2 C., M. & R. 103; 3 Dowl. 730, S. C.; *Easton v. Pratchett*, 3 Dowl. 472.

(s) *Low v. Burrows*, 4 N. & M. 366.

(t) *Bramah v. Roberts*, 1 Bing. N. C. 469.

(u) *Icley v. Crew*, 6 C. & P. 671.

must be pleaded specially, but need not aver that the contract was *against the statute*. (x)

In assumpsit by attorneys for business done in a particular court, the defence under statute 2 Geo. 2, c. 23, that one of the plaintiffs was not admitted an attorney of such court, must be pleaded specially. (y) So also the non-delivery by an attorney of a signed bill one month before the commencement of the action must be pleaded specially. (z) A distinction is to be drawn between the case of an apothecary, who, we have seen, must prove his qualification, whatever the plea may be, and that of an attorney. The enactment of 55 Geo. 3, c. 194, s. 21, makes the proof of qualification "at the trial" a condition precedent to the apothecary's recovery of his charges. The language of 2 Geo. 2, c. 23, s. 23, is that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, &c. until the expiration of one month after the delivery of a bill. There is a difference between cases in which proof is made necessary by a statute on principles of public policy, and where it is required merely for the security of individuals in transactions between themselves. And a defendant cannot know that a plaintiff is not qualified as an apothecary; it would be great injustice to call upon him to plead and prove the want of qualification, especially when he is told by a statute that unless the plaintiff proves himself qualified he cannot succeed. That case therefore is quite different from that of an attorney suing without having delivered a bill. There the fact is within the knowledge of the defendant, and he ought, if he has no other defence, to give notice of the defect insisted upon to the plaintiff, who may then deliver his bill and bring another action. (a)

IN DEBT.

The action of debt, we have seen, might be maintained upon, 1st, *simple contracts* and *legal liabilities*; 2dly, *specialties*; 3dly, *records*; * and 4thly, *statutes*; and the pleas in such actions are naturally to be arranged in the same order.

The pleading rules order that "In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that '*he never was indebted in manner and form as in the declaration alleged*,' and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit, and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*. (a¹)

(x) *Peate v. Dicken*, 1 Cr., M. & R. 422, 427.

(y) *Hill v. Sydney*, 7 Ad. & El. 956.

(z) *Lane v. Glenny*, 7 Ad. & El. 83.

(a) Per Lord Denman, C. J. *Shearwood v. Hay*, 5 Ad. & El. 388.

(a¹) [See *ante*, 492; *McGavock v. Puryear*, 6 Coldw. 34.]

"The plea of 'nil debet' shall not be allowed in any action. (b)

"In other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." (c)

As the operation of the plea of *nunquam indebitatus* in debt on simple contract is expressly identical with *non assumpsit* in assumpsit, the decisions noticed under the latter plea (d) will be applicable to the former.

Where by an act of parliament constituting a company, it is provided that in actions by the company for calls, it shall be sufficient to allege that the defendant, being a proprietor of so many shares, is indebted to the company in such sum of money upon such shares belonging to him, whereby a right of action hath accrued to the company by virtue of the act, without setting out the special matter; and that in such action it shall only be necessary to prove that the defendant was a proprietor at the time of making the calls, that they were in fact made, and that notice thereof was given according to the act; it seems the plea of *nunquam indebitatus* puts in issue all the matters required by the act to be proved. (e)

The plea must follow the language prescribed by the rule, and a plea that the defendant *never did owe*, is bad on special demurrer. (f) So also a plea that the defendant never did *promise*, is a nullity in an action of debt, and the plaintiff may sign judgment. (g)

Pleas to actions in debt, on bills of exchange and promissory notes, must traverse the same facts as prescribed by the rules relating to assumpsit. (h)

In debt on specialty or covenant, the plea of *non est factum* operates as a denial of the execution of the deed in point of fact *only; and all other defences must be specially pleaded, ^{2dly. On specialties.}

(b) This plea was the "general issue" in debt. [*Nil debet* is a good plea in New Hampshire in an action of debt on a judgment rendered in another state. *Wright v. Boynton*, 37 N. H. 9; *Judkins v. Union Mut. Fire Ins. Co.* 37 N. H. 470; *Thurber v. Blackburne*, 1 N. H. 242; *Hall v. Williams*, 6 Pick. 247; *Curtis v. Gibbs*, 1 Penn. 405; *Starbuck v. Murray*, 5 Wend. 148; *M'Rea v. Mattoon*, 13 Pick. 53; *Clark v. Mann*, 33 Maine, 268. But this is not generally allowed. *Mills v. Durgee*, 7 Cranch, 481; *St. Albans v. Bush*, 4 Vt. 58; *Clarke v. Day*, 2 Leigh, 172; *Spencer v. Brockway*, 1 Ohio, 260; *Goodrich v. Jenkins*, 6 Ohio, 42; *Gullick v. Loder*, 1 Green (N. J.) 68; *Larming v. Shute*, 2 South. 778; *Chipps v. Yancey*, 1 Breese, 2; *Newcomb v. Peck*, 17 Vt. 302. *Nil debet* may be pleaded to debt

on a foreign judgment. *Williams v. Preston*, 3 J. J. Marsh. 600. But this plea, to an action of debt on recognizance of bail, is bad on general demurrer. *Niblo v. Clark*, 3 Wend. 24; *White v. Converse*, 20 Wend. 266; *Dyer v. Cleaveland*, 18 Vt. 241. So, to an action of debt on a domestic judgment. *Dunn v. Hill*, 63 Maine, 174; *Bullis v. Giddens*, 8 John. 82.]

(c) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," Covenant and Debt, 3, 2, 4.

(d) *Ante*, 494-509.

(e) *The Edinburgh and Leith Railway Company v. Hebblewhite*, 6 M. & W. 707.

(f) *Smedley v. Joyce*, 2 Cr. M. & R. 721; *Tyr. & Gr.* 84, S. C.

(g) *King v. Myers*, 5 Dowl. 686.

(h) See *ante*, 502-509.

including matters which make the deed absolutely void, as well as those which make it voidable. (*k*)

If a public body be incorporated by a statute, with a special power of executing a deed in a certain form, *non est factum* puts in issue whether the deed was executed in the legal form, (*l*) and under this plea an alteration in a deed after execution may be given in evidence; (*m*) but in an action on a bond, a variance, even if material, between the name of the defendant as stated in the declaration and in the bond cannot be taken advantage of under the plea of *non est factum*. (*n*)

In debt on a specialty it was formerly considered that there was a material distinction between those cases in which the deed is only inducement to the action, and matter of fact is the foundation of it; and those in which the deed itself is the foundation, and the fact merely inducement, and in the former case the defendant might have pleaded *nil debet*, (*n*¹) but under the above rule, applicable to cases where *nil debet* was formerly allowed, the defendant must now plead specially any other defence than what would be put in issue by *non est factum*. (*n*²)

The defendant must plead specially payment of a bond, &c. either on or after the day, (*o*) and where no interest has been paid on the bond after the time mentioned in the condition, and there is no other circumstance to negative the presumption of payment on that day, arising from twenty years having elapsed, then the plea may be *solvit ad diem*, but otherwise it should be *solvit post diem*. (*p*)

The following defences were always required to be specially pleaded: matters showing that the deed was merely voidable, (*q*) on account of infancy, (*r*) or duress, (*s*) or fraud; (*t*) or that it was void by act of parliament, (*u*) by usury, (*x*) or gaming, (*y*) or illegal considera-

(*k*) Reg. Gen. Hil. T. 4 W. 4; "Pleadings in particular Actions," Debt and Covenant, 1.

(*l*) Hill v. Manchester & Salford Waterworks Company, 2 N. & M. 573; [Utter v. Vance, 7 Blackf. 514; Chambers v. Games, 2 Greene (Iowa), 320; People v. Rowland, 5 Barb. 449.]

(*m*) Per Gurney B. Cook v. Coxwell, 2 Cr., M. & R. 292. See also per Parke B. 4 M. & W. 418; but see Hemming v. Trenery, 9 Ad. & El. 926; ante, 505.

(*n*) Williams v. Bryant, 5 M. & W. 447.

(*n*¹) [Hyatt v. Robinson, 15 Ohio, 372; Smith v. Stewart, 6 Blackf. 162; Boynton v. Reynolds, 3 Missou. 79; Matthews v. Redwine, 23 Miss. 233; Gates v. Wheeler, 2 Hill (N. Y.) 232; Bullis v. Giddens, 8 John. 82; United States v. Cumpston, 3 McLean, 163; King v. Ramsay, 13 Ill. 619; Trimble v. State, 4 Blackf. 435; Love v. Kidwell, 4 Blackf. 553; Crigler v. Quarles, 10 Missou. 324.]

(*n*²) [See Grand Chute v. Winegar, 15 Wallace, 355.]

(*o*) 4 Anne, c. 16. *Solvit post diem* is not pleadable to a suit by the crown. The King v. Ellis, 1 Price, 23.

(*p*) Moreland v. Bennett, 1 Stra. 652; and see Hudson v. Stalwood, Rep. temp. Hardw. 133, as to these pleas in general.

(*q*) 5 Co. 119 a; Gilb. Debt, 437; Thompson v. Leach, 2 Salk. 675; 1 Lord Raym. 315, S. C.

(*r*) Darby v. Boucher, 1 Salk. 279; Zouch v. Parsons, 3 Burr. 1794, 1805; 2 Inst. 483; Thompson v. Leach, 3 Mod. 310; Baylis v. Dineley, 3 M. & Sel. 478.

(*s*) Edwards v. Brown, 1 Tyr. Rep. 207.

(*t*) Ib. Ibid.; 5 Co. 119 a.

(*u*) 5 Co. 119 a; Bul. N. P. 224; 2 Saund. 155 a; note (4).

(*x*) Lord Bernard v. Saul, 1 Stra. 496; Com Dig. Pleader, 2 W. 23; Ferguson v. Sprang, 1 Ad. & El. 576; 3 N. & M. 665.

(*y*) Com. Dig. Pleader, 2 W. 26; Massinghi v. Stephenson, 1 Campb. 291.

tion ; (z) defences arising upon statutes, as the non-enrolment of an annuity bond ; (a) many defences arising on a bail * bond. (c) So performance, or any matter in excuse of it, as *non damnificatus* to a bond of indemnity ; (d) no award to an arbitration bond ; and matters in discharge of the action, as a tender, set-off ; (e) accord and satisfaction, (f) former recovery, release, and foreign attachment ; (g) and all other defences must now be specially pleaded. It is to be observed, however, that although in an action on a bond, performance, or that the obligee was damnified by his own wrong, should be specially pleaded ; yet where the damnification is not by the wrong of the obligee, or is not a damnification arising on the contract, and would not be an answer to the action, the defendant may take advantage of the circumstances under *non est factum*, in reduction of damages ; as where in an action against the defendant on a bond conditioned for the performance of a contract by a third person, the loss arose not from the non-performance of the contract, but from the plaintiff having advanced a larger sum to the contractor, by way of instalment, than the contract required him to do. (h)

To actions on records, when there is no record, or where there is a material variance in the statement of it, *nul tiel record* is ^{adly. On records.} the proper plea, (i) A plea of payment in an action upon a record, was not good at common law, because such payment was matter *in pais*, and not of record ; but by the statute 4 Ann. c. 16, s. 12, the debtor may plead payment, but in order to come within that statute, he must have paid all the money due on the record or judgment, so that the whole of such judgment must have been satisfied ; and if it do not go to that extent, the plea will be bad. (k) Under this act a plea of accord and satisfaction is insufficient, as the act only authorizes a plea of payment. (l) It is a maxim in law that there

(z) Colton v. Goodridge, 2 Bl. Rep. 1108 ; [Dickson v. Burk, 6 Ark. 412.]

(a) Mestayer v. Biggs, 4 Tyr. 471 ; 2 Dowl. 695, S. C. ; Massey v. Nanney, 3 Bing. N. C. 480.

(c) Norton v. Danvers, 7 T. R. 375 ; Hume v. Liversedge, 1 C. & M. 332 ; Knowles v. Stevens, 1 Cr. M. & R. 26 ; Say. 116.

(d) Holmes v. Rhodes, 1 B. & P. 640, note (a).

(e) 8 Geo. 2, c. 24, s. 5 ; Bul. N. P. 172.

(f) This is no plea to debt on a money bond, &c. Scholey v. Mearns, 7 East, 150 ; Com. Dig. Accord and Satisfaction ; Kaye v. Wagborn, 1 Taunt. 428.

(g) 1 Saund. 67 a, note (1) ; Co. Ent. 139 b ; 142 c ; Lib. Plac. 160, pl. 113 ; 2 Lib. Intrat. 164 ; Anonymous, 2 Show. 374.

(h) Warre v. Calvert, 7 Ad. & El. 143 ; 2 N. & P. 126, S. C.

(i) Com. Dig. Pleader, 2 W. 13, and Record, C. ; Coy v. Hymas, 2 Stra. 1171 ; 1 Saund. 92, note (3) ; Gibb. Debt, 444 ; Marsh v. Cutler, 3 Mod. 41 ; [Hall v. Williams, 6

Pick. 232 ; Green v. Ovington, 16 John. 55 ; Bennett v. Morley, 10 Ohio, 100 ; Bullis v. Giddens, 3 John. 83 ; Boteler v. State, 8 Gill & J. 359. In debt on a judgment rendered in another state it has been held a good plea that the defendant had no notice of the proceedings in the suit in the state where the judgment was rendered. Wright v. Weisingen, 5 Sm. & M. 210. See Hall v. Williams, 6 Pick. 232 ; ante, 510, note (b) ; Wilson v. Bank of Mt. Pleasant, 6 Leigh, 570. But see Mervin v. Kimbel, 23 Wend. 393.]

(k) Peplow v. Galliers, 4 Moore, 165. As set-off on *simple contract* cannot be pleaded in this action, it is best to apply by motion. Philipson v. Caldwell, 6 Taunt. 176 ; Newton v. Newton, 8 Bing. 202. [As to the defence of the lapse of more than twenty years between the time the action accrued and the commencement of the suit under the plea of payment, see Henderson v. Henderson, 3 Danio, 314.]

(l) Peplow v. Galliers, 4 Moore, 165.

can be no averment in pleading against the validity of a record, though there may be against its operation, therefore no matter of defence can be pleaded which existed anterior to the recovery of the judgment; (m) and the original defendant himself, or his bail, or sureties, cannot plead that the judgment was obtained against him by fraud, (n) though it may be pleaded that a judgment against * a third person was so obtained. (o) The defendant may plead a release, (p) or that the debt was levied by a *fi. fa.*, (q) or *elegit*, (r) or *ca. sa.* (s) But where to a declaration in *scire facias*, on a judgment in replevin, damages £473 13s. 4d., the defendant pleaded that before the suing out the *scire facias*, the plaintiff sued out a *feri facias*, commanding the sheriff to levy £274 13s. 4d., and which writ was delivered to the sheriff, who, before the return thereof, seized and took in execution goods of the defendant to the value of £37 13s.; it was held that such plea was bad, as it did not state that the sheriff had returned the writ. (t) A plea of *nul tiel record* to a declaration in *scire facias* on a judgment more than a year and a day old, puts in issue only the recovery of the judgment, and therefore a variance in the venue in the original action cannot be taken advantage of. (u)

An executor may, to an action of debt on a judgment, plead *plene administravit*, (x) or a discharge under the lords' act. (y) But to an action of debt on a judgment suggesting a *devastavit*, he cannot plead *plene administravit*, or any other plea which puts his defence upon want of assets; he may, however, in such a case, plead that he did not waste in manner and form as in the declaration alleged, and under this plea may give evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. The pleadings in debt or *scire facias* on a recognizance or bail have already been pointed out. (z)

As *nil debet* was formerly the proper plea to an action on an Irish or foreign judgment, by-laws, &c. these cases come within the rule requiring a special plea in all actions where the plea of *nil debet* had been previously allowed. (z¹)

(m) *Moore v. Bowmaker*, 2 Marsh. 392; 6 Taunt. 379, S. C.; [*Cardesa v. Humes*, 5 Serg. & R. 65; *M'Farland v. Irwin*, 8 John. 77.]

(n) *Moore v. Bowmaker*, 2 Marsh. 392; 6 Taunt. 379, S. C.

(o) *Moore v. Bowmaker*, 2 Marsh. 392; 6 Taunt. 379, S. C.

(p) *Bac. Abr. Release*.

(q) 4 Leon, 194; Sav. 123; *Vesey v. Harris*, Cro. Car. 328; Clift. 675.

(r) *Dyer*, 299 b; *Glasscock v. Morgan*, 1 Lev. 92.

(s) *Off. Brev.* 300; *Scott v. Peacock*, 1 Salk. 271. But see *Wentworth v. Squibb*, Lutw. 641.

(t) 4 Moore, 163. It seems also that such plea afforded no answer to the whole declara-

tion, as the sum levied was only sufficient to satisfy part of the judgment, and that it was therefore bad on special demurrer. *Ib.*

(u) *Phillips v. Smith*, 2 Dowl. N. S. 688.

(x) *Richards v. Newton*, 4 Mod. 296. But see S. C. 1 *Ld. Raym.* reported *contra*; *Shelly's case*, — Salk. 296; *Skin.* 563; *Hope v. Bague*, 3 East, 2.

(y) 32 Geo. 2, c. 28, s. 20.

(z) *Tidd*, 9th ed. 1128; *Chitty's Archbold's Prac.* 7th ed. 643, 830; *ante*, 125.

(z¹) [See *ante*, 510, note (b); *Williams v. Preston*, 3 J. J. Marsh. 600. *Nil debet* has been held to be a proper plea to an action on a judgment recovered before a justice of the peace of another state. *Warren v. Flagg*, 2 Pick. 448; *Silverlake Bank v. Harding*, 5 Ohio, 346; *Robinson v. Prescott*, 4 N. H.

It has been decided that the pleading rules of Hil. T. 4 W. 4, do not prevent parties from pleading *not guilty* or *nil debet* to actions on penal statutes, and these pleas are therefore still proper, and put all the facts in issue as before the rules. (a)

To a declaration in debt on stat. 22 G. 2, c. 46, s. 14, charging the defendant that he, being deputy clerk of the peace, practised at the sessions as an attorney, a plea, that the defendant was not at any of the times, &c. deputy clerk of the peace, nor did he commit any of the supposed offences in manner and form, &c. was held bad for duplicity, the defendant should have pleaded *not guilty*. (b)

IN COVENANT.

In covenant there is not and never was strictly speaking any plea of *general* issue, for the plea of *non est factum* only puts the execution of the deed in issue, (b¹) as in debt on a specialty, (c) and not the breach of covenant or any other matter of defence; and a plea of *non infregit conventionem* is bad on demurrer, though it would be aided after verdict; (d) and *riens en arriere* is also a bad plea in this action, (e) because it impliedly admits that although nothing is now due, yet that the money was not paid on the appointed day. (e) The defendant must therefore always have pleaded specially every matter which it would be necessary to plead in debt on a bond or other specialty, (f) as that the deed was voidable by infancy (f¹) or illegality of the consideration. However, under the plea of *non est factum*, the defendant may, on the trial, avail himself of a *variance* in the statement of the deed, either in respect of a misstatement, or of the omission of a covenant qualifying the contract, (g) or an alteration after the execution; (h) and this, although the defendant has agreed to admit on the trial the due execution of the deed; (i) and if the plaintiff omit to state a condition precedent, the defendant may crave

450; *Collins v. Modisett*, 1 Blackf. 60; *Mahurin v. Bickford*, 6 N. H. 568.]

(a) *Jones v. Williams*, 4 M. & W. 375; *Earl Spencer v. Swannell*, 3 M. & W. 154. [See *Burnham v. Webster*, 5 Mass. 270; *Stilson v. Tobey*, 2 Mass. 521, 522.]

(b) *Faulkner v. Chevell*, 5 Ad. & El. 213. [See *Stilson v. Tobey*, 2 Mass. 252; *Burnham v. Webster*, 5 Mass. 266, 270.]

(b¹) [*Kane v. Sanger*, 14 John. 89; *Cooper v. Watson*, 10 Wend. 205; *Gardner v. Gardner*, 10 John. 47; *Dale v. Roosevelt*, 9 Cowen, 307; *Hebbard v. Delaplaine*, 3 Hill, 187; *M'Neish v. Stewart*, 7 Cowen, 474; *Barney v. Keith*, 6 Wend. 555; *Goulding v. Hewett*, 2 Hill, 644; *Granger v. Granger*, 6 Ohio, 41.]

(c) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," Covenant and Debt, 1. [See *Treat v. Brush*, 11 Missou. 310. The single plea of *non est factum* admits all the material averments in the declaration. *M'Neish v. Stewart*, 7 Cowen, 474;

Thomas v. Woods, 4 Cowen, 173; *Legg v. Robinson*, 7 Wend. 194; *Cooper v. Watson*, 10 Wend. 202; *Barney v. Keith*, 6 Wend. 555.]

(d) *Hodgson v. East India Company*, 8 T. R. 278; *Walsingham v. Comb*, 1 Lev. 183; *Pitt v. Russel*, 3 Lev. 19; 1 Sid. 289; *Com. Dig. Pleader*, 2 V. 5. [See *Roosevelt v. Fulton*, 7 Cowen, 71; *Phelps v. Sanger*, 1 Aiken, 150; *Bender v. Fromberger*, 4 Dall 436.]

(e) *Warner v. Theobald*, Cowp. 588; *Baden v. Flight*, 3 Bing. N. C. 685.

(f) *Com. Dig. Pleader*, 2 V. 4, &c.

(f¹) [See *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 219.]

(g) 9 East, 188; *Str.* 1146; 11 East, 639; 4 Campb. 20; 2 Stark. 35.

(h) *Per Gurney B. Cock v. Coxwell*, 2 Cr., M. & R. 292; *per Parke B. Calvert v. Baker*, 4 M. & W. 418; but see *Hemming v. Treneary*, 9 Ad. & El. 926.

(i) *Goldie v. Shuttleworth*, 1 Campb. 70.

oyer, and set out the deed and demur; (*k*) but all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. (*l*) In an action of covenant upon a lease for the breach of a covenant running with the land, if the plaintiff claim as heir, devisee, or assignee of the lessor, the defendant may traverse the *derivative title* of the plaintiff, (*m*) or admitting that the lessor had *some* legal estate in the premises at the time of the demise, the defendant may plead that such lessor was seised, &c. of a different estate from that stated in the declaration, and thereby show that the derivative title of the plaintiff does not exist. But the defendant is estopped from pleading or traversing *generally* that the lessor was seised as stated in the declaration; (*n*) though in an action at the suit of the assignee of a termor, * the defendant may deny that the lessor was possessed of the residue of the term in the manner alleged in the declaration, (*o*) when a plea of performance in general terms suffices, unless specially demurred to. (*p*) Where the defendant is a party to a deed, he cannot traverse its operation by pleading that "he did *not grant*, &c." but must plead *non est factum*; but the rule is otherwise in the case of a stranger to the deed. (*q*) The defendant must also plead *specially* performance of the covenant; (*r*) or excuse of performance, as eviction; (*s*) or by non-performance (*s*¹) by the plaintiff of a condition precedent, (*t*) or by a surrender of the lease, &c.: (*u*) or admitting the breach to have been committed, the defendant must plead specially that he is discharged; (*x*) as by his bankruptcy, if the action be for a money demand due before the act of bankruptcy; (*y*) or by accord and satis-

(*k*) Com. Dig. Pleader, 2 V. 3, 4; Howell v. Richards, 11 East, 641.

(*l*) Reg. Gen. Hill. T. 4 W. 4, "Pleadings in Particular Actions," Covenant and Debt, 1.

(*m*) Seymour v. Franco, Law Journal, vol. vii. Feb. 1829, K. B. p. 18; and Whitton v. Peacock, in C. P. 3d June, 1835, *ante*, 377.

(*n*) Blake v. Foster, 8 T. R. 437; Palmer v. Ekins, 2 Stra. 817; 2 Saund. 206 a, note, 207, 418; Andrew v. Pearce, 1 New Rep. 160. *Non tenuit* is not pleadable to a cognizance for rent in arrear, under a demise from a receiver in chancery. 4 Bing. 2.

(*o*) 4 Moore, 303; Carotik v. Blagrove, 1 B. & B. 531.

(*p*) Varley v. Manton, 9 Bing. 363; [Doogan v. Tyson, 6 Gill & J. 453. When all the covenants are in the affirmative, *omnia perforavit* is a good plea. Bailey v. Rogers, 1 Greenl. 189.]

(*q*) *Ante*, 511.

(*r*) Com. Dig. Pleader, 2 V. 13; Bul. N. P. 165; Shum v. Farrington, 1 B. & P. 640; [Bird v. Smith, 8 Ark. 368; Marston v. Hobbs, 2 Mass. 237. A plea of general performance to an assignment of a special breach is bad. Simonton v. Winter, 5 Peters,

141, 149. The plea of "covenants performed" admits the execution of the instrument, and supersedes the necessity of other proof; but it does not admit that the adverse party had performed his agreement. Neave v. Jenkins, 2 Yeates, 107; Turnpike Co. v. McCullough, 25 Penn. St. 303. So any plea in bar, negating the breaches assigned, admits the conveyance and the covenants declared on, and the deed need not be produced. Marston v. Hobbs, 2 Mass. 438. But it is otherwise in Alabama. Bryant v. Simpson, 3 Stewart, 339.]

(*s*) 1 Saund. 204, note (2); 2 Saund. 176; Stevenson v. Lambard, 2 East, 576; [Pendleton v. Dyett, 4 Cowen, 581; Kane v. Sawyer, 14 John. 89; Smith v. Shepard, 15 Pick. 147; 1 Chitty Contr. (11th Am. ed.) 464, 465; Cuthbertson v. Irving, 4 H. & N. 742, 757; Wolf v. Weiner, 7 Phil. (Pa.) 274; McAusland v. Pundt, 1 Neb. 211; Gallup v. Albany R. R. 7 Lansing, 471.]

(*s*¹) [Parker v. Parmele, 20 John. 180.]

(*t*) Glazebrook v. Woodrow, 8 T. R. 366.

(*u*) 1 Saund. 235.

(*x*) Com. Dig. Pleader, 2 V. 8.

(*y*) Charlton v. King, 4 T. R. 156; 1 Saund. 241, note (6).

faction *after breach*; (z) arbitrament, (a) former recovery, (b) foreign attachment, set-off, (c) release, &c. (d) But a parol accord and satisfaction made before breach cannot be pleaded in bar to an action of covenant, (e) nor can a parol agreement for a substituted contract be pleaded. (f) A tender may be pleaded in covenant for the payment of money. (g)

IN ACCOUNT.

In an action of account, there is no general issue. The defendant may plead infancy; (h) and when sued as bailiff or receiver in fact, he may plead that he was not bailiff or receiver; (i) IN ACCOUNT. but when sued as tenant in common under the statute, (k) if the declaration be properly framed, a plea that the defendant is not bailiff or receiver would be insufficient; (l) and if the defendant mean to deny the plaintiff's claim, he should traverse the tenancy in common. The defendant may also plead that he hath accounted, or a release, arbitrament, bond given in satisfaction, and the statute of limitations; (m) but other matters, which admit that the defendant was once chargeable and accountable, cannot in general be pleaded in bar to the action but must be pleaded before the auditors. (n) The rules of Hil. T. 4 W. 4, do not notice this form of action.

* IN DETINUE.

In detinue the general issue (although improperly so called) was *non detinet*, which before the rules of Hil. T. 4 W. 4, put in IN DETINUE. issue the facts of the plaintiff's property or possession, and the defendant's withholding the chattels; but the above rules declare that this plea "shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea." (o) Even before this rule, the defendant under this plea could not show that the goods or other chattels were pledged to him, but must have pleaded that defence specially. A lien may, however, be given in evidence under a plea denying the plaintiff's property in the goods; (p) but it cannot be given in evidence under *non detinet*. (q) The bailment or finding alleged in a declaration in *detinue* is not traversable. (r)

- (z) *Kaye v. Wagborn*, 1 Taunt. 428.
 (a) 9 Co. Rep. 79; Com. Dig. Pleader, 2 V. 8, 9.
 (b) When should be pleaded as an *estoppel*, *Vooght v. Winch*, 2 B. & Ald. 668.
 (c) See the end of this chapter.
 (d) Com. Dig. Pleader, 2 V. 8, &c.; *Johnson v. Kerr*, 1 Serg. & R. 25.
 (e) *Kaye v. Wagborn*, 1 Taunt. 428.
 (f) *Heard v. Wadham*, 1 East, 630.
 (g) *Johnson v. Clay*, 7 Taunt. 486; 1 Moore, 300, S. C.; 5 Mod. 18; 12 Mod 376; but see *Gilb. C. P.* 63.
 (h) *Bac. Abr. Accompt. E.*; Com. Dig. Accompt, E. 5.
 (i) *Ib. Ibid.*
 (k) 4 & 5 Ann. c. 16, s. 27.
 (l) *Wheeler v. Horne, Willes*, 208.
 (m) *Bac. Abr. Accompt. E.*; Com. Dig. Accompt, E. 4 to 6.
 (n) *Ib.*; *Godfrey v. Saunders*, 3 Wils. 78.
 (o) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," *Detinue*.
 (p) *Lane v. Tewson*, 1 G. & D. 584.
 (q) *Richards v. Frankum*, 6 M. & W. 420.
 (r) *Walker v. Jones*, 2 Cr. & M. 672; 4 Tyr. 915, S. C.

In each of these actions, when brought *by an executor or administrator*, the defendant may not only avail himself of either of the before-mentioned defences, but may also deny the plaintiff's representative character, which if not denied by plea is now admitted. (*r*¹) Where letters of administration had been obtained in an inferior diocese, the defendant may plead in bar that there were *bona notabilia*. (*s*) The general plea, "that the plaintiff was not nor is administrator of all the goods, &c." is not sufficient, where the defence is, that the letters of administration, which were granted by a bishop, were unfounded, because the intestate resided within another diocese in a different province, where there were *bona notabilia*. (*t*) The residence elsewhere, &c. should be specially pleaded. So if the defendant, in an action by an executor, contend that the probate is void, as that stamp is insufficient, or the seal forged, he should plead *ne unques* executor. (*u*) Where the plaintiff necessarily sues in his representative character, the defendant cannot, under the general issue, take advantage of any defect, such as the insufficiency of the stamp in the letters of administration or probate, for profert has been made of them, and the defendant has by his pleading admitted them. (*x*) But if it were part of the plaintiff's case to prove his representative character, as where he sued in trover upon his constructive possession, for a conversion in his own time, any defect in the letters of administration or probate, which prevented him from proving such character, would, before the rule Hil. T. 4 W. 4, be fatal, although there were no special plea. (*y*)

* In an action against an executor or administrator, (*z*) the defendant may, in addition to any of the before-mentioned defences, plead *ne unques* executor, (*a*) or administrator, (*b*) or that no assets have come to his hands; (*c*) or *plene administravit præter* a sum not sufficient to satisfy debts of a higher nature, as bonds outstanding, or judgments recovered against the deceased or the defendant by third persons; (*d*)

(*r*¹) [M'Kimm v. Riddle, 2 Dall. 100; Champlin v. Tilley, 3 Day, 303.]

(*s*) 1 Saund. 274, note (3.) As to pleading specially in actions for rent, see Salk. 317.

(*t*) Stokes v. Bate, 5 B. & C. 491; 8 D. & R. 247, S. C.

(*u*) 1 Saund. 275 a, notes. [In Jewett v. Jewett, 5 Mass. 275, although it was decided that it was a good plea in bar for an administrator by the law of Massachusetts, that he had been removed from office since the commencement of the suit against him, yet it was admitted that, by the common law, a determination of his power pending the action did not defeat it.]

(*x*) Thynne v. Protheroe, 2 M. & Sel. 553.

(*y*) Hunt v. Stevens, 3 Taunt. 113; 1 Saund, 275, note (a); 2 Saund. 47, note (x).

(*z*) See the pleadings in general, Com. Dig. Pleader, 2 D. 3.

(*a*) Com. Dig. Pleader, 2 D. 7. Executor not liable till he has proved or acted. Douglas v. Forrest, 4 Bing. 686; 1 M. & P. 663, S. C.

(*b*) Com. Dig. Pleader, 2 D. 7, 13. See Wooldridge v. Bishop, 7 B. & C. 406.

(*c*) Com. Dig. Pleader, 2 D. 7; [Shaw v. M'Cameron, 11 Serg. & R. 252; Douglass v. Satterlee, 11 John. 16.] Although upon an issue of *plene administravit vel non* the stamp on the probate of testator's will is admissible in evidence, yet it is not even *prima facie* evidence of assets come to the hands of the executor. Mann v. Lang, 5 Nev. & Mas. 202.

(*d*) 1 Saund 300-386, *in notis*; Com. Dig. Pleader, 2 D. 9; 10 East, 313, 315.

or *plene administravit* except a sum ready to be paid to the plaintiff; (e) and the defendant cannot or ever could avail himself of either of these defences under the general issue; (f) but under the general plea of *plene administravit* (f¹) an executor or administrator may give in evidence a retainer for a debt due to himself, though it is in general advisable to plead it. (g) Where the executor or administrator has no ground on which to dispute the plaintiff's debt, it is in general advisable not to deny it. (h) So if he cannot dispute his being executor, he should not plead *ne unques* executor, for if he do, and the plaintiff, on the plea of *plene administravit*, take judgment of assets *quando*, and proceed to trial on the other issues, and they are found for the plaintiff, and no issue which goes to the whole cause of action is found for the defendant, the defendant will be liable to costs; (i) but not so if the plaintiff do not take judgment of assets *quando*, and on the trial the plea of *plene administravit* is found for the defendant. (k)

In an action against an *heir* or *devisee*, (l) the defendant may not only plead any matter which might have been pleaded by the ancestor or deviser, but may also either deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or *devise*, either generally, (m) or specially, viz. that he has nothing but a reversion after an estate for life or years, or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised; or that he *retains* the assets to satisfy his own debt, of equal or superior degree, or debts of a superior degree due to third persons. (n) The *heir*, if an *infant*, might also have prayed that the parol should demur, or be stayed till he had become of full age; (o) * but that delay so injurious to creditors, was abolished by 1 W. 4, c. 47, s. 10. It was a good plea by a devisee that the debt did not accrue in the lifetime of the deviser. (p)

(e) *Post*, vol. ii. 384.

(f) Co. Litt. 283 a.

(f¹) [*Plene administravit* is not a good plea to an action of debt brought in the name of the judge of probate on an executor's bond. *Judge of Probate v. Lane*, 50 N. H. 556.]

(g) *Ib.*; 1 Saund. 333, note (6.)

(h) *Dearne v. Grimp*, 2 Bl. Rep. 1275. [In debt or assumpsit against an executor, the plea of *non est factum* or *non assumpsit* is an admission of a will of which the defendant is executor; but it is otherwise where the action is for a demand on which the testator was not himself liable; as for a legacy. *Hartz v. Sealy*, 6 Binn. 405.]

(i) *Marshall v. Wilder*, 9 B. & C. 657; *Hindley v. Russell*, 12 East, 232. In such case defendant should move to withdraw the

pleas of the general issue, and *ne unques* executor. But see *Edwards v. Susannah*, 1 B. & Ald. 254; *Ragg v. Wells*, 8 Taunt. 129, overruling 1 Saund. 336 b.

(k) *Hogg v. Graham*, 4 Taunt. 135; *Edwards v. Susanna*, 1 B. & Ald. 254; *Ragg v. Wells*, 8 Taunt. 129; *Tidd*, 9th ed. 979, 980.

(l) See the proceedings in general, Com. Dig. Pleader, 2 E.; 2 Saund. 7, and notes.

(m) *Ib.*; Com. Dig. Pleader, 2 E. 3.

(n) Com. Dig. Pleader, 2 E. 3. [Or he may plead in abatement the non-joinder of the heirs of a deceased heir having lands by descent. *St. Mary's Church v. Wallace*, 5 Halst. 311.]

(o) *Ib.*; *ante*, 493.

(p) 5 N. & M. 42

IN CASE.

The *general issue* in an action on the case is, "*that the defendant is not guilty of the premises [or grievances] above laid to his charge in manner and form as the plaintiff hath above thereof complained against him, and of this he puts himself upon the country,*" &c. (*p*¹)

The pleading rules of Hil. T. 4 W. 4, state that "in actions on the case the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration."

"All matters in confession and avoidance shall be pleaded specially, as in action of assumpsit."

We shall consider the effect of the different pleas in the same order in which the subjects of this action are treated of in the early part of this volume, and accordingly to treat of the pleas in this action in relation to 1st, Injuries to the person, absolutely and relatively; 2dly, to personal property, including breaches of contracts; and 3dly, to realty.

1st. Injuries to the Person. — In an action for keeping a mischievous animal, the plea of not guilty denies the *scienter* as well as the injury. (*q*) In an action for the negligent management of a train of railway carriages, whereby it ran against another train in which the plaintiff was riding, and injured him, a plea that the parties having the management of the latter train managed it so negligently and improperly, that in part by their negligence, and as well as in part by the defendant's negligence, the defendant's train ran against the other and caused the injury, was held ill (among other reasons), as amounting to not guilty; for it amounted to no more than a simple negation of the negligence which makes a defendant liable. (*r*)

In an action for a malicious outlawry, "not guilty" puts in issue as well the original debt as the existence of reasonable and probable cause for the proceeding, but not the reversal of the outlawry. (*s*) In an action for maliciously indicting the plaintiff without probable cause, the defendant may give evidence of

1st. Injuries to the person.

Negligence.

Malicious prosecutions, &c.

(*p*¹) [For a distinction as to what is open under the general issue in trespass and what is open under that issue in case, see *Flowman v. Foster*, 6 Coldw. 52.]

(*q*) *Thomas v. Morgan*, 2 Cr., M. & R. 496; 4 Tyr. 1085, S. C.

(*r*) *Bridge v. The Grand Junction Railway Company*, 3 M. & W. 244. See, further, as to negligence, *post*, 528.

(*s*) *Drummond v. Pigou*, 2 Bing. N. C. 114.

probable cause under the * general issue ; and if in addition to the plea of not guilty, he pleads specially that he had probable cause, the court will order such plea to be struck out. (t) So in an action for maliciously and without probable cause refusing to accept from the plaintiff the amount of debt and costs for which the plaintiff was a prisoner in execution, the want of probable cause is put in issue by the plea of not guilty. (u) In case for a malicious arrest, the averment in the declaration that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution, is a material allegation which the defendant should take issue upon by a plea, and is admitted under not guilty, which in such a case merely puts in issue the wrongful act, viz. the malicious arrest without probable cause. (x)

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate as a denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. (y)

The general issue is therefore the proper plea now, as it was before the pleading rules, if the defendant denies any of the material facts which essentially constitute the gist or cause of action ; as if he disputes the *publication* of the scandal, or that it concerned the plaintiff, or does not bear the *meaning* which was affixed to it by way of innuendo in the declaration, and which the plaintiff had bound himself to establish, so that there is a fatal variance ; or, the words not being actionable without the aid of special damage, that no such injury had occurred, &c. (z)

So where the defence is, that the libel or slander was published or spoken, not in the malicious sense imputed by the declaration, but in an *innocent sense*, or upon an *occasion* which warranted the publication, the same may be given in evidence under the general issue, (z¹)

(t) *Cotton v. Browne*, 3 Ad. & El. 312 ; 4 N. & M. 831, S. C.

(u) *Hoondsfeld v. Drury*, 3 P. & D. 127 ; 11 Ad. & El. 98, S. C.

(x) *Watkins v. Lee*, 5 M. & W. 270.

(y) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," IV. 1.

(z) See *post*, as to the qualities of pleas ; 1 Stark. Slander. [The plea of the general issue requires the plaintiff to prove all the facts, as alleged in his declaration, which are essential in law, to his right to recover ; consequently, such plea is proper and sufficient in all cases where the defendant means to deny or disprove any fact essential to the plaintiff's case : as where he means to deny that he spoke the words set forth in the declaration, or that the injurious consequences

alleged by the plaintiff resulted from the act of speaking the words complained of. *Foster J. in Wier v. Allen*, 51 N. H. 180 ; 1 Stark. Slander, 454.]

(z¹) [But under the practice in Massachusetts, the defence that the words were privileged is not open unless distinctly pleaded in answer ; although it may be disclosed by the plaintiff's evidence. *Goodwin v. Daniels*, 7 Allen, 61. See *Bradley v. Heath*, 12 Pick. 163 ; *Jackson v. Stetson*, 15 Mass. 50. A denial of malice does not put in issue the question of privilege. *Goodwin v. Daniels*, *supra*. And the facts should be stated on which the excuse or privilege is grounded. *Fry v. Bennett*, 5 Sandf. 54 ; *Buddington v. Davis*, 6 How. Pr. 401.]

because it proves that the defendant was not guilty of the *malicious* slander as charged in the declaration, and goes to the very root of the matter of complaint, (a) as if the words were spoken by the defendant as counsel, and were pertinent to the matter in question; (b) or were written or spoken in confidence, and without malice, (b¹) as when a master honestly and fairly had given the character of a servant to *one who asked his character with a view to hire him; (c) or if the words were innocently read as a story out of history; (d) or were spoken through concern; (e) or in a sense not defamatory; (f) for by so showing the manner and occasion of speaking the words, the defendant proves that they were not spoken with malice. So it is sufficient, if upon the whole context the jury can be induced to find it to be no libel. (g) A judge is not bound to state his opinion

(a) *Lillie v. Price*, 5 Ad. & El. 645; 5 Dowl. 432, S. C. See, also, per Alderson B. *Simpson v. Hurdia*, 5 Dowl. 305. [A statement made by a person interested in the subject-matter thereof to other persons so interested, and made with belief of its truth and without malice, is privileged. *Smith v. Higgins*, 16 Gray, 251; *Lawler v. Earle*, 5 Allen, 22; *Brow v. Hathaway*, 13 Allen, 239; *Bradley v. Heath*, 13 Pick. 163; *Bodwell v. Osgood*, 3 Pick. 379; *Sheckell v. Jackson*, 10 Cush. 26; *Harrison v. Bush*, 5 El. & Bl. 344; *Moore v. Butler*, 48 N. H. 161. A statement by a physician that a unmarried female patient is pregnant, is not a privileged communication, unless it be made in good faith to one who is reasonably entitled to receive the information. *Alpin v. Morton*, 21 Ohio St. 536.]

(b) *Brook v. Sir Henry Montague*, Cro. Jac. 90; Poph. 96; *Hodgson v. Scarlett*, Holt C. N. P. 621; 1 B. & Ald. 233, S. C. [No proceeding in the regular course of justice is to be deemed a libel. *Kidder v. Parkhurst*, 3 Allen, 393; *Strauss v. Meyer*, 48 Ill. 385; *Terry v. Fellows*, 21 La. Ann. 375; *Dunham v. Powers*, 42 Vt. 1.]

(b¹) [But friendship is no justification of slanderous words. And statements that a man has been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is not a relative, and not in answer to inquiries, are not privileged communications. *Krebs v. Oliver*, 12 Gray, 239. See, also, *Joannes v. Bennett*, 5 Allen, 169.]

(c) *Bul. N. P.* 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Curry v. Walter*, 1 B. & P. 525; *Pattison v. Jones*, 8 B. & C. 584; 3 M. & R. 101, S. C.; *aliter*, if express malice, &c. in the master, *Id.*; 3 B. & P. 587. [In an action by a servant against his master for slander in accusing him of theft, in which the defendant set up that the accusation was a privileged communication, it was ruled at the trial that statements concerning the alleged theft, made in good faith to the plaintiff, or to a police officer, or to a neighbor who had spoken to the defendant about hir-

ing the plaintiff, were not actionable, if made to such persons alone, the defendant taking reasonable care that he should not be heard by others; and the rules of law as to the proof of malice were correctly stated; it was held that the defendant had no ground of exception to the ruling. *Dale v. Harris*, 109 Mass. 193. *Colt J.* in this case said: "The inference of malice is rebutted when the occasion and circumstances of the speaking are such as to exclude the idea of malice; as when the communication was made in good faith, in the performance of a duty, and with the honest and reasonable purpose of protecting the interest of the party using the words. When that is the case, the plaintiff must prove malice in fact, or he fails to establish a necessary element in his cause of action. It is a question for the court whether the statement, if made in good faith and without malice, is thus privileged. But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there be evidence tending to show actual malice; as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity or otherwise, a purpose wrongfully to defame the plaintiff. *Brow v. Hathaway*, 13 Allen, 239; *Somerville v. Hawkins*, 10 C. B. 583; *Gassett v. Gilbert*, 6 Gray, 94." *Smith v. Higgins*, 16 Gray, 251; *Sheckell v. Jackson*, 10 Cush. 25; *Wenman v. Ash*, 13 C. B. 836, 845. But a privileged communication is not made slanderous by being spoken with intemperate heat and excitement, or in the presence of a third person. *Brow v. Hathaway*, 13 Allen, 239. See *Moualer v. Harding*, 33 Ind. 176.]

(d) *Brook v. Sir Henry Montague*, Cro. Jac. 91.

(e) *Crawford v. Middleton*, 1 Lev. 82.

(f) 4 Rep. 12 b; *Cristie v. Cowell*, Peake R. 4; *Thompson v. Bernard*, 1 Campb. 48; *Harrison v. King*, 7 Taunt. 431; 4 Price, 46, S. C.

(g) 1 Gale, 69.

whether the publication be libellous or not; (*h*) and it is for the jury to decide whether a charge is made with a motive or under circumstances which take the case out of a privileged communication. (*i*)

A plea of privileged communication must allege that the defendant made the communication on a lawful occasion, believing it to be true, and without malice, or at least *bonâ fide*. (*k*)

The effect of the plea of not guilty in putting in issue the sense in which words were written or spoken, seems, however, only to apply when the meaning is alleged by an *innuendo* in setting out the words. Under the above rule of Hil. T. 4 W. 4, the inducement, when material and properly pleaded, must be traversed if it is intended to be denied; and where the plaintiff by way of inducement stated that the words "black sheep" contained in the libel thereafter mentioned were used by the defendant at the time of publishing the libel in a particular sense, and were so understood by others, and the defendant pleaded that at the time of the committing the said supposed grievance he did not use the said words "black sheep" in the meaning imputed, &c. traversing the inducement, and concluding to the country; it was held that the plea was good, and did not amount, as objected, to not guilty. (*l*)

Before the pleading rules it was held that the defendant might, under the general issue, in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of publishing immoral works, adduce evidence to show that the supposed libel was a fair stricture upon the general run of the plaintiff's publications. (*m*) And it was *necessary* to plead specially that the defendant acted and spoke in his character of a judge, or juror, (*m*¹) or as a party, or witness, (*m*²) in a judicial proceeding, in uttering the supposed slander, (*m*³) or that the publication was procured by the contrivance of the plaintiff with a view to an action; (*n*) and it was also held, in an * action on a libel in a handbill, offering a reward for the recovery of

(*h*) *Baylis v. Lawrence*, 11 Ad. & El. 920.

(*i*) *Padmore v. Lawrence*, 11 Ad. & El. 380; [*ante*, 520, note (*c*).]

(*k*) *Smith v. Thomas*, 2 Bing. N. C. 372; 4 Dowl. 333, S. C.; [*Smith v. Higgins*, 16 Gray, 251; *Carpenter v. Bailey*, 53 N. H. 590; *Palmer v. Concord*, 48 N. H. 217. And for the purpose of proving that the owner of a building which has been set on fire had reason to believe that a particular person was the incendiary, and used good faith in charging him with the crime, the charge being a privileged communication, evidence that he had been informed of declarations and acts of the suspected person tending to show his guilt, is competent. *Lawler v. Earle*, 5 Allen, 22. See *Chapman v. Ordway*, 5 Allen, 593, *Parkhurst v. Ketchum*, 6 Allen, 406. The good faith and want of malice of the defendant, when material, may be proved by his own tes-

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timony. *Smith v. Higgins*, 16 Gray, 251.]

Such a plea would, it seems, be bad on special demurrer, as amounting to the general issue. *Lillie v. Price*, 5 Ad. & El. 645.

(*l*) *M'Gregor v. Gregory*, 2 Dowl. N. S. 769.

(*m*) *Tabart v. Tipper*, 1 Campb. 350.

(*m*¹) [As to the privilege of a juror, see *Dunham v. Powers*, 42 Vt. 1.]

(*m*²) [As to the privilege of a witness, see *Smith v. Howard*, 28 Iowa, 51; *Terry v. Fellows*, 21 La. Ann. 375; *Calkins v. Sumner*, 13 Wisc. 193.]

(*m*³) [The defence that the words used were privileged must be distinctly set forth in the answer in Massachusetts. *Goodwin v. Daniels*, 7 Allen, 61.]

(*n*) 1 Stark. Slander, 2d ed. 456, 460; 5 Esp. R. 13. By an M. P., *The King v. Creevey*, 1 M. & Sel. 273.

certain bills, and stating that the plaintiff was suspected of having embezzled them, that the defendant might show under the general issue that the handbill was published *bonâ fide* with a view to the protection of persons liable on the bills or to the conviction of the offender. (p)

It appears to be a doubtful question, whether in an action for a libel or slander, the defendant can be admitted to prove, under the general issue, *in mitigation of damages*, facts showing grounds of *suspicion*, short of actual proof, of the plaintiff's guilt; as that he was a person of *general bad character*, (p¹) or that there was a *general rumor* that he had committed the act with which he was charged. (p²) There

(p) Finden v. Westlake, M. & M. 461, *coram* Tindal C. J. His lordship said: "The defence here is not that the charge was true, but that the defendant acted *bonâ fide* in making it."

(p¹) [Clark v. Brown, 116 Mass. 504, 509; Peterson v. Morgan, 116 Mass. 350. In Pallet v. Sargent, 36 N. H. 501, Perley C. J. said: "Under the general issue evidence of the plaintiff's general bad character may be received in mitigation of damages; because it is for an injury to his character and reputation that the action is maintained. But the nature of the injury of which the plaintiff complains is not changed by the plea of the defendant; and it is certainly difficult to understand why the extent of the plaintiff's injury, and the amount which he ought to recover for his injury, do not depend on his character and reputation as much when the cause is tried on a plea justifying the words spoken, as on the general issue." In Stone v. Varney, 7 Met. 86, it was decided that, in an action for a libel, evidence that the plaintiff's general character was bad when the libel was published, is admissible under the general issue, in mitigation of damages, although the defendant has filed a plea in justification in addition to the general issue. And such evidence may be given after the plaintiff has introduced testimony to rebut the evidence given by the defendant in support of his justification. In this case the point was carefully discussed, and many American and English cases were cited and reviewed. Dewey J. said: "Such evidence has been held admissible in North Carolina, Ohio, and Kentucky, where a justification and the general issue are both pleaded. Vick v. Whitfield, 2 Hayw. 222; Dewit v. Greenfield, 5 Ham. 275; Eastland v. Caldwell, 2 Bibb, 21; Cralloway v. Middleton, 2 A. K. Marsh. 372; Chapman v. Ordway, 5 Allen, 593, 595; Parkhurst v. Ketchum, 6 Allen, 406. In New York, such evidence has been admitted where the general issue has been the only plea. Root v. King, 7 Cowen, 613. So in Connecticut, Pennsylvania, South Carolina, and New Hampshire. Brunson v. Lynde, 1 Root, 354; Austin v. Hanchet, 2 Root, 148; B. v. J. 22 Wisc. 372; Moyer v. Moyer, 49 Penn. St. 210; Conroe v. Conroe,

47 Penn. St. 198; Bridgman v. Hopkins, 34 Vt. 532; Henry v. Norwood, 4 Watts, 347; Buford v. M'Luny, 1 Nott & McC. 268; Sawyer v. Erfert, 2 Nott & McC. 511; Lamos v. Snell, 6 N. H. 413. See Wolcott v. Hall, 6 Mass. 518; Bodwell v. Swan, 3 Pick. 378; Toot v. Tracy, 1 John. 47; Alderman v. French, 1 Pick. 1; Thompson v. Nye, 16 Q. B. 175; Springstein v. Field, Anthon N. P. 252; Gilman v. Lowell, 8 Wend. 573; Paddock v. Salisbury, 2 Cowen, 811; Hammer v. McFarlin, 4 Denio, 509; Adins v. Smith, 58 Ill. 417; Wilson v. Noonan, 27 Wisc. 598. But special instances of misconduct cannot be shown. Chapman v. Ordway, 5 Allen, 593; Parkhurst v. Ketchum, 6 Allen, 406.]

(p²) [That such evidence is admissible in mitigation of damages, see Peterson v. Morgan, 116 Mass. 350; Watson v. Moore, 2 Cush. 133, 141; Bodwell v. Swan, 3 Pick. 376; Stone v. Varney, 7 Met. 91; Alderman v. French, 1 Pick. 1, 18; Haskins v. Lumsden, 10 Wisc. 359; Dame v. Kenney, 25 N. H. 318; Pallet v. Sargent, 36 N. H. 499; Knight v. Foster, 39 N. H. 576; Wier v. Allen, 51 N. H. 181; Beardsley v. Bridgman, 17 Iowa, 290; but see Wetherbee v. Marsh, 20 N. H. 561, 566, and the remarks upon it in Knight v. Foster, 39 N. H. 583; Farr v. Rosco, 9 Mich. 353. In Pallet v. Sargent, 36 N. H. 499, Perley C. J. said: "In some cases it has been held that the defendant, to mitigate damages, may give evidence of such facts and circumstances as show a ground of suspicion, not amounting to actual proof of the plaintiff's guilt. Haywood v. Foster, 16 Ohio, 88; Wagner v. Holbranner, 7 Gill, 296. But the weight of authority in this country is the other way. Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133; Regnier v. Cabot, 2 Gilman, 34; Bush v. Prosser, 13 Barb. 221. And the decisions in this state (New Hampshire), though perhaps the precise point has not arisen, go upon principles inconsistent with the admissibility of such evidence. Thus in Lamos v. Snell, 6 N. H. 413, it was held that evidence of particular facts, tending to impeach the plaintiff's character, was not admissible in mitigation of damages; and in Dame v. Kenney, 25

are some decisions and *dicta* that such evidence might be received to reduce the damages, on the ground that it was material in estimating the extent of injury the plaintiff had received. (g) But that doctrine, at least as regarded the admissibility of evidence of the plaintiff's *general bad character and repute*, was denied in the case of *Jones v. Stephens*, in the court of exchequer; (r) which was an action for a libel on the plaintiff in his character of attorney, and containing general reflections on his professional conduct and respectability; the defendant pleaded the general issue, and several pleas of justification, some of which alleged in very general terms, that the plaintiff had conducted himself in an unprofessional and disreputable manner; on the trial the defendant proposed to prove by witnesses, in support of the pleas of justification, and in contradiction of the *general averment* in the declaration that the plaintiff had carried on the profession and business of an attorney with great credit and reputation, that the plaintiff was of general bad character and repute in his business of an attorney; but the evidence was rejected by the chief baron as inadmissible: and on motion afterwards for a new trial, the court of exchequer was of opinion, and held, with many forcible observations,

N. H. 318, it was decided that rumors and general reports are not evidence to mitigate damages. We are of opinion that evidence of facts and circumstances, tending to show, but failing to show, that the charge made in the words spoken was true, and such as might raise a suspicion that the plaintiff was guilty, is not admissible in mitigation of damages. *Wier v. Allen*, 51 N. H. 181. In *Knight v. Foster*, 39 N. H. 576, it was decided, upon a full discussion, that the defendant under the general issue in an action of slander cannot prove that the words spoken were but a repetition of common reports, either to rebut malice or to mitigate damages. It was early held in Massachusetts, where the defendant pleaded the truth of the words spoken in justification, that he could not be permitted to give evidence of common rumor that the plaintiff had committed the offence charged, in answer to damages, and the strong reasons for so holding are given by Parsons C. J. in *Wolcott v. Hall*, 6 Mass. 514. The very recent case of *Peterson v. Morgan*, 116 Mass. 350, was an action for slander by repeating defamatory words. The defendant was not allowed to avail himself of evidence that rumors, charging the plaintiff with the same offence, previously prevailed in the vicinity either in bar or in mitigation of damages. If, however, the conduct or declarations of the plaintiff himself have given the defendant just ground to believe that the statements which he made were true, there are authorities which hold that he may show this in mitigation of damages. *Bradley v. Heath*, 12 Pick. 163; *McAllister v. Sibley*, 25 Maine, 474; but see *Pallet v. Sargent*, 36 N. H.

496; *Knight v. Foster*, 39 N. H. 576. But in *Parkhurst v. Ketchum*, 6 Allen, 406, it was held that it is no defence to an action for slander, by words imputing unchastity to a woman, to show that the defendant spoke the words to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the same to be true. See *Alderman v. French*, 1 Pick. 1; *Brickett v. Davis*, 21 Pick. 407, 408; *Watson v. Moore*, 2 Cush. 140; *Bodwell v. Swan*, 3 Pick. 376.]

(g) See *Peake Ev. App. xcii. 3d ed. App. xciv. 4th ed. 328*; *Earl of Leicester v. Walter*, 2 Campb. 251; — *v. Moor*, 1 M. & Sol. 234, 286, note; *Wyatt v. Gore*, Holt N. P. R. 299, 307; *Phil. Ev. 7th ed. See East v. Chapman*, M. & M. 47, cited *post*, 523. This was considered *veraxa questio*, in 6 Bing. 223, 224. The subject is well discussed in 2 Stark. on Slander, 2d ed. 87, &c. In *Waithman v. Weaver*, 1 D. & R. N. P. R. 10 (S. C. in 11 Price, 257, but differently stated), it seems a distinction was taken between proof of facts showing suspicion, and proof of mere rumors, viz. that at all events facts cannot be proved under the general issue in mitigation of damages. [It was held in *Huson v. Dale*, 19 Mich. 17, upon a full review of many cases, that in actions for slander, although the defendant does not justify, but pleads the general issue only, he may prove for the purpose of mitigating damages, that, at the time the words complained of were uttered, he had reason to believe they were true; provided the proof is offered strictly for the purpose of disproving malice, and not to establish a defence.]

(r) 11 Price, 235.

that such evidence was not admissible, either in mitigation of damages, or in support of any of the allegations contained in the pleas of justification. But in a subsequent case it was held, that if a justification had been pleaded, though the evidence might fall short of satisfying the jury that the strict legal offence was committed by the plaintiff, yet they might take * the facts into their consideration in estimating the damages. (s) It is matter of prudence, depending on the facts of each case, whether or not to plead a justification. If the evidence will either establish the plaintiff's guilt or at least establish his culpable conduct, it seems in general advisable to plead a justification as generally as may be admissible.

In *Saunders v. Mills*, (t) the court of common pleas held that the defendant, in mitigation of damages, might show that he copied a libellous report of an action from another newspaper into his own, and so was not the inventor of the slander, and consequently had less of malice against the plaintiff; (t¹) but that he could not prove that it had appeared concurrently in several other newspapers.

Under the provisions of the 6 & 7 Vict. c. 96, which came into operation on the 1st of November, 1843, the defendant in any action for defamation may (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action) give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

If the defendant disputes the character in which the plaintiff sues, he must traverse that part of the declaration, in compliance with the express provision of the rule of Hil. T. 4 W. 4.

When the defendant must specially justify the libel or slander, and how the plea should be framed.—In an action for a libel or slanderous words the defendant cannot, *under the general issue*, give in evidence the *truth* of the matter, or any part of

(s) *Chalmers v. Shackle*, 6 C. & P. 475. [See *Swift v. Dickerman*, 31 Conn. 285.]

(t) 6 Bing. 213; [*Thornton v. Stephens*, 2 M. & R. 45.]

(t¹) [*McDonald v. Woodruff*, 2 Dill. 244. In an action against a "commercial agency" company for libel, the answer set up that the defendants and a firm in the same business were under a mutual contract to furnish each other with information concerning the commercial standing of business men; that the alleged libellous words were telegraphed to said firm in confidence, as a warning, for the purpose of their business only and for

the purpose of eliciting from said firm correct information concerning the plaintiffs for the defendant's own use. A motion to strike out these allegations from the answer, as irrelevant and redundant, was denied; it was held that the allegations were not irrelevant or redundant, as the defendants were entitled to allege circumstances showing the nature and character of the libel, and as, under section 165 of the Code of Procedure in New York, being in justification and mitigation of such libel. *Jeffras v. McKillop*, 4 N. Y. Sup. Ct. (1874) 578. See *Beardale v. Tappan*, 5 Blatchf. C. C. 497.]

it, *even in mitigation of damages*, (*t*²) but *must justify specially*, (*t*³) stating the particular facts which evince the truth of the imputation: (*u*) and this rule holds whether the imputation upon the plaintiff's character be of a general or specific nature. (*x*) In framing a plea of justification of the truth, care must be taken to observe the following rules: 1st. It is necessary, although the libel contain a *general* imputation upon the plaintiff's character, that the plea should state *specific facts*, showing in what particular instances, and in what exact manner he has misconducted himself; (*y*) 2dly. The matters set up by way of justification * should be strictly conformable with the slander laid in the declaration, and must be proved as laid, at least in substance; (*z*) and, 3dly, If the matter of justification can be extended to the whole of the libel or slander, the plea should not be confined to part only, leaving the rest unjustified. (*a*)

(*t*²) [Knight v. Foster, 39 N. H. 576; Bradley v. Heath, 12 Pick. 166; Commonwealth v. Snelling, 15 Pick. 341; Jarnigan v. Fleming, 43 Miss. 710; Swift v. Dickerman, 31 Conn. 285; Thomas v. Dunawdy, 30 Ill. 373; Bellows J. in Smart v. Blanchard, 42 N. H. 146, and cases cited; Smith v. Smith, 39 Penn. St. 446.]

(*t*³) [See Shepard v. Merrill, 13 John. 475; Burrows v. Carpenter, 1 Clifford C. C. 204; Sheahan v. Collins, 20 Ill. 325.]

(*u*) See Underwood v. Parks, 2 Stra. 1200; Smith v. Richardson, Willes, 20, 24; 1 Saund. 130, note (1); 243 c, note (1); Jones v. Stephens, 11 Price, 235; Selw. N. P. Slander, IV. Libel, II.; 3 C. & P. 512; 1 Stark. Slander, 2d ed. 465. [In Pennsylvania, the defendant in an action of slander may plead both "not guilty" and "justification." Peters v. Ulmer, 74 Penn. St. 402. In Massachusetts, a denial of having spoken the words charged in an action of slander, and an averment of their truth, are consistent, and may be separately stated in the same answer. Payson v. Macomber, 3 Allen, 69. See Horton v. Banner, 6 Bush (Ky.), 596; Sumner v. Shipman, 65 N. Car. 623.]

(*x*) *Ib.*; Smith v. Richardson, Willes, 24. But if the plaintiff prove other words not stated in his declaration, to show *malice*, &c. the defendant may, under the general issue, prove the truth of such words. Warne v. Chadwell, 2 Stark. R. 457. The defendant cannot be allowed to prove that the *plaintiff libelled him*. May v. Brown, 3 B. & C. 113; 4 D. & R. 670, S. C.; Wakley v. Johnson, 1 R. & M. 422; [but see Watts v. Fraser, 7 Ad. & El. 223; S. C. 8 Ad. & El. 170; Freeman v. Tinsley, 50 Ill. 497; Richardson v. Northrup, 56 Barb. 105.]

(*y*) This rule is considered and illustrated by examples in considering *certainty* as one of the qualities of a plea of justification. [Commonwealth v. Snelling, 15 Pick. 341, 342; Alderman v. French, 1 Pick. 17; Vanwycke v. Guthrie, 4 Duer, 268; S. C. 17 N. Y. 190; Billings v. Waller, 28 How. Pr. 97; Wachter v. Quenzer, 29 N. Y. 547; Tilson

v. Clark, 45 Barb. 178; Ames v. Hazard, 8 R. I. 143; Atteberry v. Powell, 29 Missou. 429; Ormsby v. Douglass, 5 Duer, 665; Fry v. Bennett, 5 Sandf. 54; Buddington v. Davis, 6 How. Pr. 40; Sayles v. Wooden, 6 How. Pr. 84. Where, however, the defamatory matter complained of consists of a definite and specific charge, it is only necessary to allege that the specific charge is true. Vanwycke v. Guthrie, 4 Duer, 268; S. C. 17 N. Y. 190. As to the degree of evidence necessary to support an answer justifying a charge of crime on the ground of its truth, see Dill v. O'Ferrell, 45 Ind. 268; Wilson v. Barrett, 45 Ind. 163; Ellis v. Buzzell, 60 Maine, 209.

(*z*) Hilsden v. Mercer, Cro. Jac. 676; Upsher v. Betts, Cro. Jac. 578; Fysh v. Thorowgood, Cro. Eliz. 623; Bell v. Byrne, 13 East, 554; Weaver v. Lloyd, 2 B. & C. 678; 4 D. & R. 230, S. C.; 1 Stark. Slander, 2d ed. 480; [Desmond v. Brown, 29 Iowa, 53; Wachter v. Quenzer, 29 N. Y. 547; Holton v. Muzzy, 30 Vt. 365. To justify the speaking of the words laid in the declaration, the plea and evidence must meet the specific charge. It is not enough to prove that the plaintiff was guilty of another crime, of a different character, or of the same character. A charge of stealing sheep is not justified by showing that the plaintiff stole meat or boards; nor a charge that he committed adultery with A., by proving that he committed adultery with B.; nor a charge that he committed perjury in one part of his testimony, by proving that he committed perjury in another part of his testimony on the same trial. Perley C. J. in Pallet v. Sargent, 36 N. H. 496, 498; Ridley v. Perry, 16 Maine, 21; Andrews v. Vandeezer, 11 John. 42; Self v. Gardner, 15 Mis. 48; Palmer v. Haight, 2 Barb. 210; Starr v. Harrington, 1 Carter (Ind.), 515; Holmes v. Johnson, 11 Ired. 55; Sanford v. Gaddis, 13 Ill. 329; Gregory v. Atkins, 42 Vt. 237; Bundy v. Hart, 46 Missou. 460.]

(*a*) See an instance, 1 Stark. Slander, 2d ed. 484; Mountney v. Walton, 2 B. & Ad.

the former proceedings was in substance correct and faithful; and * although the plea should show the facts and detail the evidence, &c. it need not contain every word uttered at the trial. (o)

The 6 & 7 Vict. c. 96, s. 2, enacts, "That in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication, a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an act passed in the session of parliament held in the fourth year of his late majesty, intituled 'An act for the further amendment of the law, and the better advancement of justice;' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea."

Consistently with the elementary principle of pleading, that pleas of justification, or in avoidance, must *confess* the fact to which they are applied, it is essential that a special plea justifying the publication of slanderous matter should admit the libel or words complained of; and the plea will be bad if it show a publication of words substantially different from those laid in the declaration. (p)

It is also a rule, applicable as well to pleas justifying slander as other special pleas, that they should not be extended to the justification of more than the matter to which in the commencement of his plea the defendant *professes* to plead. This rule will be considered fully hereafter. We may, however, here mention, as an example to

ent, 3 B. & Ald. 702; 7 Moore. 300, S. C., in error; Saunders v. Mills, 6 Bing. 213; [Commonwealth v. Blanding, 3 Pick. 304.]

(o) See per Littledale J. Flint v. Pike, 4 B. & C. 483; 6 D. & R. 533, S. C.; and see Edwards v. Bell, 1 Bing. 403, as an authority for the position that it is sufficient

that the *substance* of the libel be justified and proved.

(p) See M'Pherson v. Daniels, 10 B. & C. 263; Johns v. Gittinge, Cro. Eliz. 239; Bellingham v. Mynors, Cro. Eliz. 153; Jones, 307; 1 Saund. 244 c, note; and per Tindal C. J. Clarkson v. Lawson, 6 Bing. 593; [ent, 523, note (z).]

the rule, that if the libel be that the plaintiff, a proctor, had been "*thrice* suspended for misconduct," a plea to the whole declaration *showing only *one* suspension, is ill on demurrer. (q) As, however, such libellous matter is divisible, a plea as to one suspension, justifying the libel *pro tanto*, is sustainable. (r)

Care should therefore be taken to confine the plea in the introductory part to the exact portions of the libel or slander which can be, and afterwards are, justified. In enumerating such portions it is not unusual to repeat and set out the matter in *hæc verba* (viz. "as to the following parts of the said supposed libel, to wit, &c. the said defendant says, &c."); but a general reference to such parts of the slander as are justified may be sufficient, if the court can see with certainty what parts are referred to. Thus, if the reference be "to so much of the said supposed libel as imputes to the plaintiff perjury," &c. (as the case may be), "the defendant saith," &c.; that would be sufficient, without repeating all these parts again, which would tend to prolixity of pleading, and ought to be avoided. (s) And where the libel was that the plaintiff, a proctor, had been "*suspended three times* for extortion, once by Lord S. and twice by Sir J. N., and the plea was, as to so much of the libel as imputed that the plaintiff had been "*once* suspended," showing a suspension by Sir J. N., it was held that the plea sufficiently designated the matter to which it was meant to be applied. (t)

The plea of justification need not *expressly* deny the *innuendoes* and epithets contained in the declaration; for if the fact be justified, the motive, intention, and manner are immaterial. (u)

The reasons which render it expedient or injudicious in certain cases to *justify* specially in an action for slander or a libel, will be pointed out upon a future occasion.

It was always necessary to plead the statute of limitations specially. (x)

In regard to injuries to persons relatively, in an action on the case for the seduction of the plaintiff's daughter, *per quod servitium amisit*, the defendant, under the plea of *not guilty*, may insist that the daughter was not her father's servant. (y)

(q) *Clarkson v. Lawson*, 6 Bing. 266.

(r) *Clarkson v. Lawson*, 6 Bing. 587. In pleading a justification to a part of the declaration, that part must be of an actionable matter. A defendant cannot quote out of a slanderous sentence words which amount to no slander at all, and content himself with justifying them only. Per Maule J. *Edsall v. Russell*, 12 L. J. R. N. S. C. P. 8, 9; 2 Dowl. N. S. 650, S. C.; per Tindal C. J. *Clarke v. Taylor*, 2 Bing. N. C. 654; 3 Scott, 95, S. C.

(s) See per Le Blanc J. *Stiles v. Nokes*, 7 East, 507; and *Tindal C. J. Clarkson v.*

Lawson, 6 Bing. 593; *M'Gregor v. Gregory*, 2 Dowl. N. S. 769.

(t) *Clarkson v. Lawson*, 6 Bing. 587.

(u) *Astley v. Younge*, 2 Burr. 807; 1 Stark. Slander, 2d ed. 476.

(x) 2 Saund. 63 a; [*Parker v. Irvin*, 47 Geo. 405; *Davenport v. Short*, 17 Minn. 24.] The burden of proof in an action for slander, is on the plaintiff to prove that the words were spoken within two years before the suing out of his writ. *Pond v. Gibson*, 5 Allen, 19; *Huston v. M'Pherson*, 8 Blackf. 562. See *Norris v. Elliott*, 39 Cal. 72.]

(y) *Holloway v. Abell*, 7 C. & P. 582.

2dly. Injuries to Personal Property, and Breach of Duty or Contract. — The rules of Hil. T. 4 W. 4 give the following examples of the effect of the general issue in this branch of the action : —

2dly. Injuries to personal property, &c.

"In this form of action against a carrier, the plea of not guilty will * operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

"In actions for an escape it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings." (z)

In an action against a railway company for the loss of goods delivered to them as common carriers, the defendants pleaded *Carriers.* that under the provisions of the act of parliament constituting the company, they were not liable for any articles taken with them by passengers, except articles of clothing of a certain weight and size, and that the goods lost by the plaintiff were to be conveyed with him as a passenger, and were not articles of clothing; and it was held that the plea was an argumentative traverse of the goods having been delivered to be carried and of the defendant's liability, and amounted to the general issue, as the plaintiff must have shown, under the plea of not guilty, that the case was not within the provisions of the act, and must have shown the existence of a special contract, in order to make the company liable. (a)

In an action against the sheriff for a false return of *nulla bona* to a writ of *fieri facias*, not guilty puts in issue only the fact of *Sheriffs for false return.* the sheriff having the money in his hands, and making the return alleged, and it is not competent to him under that plea to set up, as a defence, the bankruptcy of the debtor before the execution of the writ; (b) or an assignment by him of his goods to a third party. (c)

Where in an action against the sheriff for not selling goods within a reasonable time under a writ of *fi. fa.*, and falsely returning that the goods remained in his possession for want of buyers, a plea that the defendant could not nor might nor ought to have sold the goods under or by virtue of the writ, or to have raised thereout the moneys indorsed to be levied, within the space of time in the declaration mentioned, was held bad, as amounting to the general issue. (d) In an action against the sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the plaintiff alleged that the defendant took in execution divers goods and chattels of J. R. (the judgment debtor), of the value of the

(z) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in Particular Actions," IV. 1.

(a) *Elwall v. The Grand Junction Railway Company*, 5 M. & W. 669. ✓

(b) *Wright v. Lainson*, 2 M. & W. 739.

(c) *Lewis v. Alcock*, 3 M. & W. 188.

(d) *Rowe v. Ames*, 6 M. & W. 747.

moneys indorsed on the writ, and levied the same thereout; the defendant pleaded that he did not seize or take in execution any goods of J. R., nor levy thereout the moneys in the declaration mentioned. At the trial it was proved that the sheriff seized goods under the plaintiff's writ, but that the proceeds were appropriated to the payment of arrears of rent, and a claim upon a prior writ; and it was * held that the plea must be construed with reference to the meaning of the declaration, the terms of which it adopted, and that it traversed in effect, that the defendant did not seize any goods *liable to execution at the suit of the plaintiff*, and that the facts established a good defence to the action. (e)

By the statute 8 & 9 W. 3, (f) no *retaking* on fresh pursuit shall be given in evidence on the trial of any issue in any action of *escape* against the marshal, &c. unless the same shall be specially pleaded, nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner for whose escape such action is brought, did escape without his consent, privity, or knowledge. (g) The plea of recaption must show that the party was retaken before the action for the escape was brought. (h) A plea that the prisoner escaped without the jailer's default, and returned before action brought, should allege a detention, and that it continued to the time of action, or that it had been terminated by legal means; (i) and in an action against the marshal of the queen's bench prison, a plea alleging that while the prisoner *intended* and was about to return to the rules, the plaintiffs and others in collusion with them, in further pursuance of the fraudulent contrivance, &c. wrongfully caused the prisoner to be arrested and detained until a writ could be sued out and served on the marshal, and alleging that had not the prisoner been so collusively and illegally arrested and detained he *could* have returned to and been within the rules before the commencement of the suit, was held bad and the plaintiffs entitled to judgment *non obstante veredicto*. (k)

Plea of recaption to a declaration in case for an escape.

In an action against a person for negligently driving his cart and horse against the plaintiff's horse, the declaration being framed in the usual form, it was held that the defendant under the plea of not guilty could not show that he was not the person driving, and that the cart did not belong to him. (l) And in a similar action, charging the

Negligence.

(e) *Heenan v. Evans*, 1 Dowl. N. S. 204.

(f) 8 & 9 W. 3, c. 27, s. 6.

(g) *Bonafous v. Walker*, 2 T. R. 126; 3 Salk. 150.

(h) *Stonehouse v. Mullins*, 2 Stra. 873; 650. Selw. N. P.

(i) *Chambers v. Jones*, 11 East, 406.

(k) *Merry v. Chapman*, 3 P. & D. 25.

(l) *Taverner v. Little*, 5 Bing. N. C. 678.

See, also, *Wheatley v. Patrick*, 2 M. & W.

defendant for the negligence of his servant, it was held that the defendant under this plea could not show that the servant was not his. (m) If the accident arose from the plaintiff's negligence, not guilty is the proper plea, and a plea stating the particulars of the plaintiff's negligence, and concluding by a special traverse, was held bad. (n)

In case, by the executors of a stockholder against the Bank of * England, for refusing to transfer stock of the testatrix and to pay the dividends, the facts that nearly all the stock had been sold and transferred by a relative in the lifetime of the testatrix, her name being forged, and that she had the means of knowing of the transfer, and had been guilty of gross negligence, and that the defendants were not to blame, are available as a defence under not guilty. (o)

In an action for a deceitful warranty of a horse, it has been ruled that the plea of not guilty puts in issue both the warranty and the unsoundness — in short, the whole declaration, except the bargain and sale, that being matter of inducement. (p)

3dly. Injuries to Real Property, Easements, &c. — “In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.” (q)

In an action for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated. (r)

In an action by a reversioner for an injury to his land in the possession of his lessee, the defendant by the plea of not guilty admits the reversionary interest of the plaintiff, the demise, and the tenancy, and the injurious act alone is put in issue. (s)

“In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.” (t)

Thus in an action for diverting a stream of water, on the plea of not guilty, the only matter in issue is the fact of the diversion, and the allegation that the defendant “wrongfully” diverted the water

(m) *Hart v. Crowley*, 12 Ad. & El. 378.
 (n) *Gough v. Bryan*, 2 M. & W. 770. ✓
 (o) *Coles v. The Bank of England*, 10 Ad. & El. 437. ✓
 (p) *Spencer v. Dawson*, 1 M. & Rob. 552.
 (q) Reg. Genl. Hil. T. 4 W. 4, “Pleadings in particular Actions,” IV. 1. ✓

(r) *Norton v. Scholefield*, 9 M. & W. 665; 1 Dowl. N. S. 638, S. C. ✓
 (s) *Raine v. Alderson*, 4 Bing. N. C. 702. ✓
 (t) Reg. Genl. Hil. T. 4 W. 4, “Pleadings in particular Actions,” IV. 1. ✓

does not put the title in issue, (*u*) or any fact alleged by way of *inducement* in the declaration. (*x*)

Before the 2 & 3 W. 4, c. 71, s. 5, although plaintiffs were allowed to declare generally in actions on the case, stating that by reason of their possession of a messuage or other corporeal tenement, they were entitled to a right of common or of way, &c. without showing the origin of the right or any derivative title; (*y*) yet in other pleadings, * particularly in trespass and replevin, it was essential to justify or claim under some owner in fee, and then to state the derivative title, however difficult and prolix. (*z*) The above statute enacts, that in all pleadings to actions of trespass and in all other pleadings, wherein before the passing of that act it would have been necessary to allege the right (*scilicet*, of common or other profit *à prendre*, or of way, or other easement, or to the use of lights) to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenements in respect whereof the same is claimed for and during such of the periods mentioned in that act as may be applicable to the case, and without claiming in the name or right of the owner in fee, as was before usually done, and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter therein before mentioned, or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence in any general traverse or denial of such allegation. This enactment has introduced a much more concise mode of claiming rights of this nature. (*a*)

IN TROVER.

In trover the general issue is *not guilty*. This plea operates as a denial of the conversion only, and not of the plaintiff's title to the goods. (*b*) The conversion which this plea puts in issue is a conversion in fact, and not merely a wrongful conversion. (*c*) The plea admits that the plaintiff has *some* property in the goods in respect of which he would be entitled to recover against the defendant, but does not preclude the defendant from showing that he is tenant in common with the plaintiff. If, however, in such case there has been a conversion in fact, as by seizure and sale, the defendant must by some other plea justify such conversion, and he

IN TROVER.
General
Issue.

(*u*) *Frankum v. Earl of Falmouth*, 2 Ad. & EL. 452; 4 N. & M. 330, S. C. ✓

(*x*) *Dukes v. Gosling*, 1 Bing. N. C. 588; 3 Dowl. 619, S. C.

(*y*) *Ante*, 395.

(*z*) *Ante*, 395.

(*a*) See the forms, *post*, vol. ii. 479, 496.

(*b*) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," IV. 1. [And a denial of the conversion is only equivalent to a plea of the general issue. *Fenlason v. Rackliff*, 50 Maine, 362.]

(*c*) *Stancilffe v. Hardwick*, 2 Cr., M. & R. 1; 3 Dowl. 762; 5 Tyr. 551, S. C.

cannot under the plea of not guilty show that he was justified as tenant in common with the plaintiff in committing the conversion in fact; (d) and the defendant under this plea cannot set up an absolute property in himself in the chattel by sale from the plaintiff, although the only evidence of a conversion is a demand and refusal. (e) The plaintiff is entitled to a verdict on the plea of not guilty, if on the trial a conversion in fact be proved, although it appear from the evidence that * at the time of such conversion the plaintiff had parted with his property in the goods. (f)

A lien cannot be given in evidence under a plea of not guilty, for this plea, by the rules of Hil. T. 4 W. 4, denies only the conversion, and admits the title of the plaintiff; that title consists of the right of property and the right of possession at the time of the alleged conversion; but a lien is inconsistent with and negatives the plaintiff's right of possession. If, therefore, proof of it were admitted under the plea of not guilty, the defendant would be allowed to give in evidence at the trial a negative of that matter which he has by his plea admitted on the record. (g)

To give a lien in evidence, the defendant ought to traverse that the plaintiff was possessed of the goods as of his own property, in manner and form as alleged in the declaration; which puts in issue the right of the plaintiff to the possession of the goods as against the defendant at the time of the conversion. (h) Where a party, to whose order goods were lying at a wharf, gave the wharfinger an order to deliver them to A., but afterwards, with A.'s concurrence, gave him a fresh order to deliver them to B., which he did; in an action of trover by A. against the wharfinger, it was held that the defendant might avail himself of such transfer to B., under a plea that the plaintiff was not possessed of the goods as in the declaration mentioned. (i) So also where it appeared that the plaintiff, being the legal owner of the goods, they were seized in the actual possession of a third party, under an execution against such third party, and sold to the defendant, it was held that under a plea denying that the plaintiff was possessed as of his own property of the goods, the defendant might show that the plaintiff authorized the sale; (k) and in trover for goods seized by the defendant as sheriff, the defendant under this plea may set up the title of the assignees of a bankrupt who had sold the goods to the plaintiff, but had continued in possession of them, so that they were in his order and disposition at

(d) *Ib.* Ibid.

(e) *Barton v. Brown*, 5 M. & W. 298.

(f) *Vernon v. Shipton*, 2 M. & W. 9.

(g) *White v. Teal*, 12 Ad. & El. 106, 115;

4 P. & D. 43, S. C.

(h) *Per Parke B. Isaac v. Belcher*, 5 M. & W. 139; *White v. Teal*, 12 Ad. & El. 115;

Owen v. Knight, 4 Bing. N. C. 54; *Brandao v. Barnett*, 1 M. & G. 908; 2 Scott N. R. 96, S. C.

(i) *Vernon v. Shipton*, 2 M. & W. 9.

(k) *Pickard v. Sears*, 6 Ad. & El. 469; 3 N. & P. 488, S. C.

the time of his bankruptcy. (*l*) And where in trover by the assignees of H. L., bankrupts, against the sheriff, since the passing of the 2 & 3 Vict. c. 29, the defendant pleaded that the bankrupts being indebted to S., the latter sued out a *fi. fa.* directed to the defendant as sheriff, and thereupon, after the bankruptcy, but before the fiat, and before notice, he took the goods in execution, and that afterwards a fiat issued, under which the plaintiffs were appointed assignees, and as such entitled to the possession of the goods, which was the possession of the assignees in the declaration mentioned, it was held that the defence might have been given in evidence either under one or other of the pleas of "not possessed," or "not guilty;" but that it was not an argumentative plea of "not possessed," as it contained implied color, and admitted the right of the assignees, by relation, to the lawful possession, at the time the defendant took possession of the goods under the writ. (*m*)

A plea denying the plaintiff's property in the goods, in trover, means no property *as against the defendant*. (*n*)

In trover by the assignee of a bankrupt, a plea that the plaintiff is not assignee, puts in issue the petitioning creditor's debt, and the act of bankruptcy. (*o*)

Effect of denial of title of assignee of bankrupt.

All matters in confession and avoidance must be pleaded specially, as in actions of assumpsit, (*p*) so that where there has been a conversion in fact, and the defendant insists that such conversion was lawful, without denying the plaintiff's possession, he must confess and avoid it, by pleading specially the right or title by virtue of which he was justified in the conversion. (*q*) Thus the seizure of the subject-matter of the action, as a distress damage feasant, should be pleaded. (*r*) So where the defendant being in the employment of J. in his trade, and acting under a general authority, sold, *bond fide*, some goods belonging to J., after J. had committed an act of bankruptcy, of which the defendant was ignorant, and the sale was more than two months before the fiat; and the assignee brought trover on a plea of not guilty, it was held that the defendant had been guilty of a conversion, and that if he had any justification, he should have pleaded it specially. (*s*)

Special pleas.

(*l*) *Leake v. Loveday*, 2 Dowl. N. S. 624. See, also, *Isaac v. Belcher*, 5 M. & W. 139; *Chase v. Goble*, 2 M. & Gr. 930; 3 Scott N. R. 245, S. C.; *Ashby v. Minnett*, 3 N. & P. 231; but see per Parke B. *Samuel v. Duke*, 3 M. & W. 631.

(*m*) *Unwin v. St. Quintin*, 2 Dowl. N. S. 790.

(*n*) *Nicolls v. Bastard*, 2 Cr., M. & R. 659.

(*o*) *Butler v. Holson*, 4 Bing. N. C. 290;

6 Dowl. 409, S. C.; *Best v. Thomas*, 6 C. & P. 611.

(*p*) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," IV. 2.

(*q*) *Standcliffe v. Hardwick*, 2 Cr., M. & R. 1; 3 Dowl. 762. See instances, *Fancourt v. Bull*, 1 Bing. N. C. 681; *Kelcey v. Minter*, 1 Bing. 791.

(*r*) *Weeding v. Aldrich*, 9 Ad. & El. 861; *Listledale J. dubitante*.

(*s*) *Pearson v. Graham*, 6 Ad. & El. 899.

IN REPLEVIN.

The plea in *denial* in replevin is *non cepit modo et formā*, by which the defendant puts in issue, not only the taking, but also the taking in the place mentioned in the declaration. (t) But the defendant cannot have a return of the cattle under that plea, and therefore if he want such a return, he should plead that he took the cattle * in some other place, describing it, and traverse the place laid in the declaration; and, in order to have return, should avow or make cognizance, (t¹) stating the cause for which he distrained; (u) but if the defendant ever had the cattle in the place stated in the declaration, in leading them to the pound, though he took them elsewhere, he should avow accordingly. (x) Where the distress is for poor's rates, the defendant may plead not guilty, and give the cause of taking in evidence; (y) and a general plea is given by statute where a distress is taken for sewers' rates; (z) and the bankrupt act gives the general issue to a defendant sued for anything done in pursuance thereof. (a) But the defendant must avow or make cognizance with more particularity under a distress for rent, (b) or damage feasant. (c) And though the statute (d) gives a general avowry in cases of distresses for rent-service, &c. (e) it is still advisable in some cases to set out the title specially, in order that a traverse of a particular part of it may be taken, and that the parties may proceed to trial upon some particular point in issue; (f) and this statute does not extend to avowries for heriot custom. (g) And an avowry or cognizance for rent in arrear must correctly describe the terms of the tenancy, (h) though under an avowry for two years' rent, the party will succeed,

(t) *Johnson v. Wollyer*, 1 Stra. 507; 2 Mod. 199; 1 Saund. 347, note (1); Gilb. Repl. 4th ed. (1823); *Walton v. Kersop*, 2 Wils. 355; [*Smith v. Snyder*, 15 Wend. 325. The plea of *non cepit* in replevin, although it admits the property to be in the plaintiff, may nevertheless be joined with a plea of property in the defendant or other person, *Simpson v. M'Farland*, 18 Pick. 427. The want of a plea in replevin is not cured by a verdict. *Leckey v. M'Dermott*, 5 Serg. & R. 331. The defendant in replevin may plead several pleas. *Martin v. Ray*, 1 Blackf. 291; *Sprague v. Kneeland*, 12 Wend. 161. It is otherwise in Virginia. *Vaiden v. Bell*, 3 Rand. 448.]

(t¹) The plea of property in a stranger, which may be pleaded either in abatement or in bar, entitles the party to a return without an avowry. *Harrison v. M'Intosh*, 1 John. 380, 384; *Bemus v. Beekman*, 3 Wend. 667; *M'Farland v. Baker*, 1 Mass. 152; *Martin v. Ray*, 1 Blackf. 291. See *Gardner v. Lane*, 98 Mass. 517.]

(u) 1 Saund. 347, note (1).

(v) *Post*, vol. ii.

(y) 43 Eliz. c. 2, s. 19; 4 & 5 W. 4, c. 76, s. 104. See Co. Litt. 283 a.

(z) 23 Hen. 8, c. 5, s. 19.

(a) 6 Geo. 4, c. 16, s. 44.

(b) 11 Geo. 2, c. 19, s. 22; 2 Saund. 284 d, note (4); 1 Saund. 347, note (6). [See *Shepherd v. Boyce*, 2 John. 446.]

(c) *Hawkins v. Eckles*, 2 B. & P. 359; 2 Saund. 284 d; 1 Saund. 347. [An avowry, justifying the taking of cattle *damage feasant* is sufficient, without justifying the detention. So held in New Hampshire. *Osgood v. Green*, 30 N. H. 210.]

(d) 11 Geo. 2, c. 19, s. 22.

(e) As to distinction between an avowry and a justification in replevin, see *Marriot v. Shaw*, Com. Rep. 274; Vin. Abr. Disclaimer, 503.

(f) 2 Saund. 284 d. See cognizance for a levy under an amercement by a court leet, *Ramsey v. Nornabell*, 11 Ad. & El. 383.

(g) *Lloyd v. Winton*, 2 Wils. 28. The statute extends to a rent-charge, although formerly ruled otherwise. *Short v. Hubbard*, 2 Bing. 349.

(h) *Brown v. Sayce*, 4 Taunt. 330.

though it appear that rent was due for one year only. (i) If a defendant enter, and make a joint distress for four several poor rates, being furnished for that purpose with four warrants, one of which is bad, he may justify under the good warrants, and abandon the bad one; and if the causes of taking are distinct and the avowries separate, he will be entitled to a return of all the goods. (k)

In an avowry on the 11 Geo. 2, c. 19, the defendant must show a privity existing between himself and the tenant on the land, and it is not sufficient to state that certain persons unknown were tenants to the defendant, under a demise by persons particularly named, the unexpired term of which had vested in those persons unknown; and in an avowry on the 21 Hen. 8, c. 19, the defendant must allege that he was seised of the lands in which, &c. (l) In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially, and leaving the apportionment of the rent to be made by *the jury; or he may avow in the general form given by 11 Geo. 2, c. 10, s. 22, as upon a holding at a certain rent. And if he avow under the statute for the entire rent, or with a deduction from the entire rent, greater or less than the proportion properly belonging to his interest in the reversion, the judge at nisi prius may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the respective particles or parts, into which the reversion has been divided. (m)

Although in general it is sufficient to allege a mere possessory title against a wrong-doer, yet in replevin there is an exception; and it is not sufficient to plead merely that the defendant was *possessed* of a close, and because the cattle trespassed, &c. he took them damage feasant. But it may be alleged generally that the close was the close, soil, and freehold (*liberum tenementum*) of the defendant. (n) And prescriptive rights may be alleged in the general terms allowed by the 2 & 3 W. 4, c. 71, s. 5. (o)

• IN TRESPASS.

In *trespass*, whether to the *person*, *personal* or *real property*, the defendant can, under the general issue of not guilty, give in evidence matter which directly controverts the fact of his having committed the acts complained of; (p) as in trespass for

(i) *Forty v. Imber*, 6 East, 434; *Cobb v. Bryan*, 3 B. & P. 348.

(k) *Governors of Bristol Poor v. Wait*, 1 Ad. & El. 264; 3 N. & M. 359.

(l) *Banks v. Angell*, 3 N. & P. 94.

(m) *Roberts v. Snell*, 1 M. & Gr. 577.

(n) *Post*, vol. ii.; 1 Saund. 346 e, note (2); 3 Saund. 385, note (3); *Stephen on Pleading*, 5th ed. 358.

(o) See *ante*, in "Case," and *post*, in "Trespass."

(p) *Weathrell v. Howard*, 3 Bing. 135; 10 Moore, 502, S. C.; *Pearcy v. Walter*, 6 C. & P. 232; and see, in general, 2 Saund. 159, note (10); [*Fuller v. Rounceville*, 29 N. H. 554.]

driving the shaft of a gig into the plaintiff's horse, if in fact the plaintiff drove his horse against such shaft and thereby himself occasioned the injury, or if the injury were accidental, such matter may be properly proved under not guilty; (q) and in trespass for assault and battery, with a tearing of clothes, a plea of not guilty of the assault *modo et forma* was held to operate as a denial of the battery and *laceravit* as well as the assault, (r) and no person is bound to justify who is not *prima facie* a trespasser. (s) The rules of pleading, Hil. T. 4 W. 4, made no alteration in regard to trespass to persons or *injuries* to personal property.

In trespass *de bonis asportatis* the plea of not guilty operates as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

In trespass *quare clausum fregit* the plea of not guilty operates as a denial that the defendant committed the trespass alleged in the *place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which if intended to be denied must be traversed specially. (t)

In all actions of trespass, whether to the person, personal or real property, matters in *discharge* or in *confession and avoidance* of the action must be specially pleaded; (u) as accord and satisfaction, (x) arbitrament, release, (y) former recovery; (z) or to an action for an assault, a magistrate's certificate of acquittal of the assault, (a) or tender of sufficient amends. (b) So the statute of limitations, which in trespass to persons is, that the defendant was not guilty within four years, and in trespass to personal or real property within six years, (c) must be specially pleaded.

The plea of not guilty, therefore, is proper in trespass to *persons*, if the defendant committed no assault, battery, or imprisonment; but in trespass to *persons*, *son assault demesne*; (d) moderate correction (d¹) of a servant, &c.; (e) *molliter manus im-*

Trespass to persons.

(q) *Pearcy v. Walter*, 6 C. & P. 282. See the cases, *ante*, in "Case."

(r) *Weathrell v. Howard*, 3 Bing. 135; 10 Moore, 502, S. C.

(s) *Badkin v. Powell*, Cowp. 478; [*Rawson v. Morse*, 4 Pick. 127.

(t) Reg. Gen. Hil. T. 4 W. 4, "Pleadings in particular Actions," V. s. 3, 2.

(u) *Bird v. Randall*, 3 Burr. 1353; 1 Bl. Rep. 388, S. C.; *Barker v. Dixon*, 1 Wils. 45, *ante*; [*Fuller v. Rounceville*, 29 N. H. 554; *Rawson v. Morse*, 4 Pick. 127; *Waters v. Lilley*, 4 Pick. 145; *Butterworth v. Soper*, 13 John. 443; *Geltson v. Hoyt*, 13 John. 579; *Gambling v. Prince*, 2 Nott & McC. 138.]

(x) *Bird v. Randall*, 3 Burr. 1353; *Doe v. Lee*, 4 Taunt. 459.

(y) *Bird v. Randall*, 3 Burr. 1353.

(z) *Ib.* See *ante*, 478, note (c). Former recovery against co-trespasser, *ante*, 88, 89.

(a) *Harding v. King*, 6 C. & P. 427.

(b) 21 Jac. 1, c. 16; Com. Dig. Pleader, 3 M. 36; Vin. Abr. Trespass, S. a. 543; *Baseley v. Clarkson*, 3 Lev. 37.

(c) 21 Jac. 1, c. 52; *Macfadden v. Olivant*, 6 East, 390.

(d) *Gregory v. Hill*, 8 T. R. 299; 1 Saund. 77, 296, note (1).

(d¹) [*Hannen v. Edes*, 15 Mass. 347.

Whenever, in answer to the defendant's plea of *son assault*, the plaintiff relies upon new matter, he should not reply generally *de injuria*, but should state such new matter specially. *Brown v. Bennett*, 5 Cowen, 181.]

(e) *Watson v. Christie*, 2 B. & P. 224.

posuit to preserve the peace; or a justification in defence of the possession of real or personal property; (*f*) or by authority of law without process, as a private individual; (*g*) or under civil process, either mesne or final, (*h*) of superior, (*i*) or inferior, or foreign courts, must always have been pleaded specially. (*k*) A plea of justification is to enumerate and cover the whole, or the plaintiff, without a special replication or new assignment, will be entitled to a verdict for the trespasses proved and not justified. (*l*) For whoever assaults or imprisons another (except in some cases under particular statutes hereafter noticed) (*m*) must justify himself by showing specially to the court that the act was lawful. (*m*¹) But if a plea of justification consisted of two facts, each of which would, when separately pleaded, amount to a good defence, it would, unless in the case of pleas of prescription, sufficiently support the justification, if one of those facts be found by the jury. (*n*) A plea justifying an arrest of the plaintiff upon the ground that a felony had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific **reasons* for suspecting the plaintiff. (*o*) And a plea justifying assault and imprisonment on the ground of a breach of the peace committed by the plaintiff must show that the breach of the peace was continuing, or show facts from which a renewal of the breach was to be apprehended; (*p*) and as little as possible should be left to *inference*. (*q*)

These are positive rules of law, in order to prevent surprise on the plaintiff at the trial, by the defendant then assigning various reasons and causes of imprisoning the plaintiff, of which he had no notice, and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evi-

(*f*) *Weaver v. Bush*, 8 T. R. 78; *Gregory v. Hill*, 8 T. R. 299; 3 Wils. 71; [*Ford v. Logan*, 2 A. K. Marsh. 325; *M'Ilroy v. Cochran*, 2 A. K. Marsh. 276; *Robinson v. Hawkins*, 4 Monroe, 136; *Baldwin v. Hayden*, 6 Conn. 453; *Hyatt v. Wood*, 3 John. 239; *Sampson v. Henry*, 11 Pick. 379. *Moliter manus imposuit* is no answer to a charge of beating, bruising, wounding, and ill-treating the plaintiff. *Gates v. Lounsbury*, 20 John. 427; *Shain v. Markham*, 4 J. J. Marsh. 578.]

(*g*) *Smith v. Edge*, 6 T. R. 562. A constable, &c. may plead the general issue, *post*, 546.

(*A*) *Barker v. Braham*, 3 Wils. 370; 1 Saund. 298, note (1).

(*i*) *Ib.*

(*k*) *Collett v. Lord Keith*, 2 East, 360, 274; *Rowland v. Veale*, Cowp. 18; [*Boaz v. Tate*, 43 Ind. 60; *Butterworth v. Soper*, 13 John. 443.]

(*l*) *Bush v. Parker*, 1 Bing. N. C. 72; [*Boaz v. Tate*, 43 Ind. 60.]

(*m*) *Post*, 546.

(*m*¹) [*See Blake v. Damon*, 103 Mass. 199; *Herrick v. Manly*, 1 Caines, 252; *Kerwich v. Steelman*, 44 Geo. 197; *Bruch v. Carter*, 3 Vroom, 554. Trespass cannot be justified on the ground of mistake merely. *Hobart v. Hagget*, 3 Fairf. 67. Whenever a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon the one who justifies, to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree, otherwise the justification fails. *Rogers v. Waite*, 44 Maine, 275; *Brown v. Gordon*, 1 Gray, 182; *Commonwealth v. Clark*, 2 Met. 23; 2 Greenl. Ev. § 98; *Hanson v. European & North Amer. Railway Co.* 42 Maine, 84, 89.]

(*n*) *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(*o*) *Ante*, 259.

(*p*) *Baynes v. Brewster*, 1 G. & D. 669.

(*q*) *Ib.* *Ibid.*

dence and proofs of facts. (r) But if a person touches another in conversation or in joke, so that no actionable assault or battery is committed, then no special plea is necessary. (s) *Molliter manus imposit* is a justification of a battery as well as of an assault. (t)

In actions for injuries to personal property, which do not involve a "taking" of the subject-matter, the general issue only denies the fact of the commission of the act complained of. And therefore even where the defendant did the act at the request of the plaintiff, that matter of defence must be specially pleaded. Thus, where to trespass for unmooring the plaintiff's barge, the defendant pleaded merely the *general issue*, it was held that he could not give in evidence that he removed the barge from a situation of danger by the plaintiff's authority, or that being frozen to the barge of a third person, which the defendant was authorized to remove, the one was necessarily removed with the other, and that they were both brought together to a place of safety. (u)

In trespass *de bonis asportatis* the general issue, under the rules of Hil. T. 4 W. 4, as already stated, only denies the taking or damaging the goods mentioned, and does not put in issue the plaintiff's property therein. If the defendant claims the goods, he must deny the plaintiff's property or possession, or plead the facts specially, and therefore under not guilty he cannot show property in himself as assignee of a bankrupt or otherwise.

A distress for rent when made on the demised premises may by express enactment be given in evidence under the general issue; (x) but if made off the demised premises, as on a common, or under a fraudulent removal, the defence must be specially pleaded. (y)

* A distress or seizure for tolls, (z) stallage at a fair, &c. (a) under a by-law, (b) or for damage feasant by the occupier, (c) by a commoner, (d) or other matter of justification, with or without process, must have been pleaded specially, even before the modern rules. A general allegation of possession in a plea justifying trespass damage feasant is sufficient, independently of the statute 2 & 3 W. 4, c. 71, as it is not a local action like trespass *quare clausum fregit*. (e)

(r) Co. Litt. 282 b, 383 a; *Barker v. Bramham*, 3 Wils. 370.

(s) *Williams v. Jones*, Cases temp. Hardw. 301; *Kingsbury v. Collins*, 4 Bing. 206.

(t) Com. Dig. Pleader, 3 M. 16; per Best C. J. [See *Gates v. Lounsbury*, 20 John. 427.]

(u) *Milman v. Dolwell*, 2 Campb. 378.

(x) 11 Geo. 2, c. 19, s. 21.

(y) *Furneaux v. Fotherby*, 4 Campb. 136; 1 Esp. 257.

(z) *Bennington v. Taylor*, Lutw. 1519.

(a) *Bodle v. Wilkins*, 3 Lev. 224, 227.

(b) *Kirk v. Nowill*, 1 T. R. 119; 4 Mod. 337.

(c) 1 Saund. 221; 2 Saund. 224.

(d) 1 Saund. 346; *Cope v. Marshall*, 2 Wils. 51.

(e) 1 Saund. 221, note (1).

In trespass *quare clausum fregit* the plea of not guilty only puts in issue the commission of the trespass alleged in the place mentioned, and it is expressly precluded by the rules of Hil. T. 4 W. 4, from operating as a denial of the plaintiff's possession, or right of possession of that place, which if intended to be denied must be traversed.

A plea denying *the close to be the plaintiff's* since the above rules is a denial of the *plaintiff's title to the close* to the same extent that he would have been obliged to prove it before under the general issue; that is, it is a denial of possession if the defendant was a *wrong-doer*; if otherwise, of the right to the possession; but in either supposition it is necessarily a denial of *title*, for even in the former case possession is *title* against a wrong-doer, and therefore the plea raises a question of title in the action. (f) Where, however, to a declaration for breaking and entering the plaintiff's close, the defendant pleaded, first, not guilty; secondly, that the close was not the close of the plaintiff; thirdly, that the close was the soil and freehold of the defendant; it was held that evidence of possession was sufficient to entitle the plaintiff to a verdict on the second plea. (g) This case was confirmed in a subsequent one, in which Lord Denman C. J. in delivering the judgment of the court, said, "We agree that the question of title is not to be raised on a plea of possession; we agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrong-doer. (g¹) But these elementary principles must be understood reasonably. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession. (h) Where the plaintiff complained of an injury to a messuage and premises in his possession, and the defendant traversed the possession, it was held that the plaintiff was entitled to recover * on proof of possession of only two rooms in the house. (i) In trespass for breaking and entering three closes, where the defendants in their plea alleged that the closes were the property of a third person, and that the defendants entered as his servants, and the plaintiff replied, showing title in himself, it was held, on the plaintiff proving his case as to only two of the closes, that the issue was distributable, and that the plaintiff was

(f) Purnell v. Young, 3 M. & W. 288.

(g) Heath v. Milward, 2 Bing. N. C. 98.

(g¹) [See Brandon v. Grimke, 1 Nott & McC. 356; Marsh v. Berry, 7 Cowen, 344; Murray v. Webster, 5 N. H. 371. The defendant in this action may offer as many titles to the land in dispute as he pleases, and if they fail him, he may resort to, and rely upon, his possessory right. Mackay v. Rey-

nolds, 2 Bay, 474; Strange v. Durham, 2 Bay, 427.]

(h) Browne v. Dawson, 12 Ad. & El. 628, 629; 4 P. & D. 355, S. C.

(i) Fenn v. Grafton, 2 Bing. N. C. 617. But if the defendant justify as possessor of a *dwelling-house*, the plea will not be proved by evidence of possession of two rooms in a house. Monks v. Dykes, 4 M. & W. 567. See, also, Bond v. Downton, 2 Ad. & El. 26.

entitled to a verdict as to the two closes, and the defendant as to the third. (*k*)

If the closes are not described by their abutments or names in the declaration, and the defendant is doubtful as to the exact extent of the property claimed by the plaintiff, and has any close in the parish mentioned in the declaration, he may compel the plaintiff to *new assign*, designating and describing specifically what property he claims, by pleading *liberum tenementum*. But as by the pleading rules before referred to, the plaintiff is now required in a declaration of trespass *quare clausum fregit* to state the close by name or abutments, this is rarely requisite. The rules with regard to *new assignments* will be explained under the head of *replications*.

The plea of *liberum tenementum* (*k*¹) states a *general freehold title*, without defining the exact quality or nature of such title. It states that the *locus in quo* was and is the close, soil, and freehold of the defendant, &c. Under that plea *any* estate of *freehold*, as in fee, in tail, or for life, but not a freehold in remainder or reversion, may be given in evidence, and the plea is peculiar, and forms an exception to the general rule, that a party must show a *precise* title. (*l*) This general plea was rarely of any other utility than to compel a *new assignment*, describing the closes where they had not been particularly described in the declaration. It may, however, be usefully adopted in all cases where the freehold is said to be in a third person, and the defendant justifies as the servant of the third party; as the plaintiff in his replication can deny one only of the two facts pleaded, viz. the freehold title pleaded, or the authority or command from the alleged freeholder to the defendant, and cannot by his replication put both these matters in issue; and that which is not denied is admitted on the record. *Libertum tenementum* is a good plea to trespass on a several or free fishery, the owner of the soil being *prima facie* owner of the fishery. (*m*) Under this plea the defendant will be entitled to a verdict, if he establish a title to *that part* of the close on which the trespass was committed, and he is not bound to prove a title to the *whole* close. (*n*) This plea is also to be adopted in all cases where * the freehold is laid to be in a third person, and the defendant justifies as the servant of the third party.

If the defendant be anxious to compel the plaintiff to state his title *specially* upon the record, or admit some part of the title of the defendant, or the party under whom he justifies, he may also with propriety plead *liberum tenementum*, or adopt a still more special plea of

(*k*) *Phythian v. White*, 1 M. & W. 216; T. & Gr. 515, S. C.

(*k*¹) [See *Nevins v. Keeler*, 6 John. 63; *City of Providence v. Adams*, 10 R. I. 184. This plea admits the plaintiff's possession, and the trespass alleged. *Caruth v. Allen*, 2 McCord, 226.]

(*l*) Stephen, 5th ed. 352; 1 Saund. 347 d, note (6). As to tenancy in common, *Gow R.* 301.

(*m*) 18 Edw. 4; 4 Co. Litt. 127 a, notes.

(*n*) *Smith v. Royston*, 8 M. & W. 381; 1 Dowl. N. S. 124, S. C.

title. Thus if the defendant be in reality the freeholder, so that the plaintiff cannot with safety deny the plea, he is driven to admit its truth, and to deduce a title from the defendant, as that he demised the close to the plaintiff, &c.

In observing upon the *qualities* of pleas, we shall hereafter see that a special plea in trespass, which claims for the defendant a *possessory* right, and yet does not give the plaintiff express color, is bad ; because it amounts to the general issue, and violates the principle that a plea must *deny*, or must confess and avoid the matter alleged in the declaration. A plea of *liberum tenementum* is free from this objection, because it gives *apparent* color ; as it is not absolutely and manifestly inconsistent therewith, that the plaintiff had some inferior leasehold or minor title, in respect whereof he might have had a possessory right or title, or at least possession. It admits a sufficient possession of the plaintiff to support an action against a wrong-doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant. (o) But a special plea disclosing a *possessory* title in the defendant, as a *leaseholder* or *termor*, is openly at variance with, and directly contradicts, the very gist of the plaintiff's action of trespass. In such case, therefore, an *express color*, that is, a plausible or apparent but fictitious title, must be given to the plaintiff, according to the rules which will hereafter be explained. The object is to compel the plaintiff to state *specifically his* title, or deny that alleged in the special plea, an object which is rarely to be attained by a plea of *liberum tenementum*, the replication to which may simply traverse the general allegation. In framing the special plea of title, care must be taken to attend to the following general rules, which are ably pointed out by Mr. Serjeant Stephen, with regard to the statement of a derivative title : 1st. The derivation or commencement of an estate *in fee simple* need not be shown, as this would tend to useless prolixity. It suffices in general to deduce the title from the last absolute owner in fee simple, from or through whom the defendant claims, although the fee was only conditional or determinable on a certain event. (p) 2dly. In the case of *particular estates*, being interests or titles less than a seisin in fee simple, and in the case of copyholds, their commencement must be shown ; that is, * the derivation of the title from the last seisin in fee must be alleged. (q) 3dly. A party claiming by *inheritance* or descent must specially show *how* and in what character he is heir. (r) 4thly. If the party claim by *conveyance*, each distinct conveyance, and the nature thereof, must be specially set forth. (s) The different forms of pleading title and conveyances are fully stated in the second volume. 5thly. It is a rule that the conveyance

(o) Doe v. Wright, 10 Ad. & El. 763.

(p) Steph. 5th ed. 343 ; Co. Litt. 303 b ; Cro. Car. 571 ; Doct. Pl. 287.

(q) Stephen, 5th ed. 344, ante, 394 ; 395 ;

1 Saund. 186 d, note (1). There is an exception where the title is by inducement.

(r) Stephen, 5th ed. 347 ; ante, 382.

(s) Ib.

should be pleaded according to its legal import and effect, rather than its form of words. (t) 6thly. Where the nature of the conveyance is such that it would at common law be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document exist, and a statute render it necessary, as in the case of a conveyance with livery of seisin, &c.; but where the nature of the conveyance requires at common law a deed or other writing, such instrument must be alleged, as in the case of a grant of anything which lies in grant, and cannot be granted without deed. (u) And if a transfer of property be inoperative, except by statute, and the act require writing, as in the case of a devise of lands, the pleading must show that the will was in writing. (x)

If the defendant, in taking possession of his close, &c. has necessarily injured or destroyed or removed *goods, the property of the plaintiff*, it is proper to plead *liberum tenementum*, justifying such acts as to the personalty, as if the defendant justify cutting the *plaintiff's* posts and rails, put on his, the defendant's land, and the defendant do not claim such posts and rails; (y) but if the plaintiff has affixed anything to the defendant's freehold, so that it becomes part thereof, as a wall, &c. then a plea denying the close, &c. to be the plaintiff's will suffice, and it is not necessary specially to justify the destruction of such fixture, as it becomes the defendant's property by being annexed to his freehold. (z)

An *excuse* of the trespass, as on account of a defect of fences which the plaintiff was bound to repair, (a) or a license from the plaintiff, (b) and a *justification* under a rent-charge, or in respect of any *easement*, or incorporeal right, (c) as common of fishery, (d) or of * pasture, (e) or of turbary, (f) and a right of way either public (g) or private, (h)

(t) Stephen, 5th ed. 347; 1 Saund. 235 b, note (9). See *ante*, 312.

(u) Stephen, 5th ed. 349; 1 Saund. 276 a, note (2); *ante*, 244. A lease for years is, however, always pleaded by deed.

(x) 1 Saund. 276 a, note 2; *ante*, 244.

(y) *Welch v. Nash*, 8 East, 394. [The title to the soil does not come in question upon a declaration only for cutting down and carrying away trees on the plaintiff's ground. *Weidman v. Kohr*, 13 Serg. & R. 17. In an action of tort for breaking and entering a close and removing a fence, the defendant, under an answer which only denies the breaking and entering, cannot disprove the removal of the fence. This latter fact being a substantial matter, distinctly averred, it becomes the duty of the defendant to deny it if he intends to controvert it. *Knapp v. Slocomb*, 9 Gray, 73, 75.]

(z) The general issue was formerly sufficient. *Argent v. Durrant*, 8 T. R. 403.

(a) Co. Litt. 283; 2 Saund. 285.

(b) *Milman v. Dolwell*, 2 Campb. 379; *Bennett v. Alcott*, 2 T. R. 168; *Taylor v. Smith*, 7 Taunt. 156; *Stukeley v. Butler*, Hobart,

175; Gilb. C. P. 63; Vin. Abr. License: Com. Dig. Pleader, 3 M. 35; but see 21 Hen. 7, 28, pl. 5. [As to licenses, see 1 Sugden V. & P. (8th Am. ed.) 123 *et seq.* and notes, 126, note (n). Where the chattels of one person are placed or left on the land of another, with the permission of the latter, the owner, of the chattels has an implied irrevocable license to enter and remove them. 1 Sugden V. & P. (8th Am. ed.) 126, note (n); *Sterling v. Warden*, 51 N. H. 217; *Ellis v. Clark*, 110 Mass. 391; *Hill v. Cutting*, 107 Mass. 596; *McLeod v. Jones*, 105 Mass. 403; *Walsh v. Taylor*, 39 Md. 598; *White v. Ellwell*, 48 Maine, 360; *Webb v. Beavan*, 5 M. & Gr. 1055, and note. See *Roach v. Darnon*, 2 Humph. 425.]

(c) Per Lord Loughborough, 1 H. Bl. 352; 2 Saund. 402, note (1); Co. Litt. 283; 2 Wils. 173; Com. Dig. Pleader, E. 15.

(d) Com. Dig. Piscary.

(e) 1 Saund. 25, 340; 2 Saund. 2.

(f) 6 T. R. 748.

(g) 1 H. Bl. 352; 8 T. R. 606; 2 Saund. 158 c, notes (4) and (6).

(h) *Ib.*

and whether by grant, (*i*) will, (*k*) prescription, (*l*) custom or of necessity, (*m*) must always have been, and of course still must be, specially pleaded. (*m*¹)

So an entry by authority of law without process; as that the *locus in quo* was an inn; (*n*) or that the defendant entered to demand payment of his debt; (*o*) or to prevent murder; (*p*) or to abate a nuisance to a watercourse; (*q*) or by virtue of process, (*r*) criminal or civil, of a superior (*s*) or inferior court, (*t*) under mesne (*u*) or final process, (*u*¹) must be specially pleaded.

A justification of the trespass in respect of any claim by custom, prescription, or grant, to any right of common or other profit from or upon land, or to any way or other easement, or to any watercourse, or to the use of any water, must be pleaded. (*u*²) The prescription act, 2 & 3 W. 4, c. 71, enacts that in all pleadings to actions of trespass, it shall be sufficient to allege the enjoyment of the above rights, as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in that act, as may be applicable to the case, and without claiming in the name or right of the owner of the fee as was usually done. (*x*)

As to pleading rights of common, way, &c

This was an important amendment, as previously it was necessary to show who was seised *in fee* of the house or land in respect of which the right of common or of way, &c. was claimed, and then to aver that *immemorially* all the ancestors of the party so seised were entitled to, and from time to time actually used and enjoyed the exercise of such right, and frequently it was necessary to deduce the title through many conveyances or wills from the person so seised in fee.

By Reg. Gen. Hil. T. 4 W. 4, it is ordered that "where in an action of trespass *quare clausum fregit* the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if the right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the tres-

(*i*) 2 Mod. 274; 3 East, 294.

(*k*) 1 B. & P. 371; 1 Saund. 323, note (6); 2 Saund. 151 c.

(*l*) 1 East, 350, 377, 381; 1 B. & P. 371; 1 Saund. 322, note (6).

(*m*) 1 Saund. 323; 8 T. R. 50; Lutw. 1487.

(*m*¹) [Johnson v. Cuddington, 35 Ind. 43; Root v. Chandler, 10 Wend. 112, 113; Denrick v. Chipman, 11 John. 132; Van Buskirk v. Irving, 7 Cowen, 35.]

(*n*) Com. Dig. Pleader, 3 M. 35.

(*o*) Ib.; Holdingshaw v. Rag, Cro. Eliz. 876; [Van Buskirk v. Irving, 7 Cowen, 35.]

(*p*) Hancock v. Baker, 2 B. & P. 260.

(*q*) Raikes v. Townsend, 2 Smith's Rep. 9.

(*r*) 1 Saund. 298, note (1).

(*s*) Ratcliffe v. Burton, 3 B. & P. 223.

(*t*) Dennis v. Rowls, Lutw. 914.

(*u*) Ratcliffe v. Burton, 3 B. & P. 223.

(*u*¹) [Carson v. Wilson, 6 Halst. 43.]

(*u*²) [Waters v. Lilley, 4 Pick. 145; Strout v. Berry, 7 Mass. 385. See Saunders v. Wilson, 12 Wend. 338. License from the plaintiff must be specially pleaded. Gambling v. Prince, 2 Nott & McC. 138; Stambaugh v. Hollabaugh, 10 Serg. & R. 357; Ruggies v. Lesure, 24 Pick. 187.]

(*x*) Sect. 5; and forma, *post*, vol. ii. 479, 496.

passes proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not * be so justified. And where in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, and the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively." (y)

Of payment of money into court in actions for torts. The 3 & 4 W. 4, c. 42, s. 21, enacts, "that it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching the plaintiff's daughter or servant), by leave of any of the superior courts, where such action is pending, or a judge of any of the superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges or eight or more of them shall by any rules or orders, by them to be from time to time made, order and direct." And the late statute 6 & 7 Vict. c. 96, s. 2, empowers a defendant to pay money into court in certain actions for defamation.

IN EJECTMENT.

IN EJECTMENT. In ejectment, a defendant when he appears is compelled to enter into the consent rule and to plead the *general issue* of not guilty; consequently in that action no special plea can be adopted. (y¹) We have seen, however, that the courts have in some cases on special application permitted the defendant to plead to the jurisdiction. (z)

WHEN ADVISABLE TO PLEAD ONLY JUSTIFICATION.

WHEN ADVISABLE TO PLEAD ONLY A JUSTIFICATION. In some cases, where a justification is to be pleaded, it is not advisable to plead the general issue in addition. Where the committing the trespasses complained of cannot be disputed, but can be justified, it may sometimes be advisable to plead such justification alone, without the plea of the general issue,

(y) See Appendix.
(y¹) [See *Crandall v. Gallup*, 12 Conn. 365.]

(z) *Ante*, 214, 458.

for by that means the defendant's counsel may on the trial have the general reply. (a) Thus *in trespass *quare clausum fregit*, if the plaintiff's possession cannot be disputed, and the defendant relies upon a right of way, it is better not to plead the general issue, because if only the right of way were pleaded and traversed, then the defendant's counsel has a right to begin at the trial, and thereby, in case the plaintiff should examine any witness in chief, the defendant's counsel would have the advantage of the reply. (c) And this course is sometimes advisedly adopted in actions for libel, where the publication of the libel as described in the declaration is to be admitted. (d)

On the other hand it may not be advisable to plead a justification, if there is any doubt of establishing it, as in the case of libel or slander, it is not advisable to justify on the ground that the words are true, unless the plea can be supported by indisputable evidence, because such a justification when ineffectual will in general materially enhance the damages. But there are, however, some decisions that, under the general issue in case for slanderous matter, the truth cannot be proved, even in mitigation of damages; (e) and therefore a special plea is often necessary with a view to reduce the damages, although the proofs fall short of substantiating the exact truth of all the slander stated. It is also doubtful whether *rumors* or *suspitions* of the plaintiff's guilt can be shown even in mitigation of damages, (f) which often presents an additional reason for pleading specially to let in such evidence.

MATTER OF ESTOPPEL, WHEN MUST BE SPECIALLY PLEADED AT COMMON LAW.

Matter of *estoppel* should be specially pleaded as such. Thus, if the defendant obtained a verdict against the plaintiff in a former action upon the same cause of action as that which forms the subject of the second suit, if the verdict be not pleaded as an *estoppel* the defendant refers the merits to the second jury, and the verdict is merely *argument* and is not *conclusive* in his favor. (h)

MATTER OF
ESTOPPEL,
WHEN MUST
BE SPECIALLY
PLEADED AT
COMMON
LAW. (g)

ALL DEFENCES SHOULD BE PLEADED.

Care should be taken to plead in the first instance *every matter of defence* of which the defendant would not be at liberty to avail himself under the general issue. (h¹) For, though the court will in general give the defendant leave to add or

ALL DE-
FENCES
SHOULD BE
PLEADED.

(a) *Hodges v. Holder*, 3 Campb. 366. [See *Davis v. Mason*, 4 Pick. 256; *Weidman v. Kohr*, 13 Serg. & R. 17.]

(c) *Hodges v. Holder*, 3 Campb. 366.

(d) 3 C. & P. 474.

(e) *Ante*, 521.

(f) *Ib. Ibid.*

(g) See, further, as to pleas of *estoppel*, *post.*

(h) *Vooght v. Winch*, 2 B. & Ald. 668; *Stafford v. Clark*, 2 Bing. 377; and see *M'Clell. & Y.* 509.

(h¹) [See *Northrup v. Mississippi & C. Ins. Co.* 47 Missou. 435. In *Mulry v. Mohawk*

alter the plea where *the justice of the case requires it*, yet this will be only on payment of the costs incurred by his mistake; and if the defendant be obliged to ask indulgence, * as time to plead, he will not afterwards be allowed to plead a plea contrary to the merits or justice of the case; thus to a declaration by an attorney on his bill of costs, a defendant, after obtaining time, was not allowed to plead that the plaintiff had not delivered his signed bill a month before action brought, (i) and if the cause should proceed to trial and be found against the defendant on account of the omission of one or more grounds of defence, he will in general be precluded forever from taking advantage thereof, unless in some cases by *audita querela* or error in fact *coram nobis*, &c. (k) And as it is a rule of pleading that a departure will not be allowed, the defendant cannot in general rectify the omission of a ground of defence by his rejoinder. In debt on an arbitration bond, if the defendant merely plead no award, and the plaintiff reply setting out an award, the defendant cannot rejoin that he performed it, &c. (l)

When it will suffice to prove part of the ground of defence.

Valley Ins. Co. 5 Gray, 542, Bigelow J. said: "Formerly, by pleading the general issue, everything was open to proof, which went to show that the plaintiff's claim was invalid through fraud or illegality, or was, in its inception, void in law. *Hulet v. Stratton*, 5 Cush. 539; *Dixie v. Abbott*, 7 Cush. 610; *Granger v. Hsley*, 2 Gray, 521; *Myers v. Carr*, 12 Mich. 63; *McGavock v. Puryear*, 6 Coldw. 34. But the practice act of Massachusetts, by abolishing the general issue, and substituting therefor an answer, which is required to contain precise, certain, and substantial averments and denials, and providing that every matter averred in the declaration, and not denied by the answer, shall be deemed to be admitted, effected a material change, not only in the forms of pleading, but also in the mode of making up issues of fact between the parties. Whenever the defendant intends to rest his defence upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in clear and precise terms in the answer; and as the plaintiff is not bound to aver anything which tends to defeat his action, or which shows that his claim is illegal or void in its inception or otherwise, all such matters must be set out and averred in the answer under the practice act. This constitutes the main difference between the system of pleading established by the practice act, and that which was previously in force." Unless the defendant has stated a matter of defence in his answer, he cannot take advantage of it, though disclosed by the plaintiff's testimony. *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 544; *Haskins v. Hamilton Mutual Ins. Co.* 5 Gray, 432. So in New York. *Dingeldien v. Third Avenue R. R. Co.* 9 Bosw. 91; *S. C.* 37 N. Y. 575; *Brasill v. Isham*, 12 N. Y. 9; *Morrell v. Irving Fire Ins. Co.* 33 N. Y. 429,

447; *Wright v. Delafield*, 25 N. Y. 266; *McKyring v. Bull*, 16 N. Y. 297; *Tilson v. Clark*, 45 Barb. 178; *Fry v. Bennett*, 28 N. Y. 325; *Rapelee v. Stewart*, 27 N. Y. 311. Under the Massachusetts practice act, where the purchaser of a chattel sues an officer for attaching it as the property of the vendor, the defendant cannot, under an answer simply denying the plaintiff's property, prove that the sale was fraudulent and void against creditors; this is special matter, which must be set out in the answer. *Thissell v. Page*, 11 Gray, 394. So, in an action on a policy of insurance, the defence of a want of insurable interest must be specially alleged. *Forbes v. American Ins. Co.* 15 Gray, 249. So, the defence that prior to the commencement of the action the claim sued upon had been sold by the plaintiff, must be set forth in the answer. *Cushman v. Davis*, 3 Allen, 99; *Hawes v. Ryder*, 100 Mass. 216. Payment must be specially alleged in the answer. *O'Neal v. Kittredge*, 3 Allen, 470; *Canfield v. Miller*, 13 Gray, 274; *Wolcott v. Smith*, 15 Gray, 537. Want of consideration cannot be shown under an answer which alleges only the statute of limitations. *Davidson v. Delano*, 11 Allen, 523. Illegality of the contract in suit cannot be relied upon in defence, unless it is stated either in the declaration or answer. *Goss v. Austin*, 11 Allen, 525. So accord and satisfaction. *Parker v. Lowell*, 11 Gray, 353. So the defence that the action is prematurely commenced. *Reed v. Scituate*, 7 Allen, 141.]

(i) *Neale v. M'Kenzie*, 1 Cr., M. & R. 61; 2 Dowl. 702; 4 Tyr. 670, S. C.; *Beck v. Mordaunt*, 2 Bing. N. C. 140.

(k) *Tidd*, 9th ed. 907; *Ib.* Index, ut. "*Audita Querela*;" 2 Saund. 137 g, to 150.

(l) [*Barlow v. Todd*, 3 John. 367; *Monroe v. Allaire*, 3 Caines, 320.] See *post*, as to departure in pleading.

There are many cases in which it may be advisable to plead in one plea all the grounds of defence, and in which it may suffice to prove part of the allegations in the plea. (*m*)

OF SUFFERING JUDGMENT BY DEFAULT AS TO PART.

It is sometimes advisable not to plead either the general issue or a special plea to the *whole* declaration, but to suffer judgment by default to certain parts of the declaration, which the plaintiff can indisputably establish. Thus, where the plaintiff's demand is altogether denied by the pleas, and at the trial the plaintiff obtain a verdict for part of his demand, and the defendant obtain a verdict as to the other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the defendant; and on which last-mentioned issues the defendant was not formerly entitled to claim any costs from the plaintiff. But where the defendant suffered judgment by default as to part of the plaintiff's demand, and pleaded only to the other part, and the plaintiff took issue on the pleas, and at the trial *all* the issues were found for the defendant, then the defendant was entitled to the costs of the issues found for him, and the plaintiff was entitled only to the costs of the judgment by default, and what he would have been entitled to on executing a writ of inquiry. (*n*)

OF SUFFER-
ING JUDGE-
MENT BY
DEFAULT AS
TO PART.

* OF ISSUABLE PLEAS.

In framing a special plea it is also necessary to consider whether the defendant is under terms of pleading *issuably*, for where a defendant has obtained time to plead on the terms of pleading *issuably*, and by his pleading fails to bring the *merits* of the case, or some question of fact, or some question of *law* arising on the facts, in issue, he does not comply with the terms of the order to plead *issuably*, (*o*) and the plaintiff may sign judgment for want of a plea. A *general demurrer* for some defect in *substance* is an issuable plea, (*o*¹) because the legal merits of the case are thereby brought in issue. (*p*) A plea in abatement is not an issuable plea, (*q*) nor a

OF ISSUABLE
PLEAS.

(*m*) *Bush v. Parker*, 1 Bing. N. C. 72; *Atkinson v. Warne*, 3 Dowl. 483; *Governors of Bristol Poor v. Wait*, 1 Ad. & El. 264; 3 N. & M. 359, S. C.; 1 Har. & Wol. 15.

(*n*) Tidd, 9th ed. 978, 974.

(*o*) *Berry v. Anderson*, 7 T. R. 530; *Foster v. Snow*, 2 Burr. 782; Tidd, 9th ed. 471; *Sautell v. Gillard*, 5 D. & R. 620. As to what are issuable pleas, see Chitty's Arch. Pr. 7th ed. 163.

(*o*¹) [See *Syme v. Griffin*, 4 Hen. & M. 377.]

(*p*) *Gray v. Ashton*, 3 Burr. 1788; *Bell v.*

Da Costa, 2 B. & P. 446; Tidd, 9th ed. 472; *Holmes v. Hodgson*, 8 Moore, 379; *Newnham v. Dowding*, 1 Chitty's Rep. 711. Where the defendant was advised he had a substantial ground of demurrer, the court set aside the judgment signed for want of a plea, upon terms. *Berry v. Anderson*, 7 T. R. 530; 1 East, 414 a, S. C. See the judgment of Mr. Justice Coleridge, in *Barker v. Gleadow*, 5 Dowl. 135, as to when a demurrer is an issuable plea.

(*q*) *Kilwick v. Maidman*, 1 Burr. 59; *Barnes*, 263.

plea of alien enemy, (r) nor an untrue plea of judgment recovered; (s) nor can a *special* demurrer be pleaded if the defendant be bound to plead issuably, although if there are good grounds the court will sometimes strike out the causes. (t) But a true plea that a bail bond was taken for ease and favor, (u) and a tender, (x) and the statute of limitations, (y) are issuable pleas. So, where the defendant, in an action on a recognizance of bail, under a judge's order to plead issuably, pleaded *nul tiel record*, and that no *ca. sa.* was issued against the principal, the court of C. P. held that such pleas might be considered issuable, and that the plaintiff could not sign judgment as for want of a plea. (z) And if a plea be in substance a fair issuable plea to the merits, the mere circumstance of its being informal will not render it a nullity. (a) Where the *replication* does not tender a fair issue, but affords reasonable and good cause of demurrer, the defendant, though under terms of pleading issuably, may *demur even specially to such replication*; for a reasonable and fair demurrer to the replication, even for want of form only, is not a contravention of the terms of pleading issuably. (b)

When the defendant, being under the terms of pleading issuably, pleads a sham plea, (c) or demurs for want of form, judgment may *be signed. (i) When several pleas are pleaded, one of which is not issuable, it will vitiate all the others; (k) and where the defendant being under an order to plead issuably puts in a sham demurrer to some of the counts, and pleads issuably to the rest, judgment by *nul dicit* as to the whole may be signed. (l) It seems that the court will not now entertain an application to set aside a plea on the ground that it is not issuable, but will leave the plaintiff to act on his own responsibility. (m)

OF GENERAL ISSUE BY STATUTE.

In an action against *justices of the peace, mayors, constables, and other peace officers, or any others acting in their aid and assistance, or by their command*, (n) for anything done by them by virtue or by

(r) *Simeon v. Thompson*, 8 T. R. 71.
 (s) *Heron v. Heron*, 1 Bl. Rep. 376; *Lowfield v. Jackson*, 2 Wils. 117; *Cave v. Aaron*, 3 Wils. 33; *Hartley v. Hodson*, 1 Moore, 431; *Edwards v. Walter*, 2 Chitty's Rep. 292. [Nor a plea of another action pending. *Davis v. Grainger*, 3 John. 259.] Nor any other plea which does not go to the merits. *Tidd*, 9th ed. 471, and note (u).
 (t) *Nanney v. Kendrick*, 1 Dowl. 610; *Barker v. Gleadow*, 5 Dowl. 135.
 (u) *Dearden v. Holden*, 1 Burr. 605.
 (x) *Kilwick v. Maidman*, 1 Burr. 59; *Noone v. Smith*, 1 H. Bl. 369.
 (y) *Bucker v. Hannay*, 3 T. R. 124; *Madocks v. Holmes*, 1 B. & P. 228; *Tidd*, 9th ed. 471; [but see *Tomlin v. How*, *Gilmer*, 1.]

(z) *Hartley v. Hodson*, 1 Moore, 430.
 (a) *Baily v. Edwards*, *Cases temp. Hardw.* 179; *Thellusson v. Smith*, 5 T. R. 152.
 (b) *Barker v. Gleadow*, 5 Dowl. 135.
 (c) As to sham pleas, see *post*.
 (i) *Tidd*, 9th ed. 472; *Blick v. Dymoke*, 1 Bing. 379.
 (k) *Waterfall v. Globe*, 3 T. R. 305.
 (l) *Cuming v. Sharland*, 1 East, 411.
 (m) *Tidd*, 9th ed. 472; *Hatcher v. Burchard*, 4 Jur. 799, C. B.; 3 Chitty's Gen. Prac. by Lush, 595.
 (n) 21 Jac. 1, c. 12, s. 5; Co. Lit. 283; Vaugh. 111. See *Nathan v. Cohen*, 3 Campb. 257; *M'Cloughan v. Clayton*, Holt N. P. R. 478. As to when individuals acting in aid must plead specially, see *Nathan v.*

reason of their offices, or against persons for anything done in pursuance of the bankrupt act; (o) the general issue may be pleaded, and the special matter given in evidence. And if the lord chancellor be sued for committing a person to prison he may plead the general issue. (p) There is a similar provision in the highway, (q) turnpike, (r) poor law, municipal corporations, militia, and assessed tax acts, building act, and in various other statutes, in protection of persons acting in the execution of their office, or others in aid of them. (s) In these cases as well before as since the pleading rule Hil. T. 4 W. 4, the plea of not guilty suffices, and all the special matters may be given in issue under that plea. (t) By 5 & 6 Vict. c. 97, s. 3, this power of pleading the general issue by statute was taken away in all cases where the privilege was given by local or personal acts. Whenever the general issue is pleaded under an act of parliament, it is necessary to insert the words "by statute" in the margin of the plea. (u)

II. OF THE QUALITY OF PLEAS IN BAR.

There are some *general qualities* which affect pleas in bar, and some *rules* which prevail in the construction of them, which it is advisable * to consider before we inquire into their *form*. The *general qualities* of a plea in bar are, —

QUALITIES.

1st, That it be adapted to the nature and form of the action, and also be conformable to the count.

2dly, That it answer all which it assumes to answer, and no more.

3dly, That it deny, or admit and avoid the facts; and herein of giving color, and of pleas amounting to the general issue.

4thly, That it be single.

5thly, Certain.

6thly, Direct and positive, and not argumentative.

7thly, Capable of trial.

And, 8thly, True; and herein of *sham* pleas. (u¹)

Cohen, M'Cloughan v. Clayton, *supra*; Mure v. Kaye, 4 Taunt. 34.

(o) 6 Geo. 4, c. 16, s. 44; but it is more usual to plead the latter defence. 1 Mont. Bank. Law. 410. See pleas, *post*, vol. ii. 286.

(p) Dicus v. Lord Brougham, 6 Car. & P. 249, 268.

(q) 5 & 6 W. 4, c. 50, s. 109.

(r) 3 Geo. 4, c. 126, s. 147.

(s) See particularly the statutes, 43 Eliz. c. 2, s. 19; 7 Jac. 1, c. 5; 11 Geo. 2, c. 19, s. 21; 23 Geo. 3, c. 70, s. 34; 24 Geo. 3, sess. 2, c. 47, s. 35, 39; 28 Geo. 3, c. 37, s. 23; 42 Geo. 2, c. 85, s. 6; and the 43 Geo. 3, c. 99, s. 70; under larceny acts, &c. 7 & 8 Geo. 4, c. 4, s. 155; c. 29, s. 75; c. 30, s. 41; 9 Geo. 4, c. 4, s. 155. [If the party, at whose instance either civil or criminal process issued, merely delivered it to the officer and directed

him to arrest the plaintiff, he must plead the matter as in other cases. Herrick v. Mauly, 1 Caines, 252.]

(t) Wells v. Ody, 2 Cr. M. & R. 128. But observe the suggestion of Alderson B.

(u) Reg. Gen. T. T. 1 Vict. See Appendix.

(u¹) [See *ante*, 491, note (o¹). A brief statement of defence in New Hampshire is held to be a substitute for a special plea, and it should contain all the substantial elements of such a plea. Pike v. Taylor, 49 N. H. 124, 127; Folsom v. Brown, 21 N. H. 144; Pallet v. Sargent, 36 N. H. 496; Folsom v. Brown, 25 N. H. 120, 121; Rangley v. Webster, 11 N. H. 399. So in Maine. Sturtevant v. Randall, 53 Maine, 149; Granite State Bank v. Otis, 53 Maine, 133. The same is true of an answer under the Massa.

1st. *Every plea in bar must be adapted to the nature of the action, and conformable to the count.* (b) Therefore in an action

1st. Conformable to the action and count, and to the alleged breach.

against husband and wife for words spoken by the wife, a plea that "they" are not guilty, instead of "she is not guilty," appears to be improper. (c) We have already seen what are the appropriate general issues and special pleas in each action. If the defendant plead a plea not adapted to the nature of the action, as *nil debet* in assumpsit; (d) or non assumpsit in debt; (e) or a plea of set-off to an action of debt, as if it were an action of assumpsit, (f) the plaintiff may treat it as a nullity, and sign judgment. (g) But the plea of "not guilty" in an action of debt on a penal statute, is not such a nullity as will warrant the plaintiff in signing judgment; (h) nor is the plea of *nil debet* in an action of debt on a judgment. (i) So, a plea in assumpsit that the defendant "did not undertake (omitting "or promise") in manner," &c. concluding to the country, is not a plea which can be treated as a nullity. (k) Where the plea, though informal, goes to the substance of the action, the plaintiff should demur, and not sign judgment; (l) and in general, where the defendant pleads an improper plea, the safer course is to demur, or move the court to set it aside, (l¹) if the defendant be not under terms to plead issuably. (m) In debt * for £1,800, the defendant pleaded that he did not owe "the said sum of £10 above demanded;" and the court, after issue joined, would not compel him to amend. (n) If declaration state breach of condition of bond in

chusetts practice act. *Ante*, 256, note (d). As to the effect of notice under the general issue in Connecticut, *Merrill v. Everett*, 38 Conn. 40. In Maine it is held not to be necessary that specifications of defence should be equivalent in terms to a technical plea, though they state the grounds of defence more particularly. What would be sufficient for a plea might be insufficient for specifications of defence. *Hart v. Hardy*, 42 Maine, 196. And it is equally true that what would be bad as a plea might be good as a specification of defence. *Fenlason v. Rackliffe*, 50 Maine, 362; *Solon v. Rowell*, 49 Maine, 330; *Day v. Frye*, 41 Maine, 326; *Trask v. Patterson*, 29 Maine, 499; *Washburn v. Mosely*, 22 Maine, 160; *Brickett v. Davis*, 21 Pick. 404; *Hart v. Hardy*, 42 Maine, 196.]

(b) *Co. Litt.* 303 a, 285 b; *Bac. Abr.* Pleas, I. *per tot.*; 1 *Rol. Rep.* 216.
(c) 1 *Rol. Rep.* 216; [*Chew v. Wooley*, 7 *John.* 402.]

(d) *Barnes*, 257; *Tidd*, 9th ed. 476, 563; *sed vide Bailey v. Edwards*, *Rep. t. Hardw.* 179; *Brennan v. Egan*, 4 *Taunt.* 614. See *Davison v. Moreton*, 1 *Chit. Rep.* 715, 716, note, and cases there collected, as to pleading not guilty in assumpsit or non assumpsit in an action for a tort. And see *Robinson v. Green*, 1 *Stra.* 574; *Marsham v. Gibbs*, 2 *Stra.* 1022; *Lawes on Pl.* 527. Since the

Rules of Hil. T. 4 W. 4, *nil debet* cannot, under any circumstances, be pleaded to an account stated, and can only be pleaded to other counts by virtue of some penal or other statute not affected by the rules. *Calvert v. Moggs*, 10 *Ad. & El.* 632.

(e) *Perry v. Fisher*, 6 *East*, 549; *Taylor v. Capper*, 14 *East*, 442; *Brennan v. Egan*, 4 *Taunt.* 164; *Davison v. Moreton*, 1 *Chit. Rep.* 716, note; *Tidd*, 9th ed. 476.

(f) *Penfold v. Hawkins*, 2 *M. & Sel.* 606.

(g) See *Tidd*, 9th ed. 563. See, further, as to what pleas can be treated as nullities, *Chitty's Arch. Pr.* 7th ed. 166, 167.

(h) *Coppin v. Carter*, 1 *T. R.* 462; *Macdonnell v. Macdonnell*, 3 *B. & P.* 174; *Com. Dig. Plead.* 2 *S. 11*, s. 17.

(i) *Anonymous*, 2 *Chit. Rep.* 239.

(k) 3 *D. & R.* 621.

(l) *Thellusson v. Smith*, 5 *T. R.* 152; 5 *Exp. Rep.* 38.

(l¹) [*See Falls v. Stickney*, 3 *John.* 541; *Mawkins v. Wilkins*, 1 *Aiken*, 107.]

(m) *Kilwick v. Maidman*, 1 *Burr.* 59; *Stadholve v. Hodgson*, 2 *T. R.* 390; *Berry v. Anderson*, 7 *T. R.* 530; *Bailey v. Edwards*, *Rep. temp. Hardw.* 179; *Thellusson v. Smith*, 5 *T. R.* 152; *Chitty's Arch. Pr.* 7th ed. 167.

(n) 1 *D. & R.* 473. See 1 *M. & P.* 276; *sed vide Macdonnell v. Macdonnell*, 3 *B. & P.* 174.

non-payment of a *principal sum*, a plea of payment of that and of the *interest thereon* is bad. (o) But the plaintiff *might*, instead of demurring, safely take issue in the words of the plea, so that the unnecessary averment in the plea cannot be treated by the defendant as *surplusage*. (o)

The plea must not only be *adapted to the nature of the action*, but also be *conformable to the count*. Thus, if an assignee of a bankrupt declare that the defendant was indebted to the bankrupt, and promised the plaintiff, as assignee, to pay him, the defendant cannot plead that the cause of action did not accrue to the *bankrupt* within six years; because the plea does not answer the promise laid in the declaration, and precludes the plaintiff from proving a promise to himself, and is therefore bad on demurrer. (p) And in debt *qui tam*, a plea that the defendant did not owe the money "to the plaintiff" alone, was held insufficient, though if it had been *nil debet* generally, it would have sufficed. (q) So the plea must not contrary to the legal effect treat an instrument as a promissory note when it is not so declared on. (r)

When the *time* is not material, it is a rule that the plea should follow the day in the declaration; and if it be material to vary from it, the plea should conclude with a traverse. (s) Where, however, there is no ground to intend the contrary, the plea will be considered as conformable to the count; thus, in assumpsit against an executor, on the promise of his *testator*, the defendant pleaded that *he* did not undertake, and it was adjudged that it should be intended that the defendant meant to plead that the testator did not promise, as there was no count in the declaration on a promise by the executor. (t)

The instances in which a plea may be treated as a sham plea and as a nullity, in consequence of the matter pleaded being inconsistent and impossible, with reference to the declaration, will be hereafter mentioned.

2dly. The defendant must take care in the introductory part of his plea as well as in the body to plead to and answer every part of the causes of action charged in the declaration, for otherwise the plaintiff, after proving the facts under the general issue, will recover for all that *has not been justified, and this without new assigning, but not so as to mere matters in aggravation. (z)

2dly. Should answer the whole charges, with the exception of matters in aggravation.

(o) *Bishton v. Evans*, 2 Cr. M. & R. 14.

(p) *Skinner v. Rebow*, 2 Stra. 919; *Kinder v. Paris*, 2 H. Bl. 561.

(q) *Scot v. Lawes*, Hob. 327, 328; Reg. Plac. 302; Bac. Abr. Action *qui tam*, D.

(r) 1 Harr. & Woll. 426. [Where a declaration avers the waiver of a bar from lapse of time, the bar is admitted thereby, and a denial of such waiver, without more dis-

tinctly setting up the bar, is a sufficient answer. *Vogel v. People's Ins. Co.* 9 Gray, 23.]

(s) 1 Saund. 14, 81 a, note (3); 2 Saund. 5 b, note (3); Com. Dig. Pleader, E. 4; *Fisher v. Ford*, 12 Ad. & El. 654; 4 P. & D. 347. See post as to *Quæ est eadem*.

(t) *Browning v. Litton*, 1 Lev. 185; *Baker's case*, Latch, 125.

(z) *Bush v. Parker*, 1 Bing. N. C. 72. As

3dly. It is a rule that every plea must answer the whole declaration or count, or rather all that it assumes in the introductory part to answer, and no more. (a) If a plea begin with an answer to the *whole*, but in truth the matter pleaded is only an answer to *part*, the whole plea is naught, and the plaintiff may demur; (a¹) but if a plea begin only as an answer to *part*, and is in truth but an answer to part, as if the defendant in trespass for taking two sheep plead that the plaintiff "ought not to have his action as to *one*," because he took that *one* doing damage on his close, &c. and does not in that or any other plea (b) notice the remainder of the declaration, the plaintiff cannot demur to the plea, for it is sufficient as far as it extends, (b¹) but must take judgment for the part unanswered as by *nil dicit*. (b²) If he demur or plead over, without

3dly. Must answer all it assumes to answer, and no more.

to what is a distinct trespass, or mere matter of aggravation, see *Foulkes v. Scarpe*, 1 Dowl. N. S. 691; [*ante*, 535, note (t).]

(a) Co. Litt. 303 a; Com. Dig. Pleader, E. 1, 36; 1 Saund. 28, note (3); and notes (e), (f), (g), (h), 5th ed.; Gray v. Pindar, 2 B. & P. 427; Macdonnell v. Macdonnell, 3 B. & P. 174; Steph. 5th ed. 246; 1 Tyr. & Gr. 85; 5 Tyr. 421.

(a¹) *McDougle v. Gates*, 21 Ind. 65; *McClintic v. Cary*, 22 Ind. 170; *Sanders v. Sanders*, 39 Ind. 207; *Trisler v. Trisler*, 38 Ind. 282; *Leslie v. Harlow*, 18 N. H. 518; *Foster v. Hazen*, 12 Barb. 547; *Beach v. Barons*, 13 Barb. 306; *Nichols v. Dusenbury*, 2 N. Y. 283; *Willis v. Taggard*, 6 How. Pr. 433; *Thumb v. Walrath*, 6 How. Pr. 196; *Hickley v. Grosjean*, 6 Blackf. 351; *Howk v. Pollard*, 6 Blackf. 108; *Breckenridge v. Lee*, 3 Bibb, 330; *Muldrow v. McClelland*, 1 Litt. (Ky.) 5; *Yancy v. Teter*, 39 Ind. 305; *Harpham v. Haynes*, 30 Ill. 404; *Alvord v. Essner*, 45 Ind. 156; *Curran v. Curran*, 40 Ind. 473; *Law v. Vierling*, 45 Ind. 25; *Jackson v. Fosbender*, 45 Ind. 305; *Nevins v. Keeler*, 6 John. 63; *Riggs v. Denniston*, 3 John. Cas. 198; *Boyd v. Weeks*, 5 Hill, 393; *Spencer v. Southwick*, 11 John. 583, 587; *Hallett v. Holmes*, 18 John. 28; *Van Ness v. Hamilton*, 19 John. 374; *Cooper v. Greeley*, 1 Denio, 347; *Foster v. Hazen*, 12 Barb. 547; *Fletcher v. Peck*, 6 Cranch, 126; *Carpenter v. Briggs*, 15 Vt. 34; *Gray v. Ayres*, 7 Dana, 375; *Wittick v. Traun*, 27 Ala. 562; S. C. 27 Ala. 570; *Smith v. Ely*, 5 McLean, 76; *Curtis v. Central Railway*, 6 McLean, 401; *Mitchell v. Sellman*, 5 Md. 376; *Clark v. Schwing*, 1 Dana, 333; *Fowler v. Commonwealth*, 1 Dana, 958; *Traster v. Snelson*, 29 Ind. 96; *Conger v. Parker*, 29 Ind. 380; *Rogers v. Place*, 29 Ind. 577. But this rule has no application to pleas of set-off. *Myers v. State*, 45 Ind. 160.]

(b) 1 Saund. 28, note (g), 5th ed.; per *Bosanquet J. Clarkson v. Lawson*, 6 Bing. 595; *Henry v. Earl*, 8 M. & W. 228; *Wood v. Farr*, 5 Bing. N. C. 248.

(b¹) [Where the declaration or complaint alleges a divisible cause of action, or several

distinct causes of action, the defendant may deny part, or some, or one of the causes of action, and leave the remainder unanswered, or may make to it any other defence. *Willis v. Taggard*, 6 How. Pr. 433; *Snyder v. White*, 6 How. Pr. 321; *Genesee Mutual Ins. Co. v. Moynihan*, 5 How. Pr. 321; *Smith v. Shufelt*, 3 Code R. 175; *Tracy v. Humphrey*, 3 Code R. 190; S. C. 5 How. Pr. 155; *Longworthy v. Knapp*, 4 Abb. Pr. 115. An answer is sufficient if it constitutes a defence or counter-claim to so much of the complaint as it assumes to answer. *McKyring v. Bull*, 16 N. Y. 297, 307; *Allen v. Haskins*, 5 Duer, 332; *Kneedler v. Sternberg*, 10 How. Pr. 68. The answer should so distinctly specify that portion of the complaint to which it applies that the court can at once see what it covers. *Davidson v. Schermerhorn*, 1 Barb. 480. Still, if it assumes to answer only a part, without specifying what part, it is sufficient if it denies a material allegation in the complaint. *Cottingham v. State*, 7 Blackf. 405. When the answer assumes to answer only a specified part, it is confined to that part, though in reality it constitutes a legal defence to the whole action. *Cross v. Watson*, 6 Blackf. 129. See *ante*, 490, note.]

(b²) [*Carpenter v. Briggs*, 15 Vt. 34; *Culbertson v. Stanley*, 6 Blackf. 87; *Cross v. Watson*, 6 Blackf. 130; *Deshler v. Hodge*, 3 Ala. 509; *Hunt v. Mansur*, 5 Blackf. 214; *Dwight v. Holbrook*, 1 Allen, 560; *Hogan v. Ross*, 13 How. (U. S.) 173; *Case v. Ladd*, 2 Allen, 13. In pleadings at law whatever is not denied is taken to be admitted. *Perley C. J. in Tappan v. Tappan*, 36 N. H. 109; *Dudley v. Sumner*, 5 Mass. 438; *Ayer v. Spring*, 10 Mass. 80; *Cheever v. Mirick*, 2 N. H. 376; *Carpenter v. Briggs*, 15 Vt. 34; *Briggs v. Dorr*, 19 John. 95; *Raymond v. Wheeler*, 9 Cowen, 295. This rule is not changed by the Massachusetts practice act. *Dwight v. Holbrook*, *supra*. In New York the plaintiff is not bound to take judgment by *nil dicit* where a defective plea is interposed, but may demur generally. *Underwood v. Campbell*, 13 Wend. 78; *Ethridge v. Osborne*, 12 Wend. 399; *Sterling v. Sher*

taking such judgment, the *whole* action is *discontinued*; (c) for in such case the plaintiff, by omitting to enforce his claim in respect of the unanswered portion of such claim by taking judgment, or to resign it by entering a *nolle prosequi* thereto, causes a chasm or hiatus in the proceedings. (d) But where to a declaration in debt demanding £60 and containing six counts for £10 each, the defendant pleaded that he did not owe the said sum of £10 above demanded, and the plaintiff treated the plea as a nullity and signed judgment, the court set the judgment aside on the ground that the "of £10" might be struck out as surplusage. (e) If the plea profess to answer only a part, but afterwards answers more, it has been held that the plaintiff should not demur, but should take judgment for the part not mentioned in the beginning of the plea. (f) But if a plea profess in its commencement to answer the whole cause of action, and afterwards answer only a part, the whole plea is bad: (g) and in this instance the plea being insufficient, the plaintiff's course is to demur generally or specially, *and there will be no discontinuance by so doing, or by replying, instead of taking judgment as to the unanswered part. (h) As if in covenant for seven quarters' rent, a plea profess to answer the whole, but only show a surrender before the last four of the seven

wood, 20 John. 204; Hickok v. Coates, 2 Wend. 419; Slocum v. Despard, 8 Wend. 615.]

(c) Weeks v. Peach, Salk. 179; 1 Saund. 28, note (3); Harvey v. Richards, 1 H. Bl. 645; Tippet v. May, 1 B. & P. 411; Everard v. Paterson, 6 Taunt. 645; 2 Marsh. 304, S. C. [See Frost v. Hammett, 11 Pick. 70; Earle v. Hall, 22 Pick. 102, 106; Somes v. Skinner, 16 Mass. 343; and the remarks upon the text by Spencer C. J. in Sterling v. Sherwood, 20 John. 206. See, also, the rule laid down by Kent J. in Riggs v. Denniston, 3 John. 205.] A discontinuance is cured after verdict by statute; 32 Hen. 8, c. 30; Harvey v. Richards, 1 H. Bl. 645; and after judgment by *nil dicit*, confession, or *non sum informatus*, by 4 & 5 Ann. c. 16.

(d) See Steph. 5th. ed. 247. [See Aurora City v. West, 7 Wallace, 82.]

(e) Risdale v. Kelly, 1 Cr. & Jer. 410.

(f) Woodward v. Robinson, 1 Stra. 303; 1 Saund. 28, note (3), *acc.*; [Hallett v. Holmes, 18 John. 28; Nevins v. Keeler, 6 John. 63; Loder v. Phelps, 13 Wend. 48; Edwards v. White, 12 Conn. 28;] but see Gray v. Pindar, 2 B. & P. 427, where it was decided that when a plea begins as an answer to part, and contains in the body of it an answer to the whole, the plaintiff may demur; but (as observed in note (g) to 1 Saund. 28, 5th ed.) in this case there was a plea of *non assumpti* to the whole declaration, so that the special plea which was demurred to could not operate as a discontinu-

ance; and see per Bosanquet J. Clarkson v. Lawson, 6 Bing. 595.

(g) 1 Saund. 28, note (3); Cooper v. Monke, Willes, 55; Weekes v. Peach, 1 Salk. 179; Wilcox v. Newman, 1 Chit. Rep. 132; Thomas v. Heathorn, 2 B. & C. 477; 3 D. & R. 647, S. C.

(h) Crump v. Adney, 3 Tyr. 279; Everard v. Paterson, 6 Taunt. 646, 647; Steph. 5th. ed. 247; Thomas v. Heathorn, 2 B. & C. 477; 3 D. & R. 647, S. C.; Clarkson v. Lawson, 6 Bing. 266; [Nevins v. Keeler, 6 John. 65; Stillwell v. Hasbrouck, 1 Hill, 561; Gillespie v. Thomas, 15 Wend. 464; Lattin v. Vail, 17 Wend. 188; Crain v. Yates, 2 H. & Gill, 332; Hallett v. Holmes, 18 John. 28; Loder v. Phelps, 13 Wend. 46; Van Ness v. Hamilton, 19 John. 349; Osborn v. Etheridge, 13 Wend. 339; Slocum v. Despard, 8 Wend. 615; Hickok v. Coates, 2 Wend. 419; Underwood v. Campbell, 13 Wend. 78; Phelps v. Sowles, 19 Wend. 547; Taylor v. Bank of Kentucky, 2 J. J. Marsh. 564; Postmaster v. Reeder, 4 Wash. C. C. 678; Farquhar v. Collins, 3 A. K. Marsh. 31; Brewster v. Hobart, 15 Wend. 302; Tappan v. Prescott, 9 N. H. 534; Snyder v. Gaither, 3 Scam. 91; Frink v. King, 3 Scam. 144; Adams v. McMillan, 7 Porter, 73; Weimer v. Shelton, 7 Missou. 237; Bettie v. Wilson, 14 Ohio, 257; Hawk v. Pollard, 6 Blackf. 108; Hickley v. Grosjean, 6 Blackf. 351; Rust v. Smith, 5 Blackf. 352; Wittick v. Traun, 27 Ala. 562; S. C. 27 Ala. 570; White v. Yarborough, 16 Ala. 109; Hunt v. Martin, 8 Grattan, 587; State v. Holmes, 4 Vt. 111.]

quarters' rent accrued due, it is bad on demurrer, because it does not answer the whole breach, which is not entire, but part of it may be proved. (i) And where to a declaration for a libel, which charged that the plaintiff had been *three* times suspended for misconduct as a proctor, the defendant pleaded to the *whole* declaration that the plaintiff had been *once* so suspended, it was held on demurrer that the plea was altogether bad; although as the libel was divisible, the plea would have been sufficient had it been confined in the introduction, &c. to the charge of the single suspension. (k) So, if in trespass the defendant assume in the introductory part of his plea to justify an assault, battery, and *wounding*, and afterwards merely show that by virtue of a writ he *arrested* the plaintiff, but allege nothing to justify the *wounding*, this is bad on demurrer. (l) But these rules should be understood with this qualification, that the part of the declaration which is professed to be, but it is not answered by the plea, is material, and the gist of the action; for where anything is inserted in the declaration merely as matter of *aggravation*, the plea need not answer or justify that, and the answering the matter which is the gist of the action will suffice. (m)

A general charge ought to be answered in every part, but it is said to be sufficient to answer a collateral issue in the words of the plaintiff. (n) Thus, in an action for waste in cutting twenty trees, the defendant ought to plead that he did not cut the said trees, or *either of them*, or the traverse would be too large; though in debt on an obligation that he shall do no waste, if the breach assigned is that he cut twenty oaks, it is sufficient to plead that he did not cut the said twenty oaks *modo et formâ*. (o) A plea in bar to an avowry for rent for £120 that the said £120 were not due, without saying "or any part thereof," is bad on demurrer. (p) The points on this subject will be more fully stated when we consider the nature of *traverses*.

* The fault of *discontinuance* in pleading may occur in a replication;

(i) *Barnard v. Duthy*, 5 Taunt. 27. See *Winstone v. Linn*, 1 B. & C. 460.

(k) *Clarkson v. Lawson*, 6 Bing. 266, 587.

(l) 1 Saund. 296, note (1); *Gregory v. Hill*, 8 T. R. 299; *Smith v. Edge*, 6 T. R. 562; *Johnson v. Northwood*, 7 Taunt. 689; 1 Moore, 420, S. C. [See *Gates v. Lounsbury*, 20 John. 427.]

(m) *Taylor v. Cole*, 1 H. Bl. 555; 3 T. R. 297, S. C.; *Monprivatt v. Smith*, 2 Campb. 175; 1 Saund. 28, note (3); *Dye v. Leatherdale*, 3 Wils. 20; *Gates v. Bayley*, 2 Wils. 313; Com. Dig. Pleader, E. 1. *Quere*, whether a plea directly and expressly denying the facts alleged in one count and wholly inapplicable to the other cause of action stated in the declaration, but without any introductory statement professedly limiting its application to the first count, is to be consid-

ered as a plea to that count only, or as an informal answer to the whole declaration. *Worley v. Harrison*, 5 Nev. & Man. 173. As to what is a distinct trespass or mere matter of aggravation, see *Foulkes v. Scarpe*, 1 Dowl. N. S. 691; [Sterling v. Warden, 51 N. H. 217, 230; *Sampson v. Henry*, 13 Pick. 36; *Eames v. Prentice*, 8 Cush. 337; *Knapp v. Slocomb*, 9 Gray, 73, 74; *Gilbert v. Thompson*, 9 Cush. 348.]

(n) *Roberts v. Andrews*, Cro. Eliz. 84; *Cobb v. Bryan*, 3 B. & P. 348; Com. Dig. Pleader, G. 15.

(o) *Roberts v. Andrews*, Cro. Eliz. 84; *Newhall v. Barnard*, Yelv. 225. See 2 Saund. 5 *b, c, d, e*, when to traverse the place alleged.

(p) *Cobb v. Bryan*, 3 B. & P. 348.

as where a plea to the whole of an entire and indivisible claim is not answered or noticed *in toto* by the plaintiff. (q)

4thly. A plea in bar, unlike a plea in abatement, offers matter which is a conclusive answer or defence to the action upon the merits. It is obvious that such a plea must contain either, 1st, a *traverse* or denial of the plaintiff's allegations; or 2dly, an express or implied *admission* that such allegations are true, with a statement of matter which destroys their effect. In other words, a plea in bar must *deny*, or *confess and avoid* the facts stated in the declaration. (r) Pleas in bar are not therefore susceptible of any other division than, 1st, pleas of *traverse* or *denial*; (r¹) 2dly, pleas by way of *confession* and *avoidance*. (r²)

4thly. A plea must deny or confess, and avoid: and herein of giving color, and of special pleas, amounting to the general issue.

Pleas in *denial* are either the general issue in those actions in which so general a traverse is admissible, or they occur in instances in which, there being no general issue, as in covenant, &c. some specific fact is specially disputed. The doctrine of *traverses* will be discussed in a subsequent part of the work.

The quality of a plea in *confession* and *avoidance* is more peculiar, and demands particular attention. A plea of this description is either in *justification* or *excuse* of the matters alleged in the declaration; as, imprisonment under a magistrate's warrant, or *son assault demeane* in

(q) See *Winstone v. Linn*, 1 B. & C. 460, 465, 466; 2 D. & R. 471, S. C.; and *post*, as to traverses.

(r) See Reg. Pl. 59; 21 H. 6, 12; Tidd, 9th ed. 653; *Merceron v. Dowson*, 5 B. & C. 479; *Carr v. Hinchliff*, 4 B. & C. 547; Steph. on Pleading, 5th ed. 57.

(r¹) [The general denial in an answer, in Massachusetts, puts in issue all the facts necessary to the plaintiff's *prima facie* case, even if not expressly alleged; *Davis v. Travis*, 97 Mass. 222; *Hawes v. Ryder*, 100 Mass. 216; so an answer which alleges the defendant's ignorance, so that he can neither admit nor deny the plaintiff's allegations. *Knapp v. Slocumb*, 9 Gray, 73. As to matters open to defendants under general denial, see *Snow v. Chatfield*, 11 Gray, 12; *Howard v. Hayward*, 16 Gray, 354; *Warren v. Ferdinand*, 9 Allen, 357. Where the answer merely denies that the defendant owes the amount claimed, or any sum whatever, the allegations of the declaration are admitted. *Bruce v. Mathews*, 101 Mass. 64; *Van Buren v. Swan*, 4 Allen, 380; *Oliver v. Halifax Gold Mining Co.* 11 Allen, 286; *Hawes v. Ryder*, 100 Mass. 216; *Framingham Bank v. Gay*, 9 Gray, 241. It is not enough that the answer denies a mere conclusion of law; it must contradict some material averments of the complaint. *Thurston v. Oldham*, 6 Bush, 16. In Indiana, the general denial imposes upon the plaintiff the burden of

proving every material allegation of the complaint. *Lafayette &c. Co. R. R. v. Ehnman*, 30 Ind. 83; i. e. every allegation, which the plaintiff is bound to prove, in order to maintain his action. *Adams Express Co. v. Darnell*, 31 Ind. 20.]

(r²) [Under the New York Code, § 149, the answer of the defendant must contain (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (2) A statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition. See *Mattison v. Smith*, 1 Rob. 706; S. C. 19 Abb. Pr. 288; *McKyring v. Bull*, 16 N. Y. 297, 307; *Dennison v. Dennison*, 9 How. Pr. 246; *Seward v. Miller*, 6 How. Pr. 312; *Gilbert v. Cram*, 12 How. Pr. 455. The Code of Iowa is similar. Revis. of 1860, § 2880, p. 519. As to the requirements of an answer under Massachusetts practice act, see *ante*, 256, note (d); of a notice of defence in Connecticut, *Merrill v. Everett*, 38 Conn. 40. New matter is that which admits the cause of action alleged in the complaint, yet constitutes a defence to the same. *Gilbert v. Cram*, 12 How. Pr. 455; *Carter v. Koezley*, 14 Abb. Pr. 147; S. C. 9 Bosw. 583; *Brazill v. Isham*, 12 N. Y. 17; *Bellinger v. Cragne*, 31 Barb. 534; *Radde v. Ruckgaber*, 3 Duer, 681.]

trespasses; or it is in *discharge* of the cause of action by subsequent matter, as accord and satisfaction, or a release. (s) It is observable that each of these pleas admits the mere *facts* stated in the declaration, as that the defendant committed the trespasses charged; that the *contract was made*, or the *debt* was incurred, &c. (s¹) But the matter which they allege by way of defence defeats or avoids the legal effect of those facts, and disproves, if true, the plaintiff's right of action. (s²) As a part of this rule, that a plea must either traverse or deny, or *confess and avoid*, it was held that a plea of discharge under an insolvent act from liability to perform the promises laid in the declaration must expressly confess such promises to have been made, and this not hypothetically; and that therefore a plea of discharge from the alleged promises, "*if any such were made*," was demurrable. (t) So, very recently a plea of the statute of limitations, alleging that the cause of action, "*if any such there be*," did not accrue, &c. was bad on special demurrer; (u) and yet it has been the *course in various pleas, as in those to the jurisdiction, and in pleas in abatement of non-joinder, to introduce those words. (u¹)

The *principles* of pleading, and now as we have just seen the express rules, (y) require in general that matter in confession and avoidance should be *specialy pleaded*, and not be given in evidence under the general issue. (z)

An important rule of pleading is deducible from the principle that a plea in bar must traverse, or confess and avoid, the matter to which it is applied, namely, that a plea in confession and avoidance must *give color*; (z¹) and on this rule chiefly depends the

(s) See Com. Dig. Pleader, 3 M. 12; Steph. 5th. ed. 229.

(s¹) [When a defendant files a confession of the plaintiff's right to recover a certain amount of damages, and pleads to the residue of his claim (under the Genl. Sts. N. Hamp. c. 208, § 2) the plea to the residue is not, in any manner, or to any extent, affected by the confession. McIntire v. Randolph, 50 N. H. 94; Corey v. Bath, 35 N. H. 531.]

(s²) [The answer under the New York Code, § 149, must distinctly state every fact which, when the plaintiff's case is admitted or proved, the defendant must prove to defeat a recovery. McKyring v. Bull, 16 N. Y. 297, 307; Dennis v. Snell, 54 Barb. 411; S. C. 34 How. Pr. 467; Ayrault v. Chamberlain, 33 Barb. 229; S. C. 31 N. Y. 614; Jacobs v. Remsen, 12 Abb. Pr. 390; S. C. 36 N. Y. 668.]

(t) Gould v. Lasbury, 1 Cr., M. & R. 254; 2 Dowl. 707, S. C.; *sed quere*, this has since been doubted.

(u) Margetts v. Bays, 4 Ad. & El. 489; [Conger v. Johnston, 2 Denio, 96.]

(u¹) [A like rule has been applied in Massachusetts to hypothetical averments in

answers, which occupy the place of special pleas in that state. Jackman v. Daland, Essex Co. Sup. Jud. Court, Nov. T. 1874. See Hamilton v. Hough, 13 How. Pr. C. 14; Ketchum v. Zerega, 1 E. D. Smith, 553; Brown v. Ryckman, 12 How. Pr. 313. But a defendant, in his answer of new matter, in order to avoid a cause of action, need not confess it. He has a right to say, I deny your alleged cause of action, but if you shall succeed in proving it, still I am not liable, because," &c. Taylor v. Richards, 9 Bosw. 679; *contra*, Gregory v. Trainer, 4 E. D. Smith, 58. So, in pleading new matter, the answer will be sufficient, if it refer to the cause of action to be answered, as the *supposed* cause of action: Eavestaff v. Russell, 10 M. & W. 365; or the *supposed* cause of action, if any such there be. McCormick v. Pickering, 4 N. Y. 280; or as the sum "claimed and demanded." Scadding v. Eyles, 9 Q. B. 858.]

(y) *Ante*, 503, 506.

(z) *Ib.* *Ibid.*

(z¹) [Dibble v. Duncan, 2 McLean, 553.]

(a) See a recent form of color, Jones v. Brown, 1 Bing. N. C. 484.

doctrine that a special plea, not pleaded as a general issue, but which is so in effect, will be defective.

It is plain that a plea which shows new matter in *avoidance* or *discharge* of the plaintiff's allegations is double and argumentative, if it do not admit the apparent truth of those allegations as matter of fact. There can be no occasion to adduce grounds for defeating the operation of disputed facts. The plea in avoidance must therefore give color to the plaintiff, that is, must give him credit for having an apparent or *prima facie* right of action, independently of the matter disclosed in the plea to destroy it.

Where the defence consists of matter of *fact*, merely amounting to a *denial* of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a *special* plea is bad, as unnecessary and amounting to the general issue; (a¹) first, because such special plea, if considered as a *traverse*, tends to needless prolixity and expense, and is an argumentative denial and a departure from the prescribed forms of pleading the general issue; and, secondly, if viewed as a plea in *confession and avoidance*, it does not give color or a plausible ground of action to the plaintiff. (b)

Thus, in assumpsit or debt on simple contract, a plea of matter which shows that no such contract was *in fact* made, is bad; as a plea in an action for the price of a horse, "that the defendant did not

(a¹) [In an action of contract in Massachusetts, on an account annexed, for services rendered, to which the defendant's answer was a mere denial of indebtedment, and amounted only to the general issue, which is expressly abolished by Genl. Sts. c. 129, § 15, it was held that the performance of the services and the value of them as alleged were admitted. *Van Buren v. Swan*, 4 Allen, 380. A plea of *nul tiel corporation*, to an action of assumpsit against a corporation is bad on special demurrer as amounting to the general issue. *Bank of Auburn v. Weed*, 19 John. 300. See *Kennedy v. Strong*, 10 John. 289; *Richards v. Cuyler*, 2 Hall, 201; *Potter v. Stanley*, 1 D. Chip. 243; *Merritt v. Miller*, 13 Vt. 416; *Burton v. Bostwick*, *Brayt*, 195; *Thayer v. Brewer*, 15 Pick. 217, 219; *Martin v. Woods*, 6 Mass. 6; *Gardner v. Webber*, 17 Pick. 407; *Little v. Bolles*, 7 Halst. 171. So, a plea of license, in an action *quare clausum*, from one having only a possessory right to the *locus in quo*, without giving color to the plaintiff, is bad for the same cause. *Underwood v. Campbell*, 13 Wend. 78; *Collett v. Flinn*, 5 Cowen, 466. See *Van Ness v. Forrest*, 8 Cranch, 30; *Wheeler v. Curtis*, 11 Wend. 660. But a special plea alleging facts which will maintain the defence under the general issue

does not necessarily amount to the general issue. *Dewees v. Manhattan Ins. Co.* 34 N. J. (Law) 244.]

(b) Com. Dig. Pleader, E. 14; Bac. Abr. Pleas, G. 3; 3 Bl. Com. 309; 1 M. & P. 294, 308; *Carr v. Hinchliff*, 4 B. & C. 547; Steph. 5th ed. 460. In 1 M. & P. 307, the court complained of the contradiction in the books as to what amounts to the general issue. There is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue. Under the latter, various things may be given in evidence under the general issue, independently of any of the new rules; but it is incorrect language to say that these things amount to the general issue; they only defeat the contract; but what in correct language may be said to amount to the general issue is, that, for some reason specially stated, the contract does not exist in the form in which it is alleged, and where that is the case, it is an argumentative denial of the contract, instead of being a direct denial, and which according to the correct rule of pleading is not allowed. *Hayselden v. Staff*, 5 Ad. & El. 160, 161.

*buy the horse." (g) So in an action of assumpsit against a defendant for the use and occupation of a house "by A. his wife, at his request," a plea that A. was not the defendant's wife is bad. (h) And if, in trespass for breaking and entering the plaintiff's house and taking "his" goods, the defendant justify as sheriff under a *feri facias* against the goods of a *third* person, the plea will be bad if it state that the defendant took the goods *mentioned in the declaration*. (i) So, where in a declaration for slander, the words set out imported an unqualified assertion by the defendant that the plaintiff was insolvent, and in a plea of justification the defendant only admitted that he had uttered words importing that he had mentioned the fact, *on the authority of a third person*, who was the author; the court held the plea bad, because it did not confess *and avoid the charge* laid in the declaration. (k) In trespass for an assault and battery, where the defendant pleaded that he was riding a horse in the highway, and that his horse being frightened ran away with him, and that the plaintiff was desired to go out of the way, and did not, and the horse ran upon the plaintiff against the defendant's will; on demurrer, the plaintiff had judgment, because the defendant had assumed to justify the battery, and yet had not confessed that which amounted to a battery by himself; for if the horse ran away against the will of the rider, it could not be said, with any color of reason, to be a battery in the rider; and it was observed by the court, that if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence. (l)

The common allegation in a plea, by way of introduction, that the cause of action laid in one count, and the cause of action laid in another count, are one and the same, showing matter in discharge of one cause of action only, seems to render the plea defective, as

(g) Vin. Abr. Certainty in Pleading, E. 15, cites Bro. Traverse, pl. 275; 22 Edw. 4, 29.

(h) *Sinclair v. Hervey*, 2 Chit. Rep. 642. In assumpsit on a bill of exchange by the drawer against the acceptors, who were partners, one of the defendants pleaded that the other had accepted in fraud of the partnership and without his consent and without consideration to him, and that the plaintiff at the time of the drawing and accepting of the bill had notice; this plea was held bad as an argumentative traverse of the acceptance. *Jones v. Corbett*, 2 G. & D. 308. Where the declaration averred a promise by the defendant to pay the plaintiff £500 on the latter procuring the release of S. from custody on a *ca. sa.*, and averring that the plaintiff did procure the release of S., a plea that S. was discharged from custody by a judge's order on account of his privilege of parliament, was held bad as an argumenta-

tive traverse of the allegation that the plaintiff had procured such release. *Butcher v. Steuart*, 9 M. & W. 405; 1 Dowl. N. S. 630. To a declaration on a bargain and sale of 6,000 oak trees to the defendant, with an averment of a tender of them to the defendant, a plea that the trees tendered were not the trees bargained for by the defendant, was held bad as amounting to the general issue. *Smith v. Dixon*, 7 Ad. & El. 1. See, also, *Solly v. Neish*, 2 Cr., M. & R. 355; 5 Tyrw. 625, S. C.; *Hayselden v. Staff*, 5 Ad. & El. 153; and the various cases previously referred to in treating of the general issue.

(i) See the forms, *post*, vol. ii. 712.

(k) *M'Pherson v. Daniels*, 10 B. & C. 263.

(l) *Gibbons v. Pepper*, Salk. 637; *Ld. Raym.* 38, S. C.; *Scott v. Shepherd*, 3 Wils. 411.

amounting to the general issue. (*m*) The fault in question is no ground of error; and can it seems only be objected to by a *special* *demurrer. (*n*) It has even been said that the only mode of taking advantage of the defect is to apply to the court to set aside the plea; (*o*) but it is difficult to imagine upon what principle the right of demurrer can be excluded: and there are many instances in which it has been exercised. (*p*)

In the above instances the mere *facts* are denied, and no question of *law* upon their effect is raised. Where the cause of action is avoided by matter *ex post facto*, as payment, accord and satisfaction, &c. it may always be specially pleaded. (*q*) So, where the defence consists of matter of *law*, where in other words the mere facts charged in the declaration are admitted, and their *legal* operation is disputed by matter alleged in the plea, the defendant need not plead the general issue, and the plea may be special. In this case, from the nature of the defence, the plaintiff has an *implied color* of action, bad indeed in point of law if the facts pleaded be true, but which is properly referred to the decision of the court. (*r*) Thus, in assumpsit, the defendant *might* before the pleading rules and now *must* specially plead infancy, lunacy, or coverture, when the contract was made; or illegality of consideration, as usury or gaming. So a plea in assumpsit for goods sold, that they were sold by A. as the plaintiff's agent, that the agent sold them as his own with the plaintiff's privity, and that the defendant was not aware of the real facts, and showing a debt from the agent as a set-off, is good; for this matter operates as a legal extinguishment of a debt not otherwise denied. (*s*) So a plea in trover, that A. was possessed of and lost the goods, that B. found them and gave them to the plaintiff, who lost them, and that the defendant found them, and by the command of A. converted them, was held sufficient, because it gave an implied color by confessing the *possession and property* in the plaintiff against all but the lawful owner. (*t*)

So, without giving express color, the defendant may plead in trespass or trover that A. was *possessed* of the goods, not alleging they

(*m*) *Ante*, 428; Freeman, 367; *vide post*, as to the *que est eadem*.

(*n*) [Freeport v. Edgecumbe, 1 Mass. 459; Whittlesey v. Wolcott, 2 Day, 431; York v. Jones, 2 N. H. 454; Crandall v. Gallup, 12 Conn. 365; Ogden v. Lucas, 48 Ill. 492.] See *post*, as to the consequences of not giving express color when necessary.

(*o*) See Warner v. Wainsford, Hob. 127; 1 Leon. 178; 2 Rol. Rep. 140; Com. Dig. Pleading, G. 14; Steph. 2d. ed. 463; [Whittlesey v. Wolcott, 2 Day, 431.]

(*p*) And see The King v. Johnson, 6 East, 583, 597; Sinclair v. Hervey, 2 Chit. Rep. 642; Rayner v. Wright, 2 Dowl. N. S. 415.

(*q*) 1 M. & P. 308; Carr v. Hinchliff, 4 B. & C. 552.

(*r*) Tidd, 9th ed. 653.

(*s*) Carr v. Hinchliff, 4 B. & C. 547; 4 D. & R. 42, S. C.; and though the facts might be given in evidence under the general issue, yet as they confess and avoid the plaintiff's demand, they may be specially pleaded. Purchell v. Salter, 1 G. & D. 686.

(*t*) Rockwood v. Feaser, Cro. Eliz. 262; Archbishop of Canterbury v. Kemp, Cro. Eliz. 539; 8 Co. 90 b; Com. Dig. Pleading, E. 14, *acc.*; Bellamy v. Balthorp, Latch, 185; 1 Leon. 178, *semb. contra*. See Unwin v. St. Quentin, 2 Dowl. N. S. 790.

were his own, and sold them in market overt to the defendant; or that B. took them *de quodam ignoto*, and waived them within the defendant's manor, wherefore he took them: because such plea gives an implied color, and does not deny but that the *property* was in the plaintiff; and the defendant is not bound to show expressly in * whom it was. (x) So, in trespass for taking corn, the defendant may plead that he took it as tithe or as wreck, without giving express color. (y) The plea of *liberum tenementum* may also be considered as giving implied color, (z) for it tacitly admits that in point of *fact* the plaintiff may have been in *possession* of the *locus in quo* (which, as in the case of personal property, *prima facie* entitles the plaintiff to maintain trespass against all the world but the rightful owner (a)), but insists that in point of *law* such possession is unlawful. (b) So, in trespass to lands, if the defendant aver that the plaintiff was seised, and claim under a demise from him, *express* color need not be given; (c) but a plea of such demise, "by virtue whereof the defendant entered and was *possessed*" at the time of the trespasses, appears to be bad, as amounting to the general issue. (d) The unnecessary addition of color appears to be no ground of demurrer, for the introduction of superfluous words of form will not vitiate. (e)

But where from the nature of the defence, the plaintiff would have no implied color of action, the defendant cannot plead specially any matter which controverts what the plaintiff would on the general issue be bound to prove without giving *express color*. (f) Express color is defined to be "a feigned matter pleaded by the defendant in trespass, from which the plaintiff seems to have a good cause of action, whereas he has in truth only an appearance or color of cause." (g) Thus, in an action of trespass to land, if the defendant plead a possessory title under a demise from a third person, this plea, showing that the right of possession is in the defendant, would without giving express color, amount to the general issue; (h) for it goes to deny that the trespass was, as alleged in the declaration, committed in the *plaintiff's* close, and shows the right of possession in the defendant, although the possessory right and possession of the plaintiff are the very gist of his action. But if the defendant, after stating his own title, allege, as is usual, that the plaintiff entered upon

(x) 10 Co. 90 b.

(y) 10 Co. 88 a, &c.; Reg. Pl. 304.

(z) *Dodd v. Kyffin*, 7 T. R. 354; *Argent v. Durrant*, 8 T. R. 403. See *ante*, 539.

(a) *Wood v. Hampstead*, Cro. Eliz. 262; *Graham v. Peat*, 1 East, 244.

(b) As to this plea, see 1 Saund. 299 c.

(c) 3 Salk. 273; Tidd, 9th ed. 653.

(d) Sty. 355; Steph. 2d ed. 460.

(e) *Taylor v. Eastwood*, 1 East, 219; *ante*, 252.

(f) 2 Saund. 401 a; 10 Co. 88, &c.; *Dinham v. Beckett*, Cro. Eliz. 76; *Argent v.*

Durrant, 8 T. R. 406. As to color in pleading in general, see 10 Co. 88, &c.; *Taylor v. Eastwood*, 1 East, 215; 3 Bl. Com. 309; Reg. Plac. 303; Doc. Plac. Color; Doct. & Stud. lib. 2, c. 53; 3 Salk. 273; Bac. Abr. Pleas, 1, 8; Com. Dig. Plead. 3 M. 40. Express color explained, Steph. 5th ed. 237.

(g) Bac. Abr. Trespass, I. 4.

(h) 2 Saund. 401; *Dodd v. Kyffin*, 7 T. R. 354; *Argent v. Durrant*, 8 T. R. 406; *Taylor v. Eastwood*, 1 East, 215; Com. Dig. Pleader, 3 M. 40, 41.

his possession "*under color of a charter of demise for life made to the plaintiff before the demise to the defendant,*" by the former proprietor of the estate, from whom the defendant derives title, and "*that the defendant reëntered, &c.*" this creates a question of law for the decision of the court, and by that means prevents the plea from amounting to * the general issue, and being matter of fiction or supposal, is not traversable. (i) As the plaintiff cannot traverse the colorable title given him, he must in his replication either traverse or avoid the defendant's title as alleged in the plea, or demur if it be insufficient in law. So, in trespass for taking goods, if the defendant plead that A. was possessed of them *as of his own proper goods*, and sold them in market overt to the defendant, the defendant must give express color, for this plea alleging that A. was possessed of his own property amounts to a denial that the plaintiff had any property in them, and therefore gives no color of action: and the color usually given in such case is that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. (k)

The subtle and somewhat intricate doctrine of *express* color is not of very frequent occurrence in pleading, and it seems can only arise at the present day in trespass, and is rarely adopted except in trespass to land. It is obviously founded on the principle that a plea in bar must deny or admit and avoid the facts charged by the plaintiff. The object of using it is in general either to compel the plaintiff expressly to traverse or avoid the defendant's title. If the plea consists of distinct allegations, showing a lengthened descent from several successive persons or various deeds, &c. constituting the defendant's title, the plaintiff can traverse one only of such allegations or deeds, &c.; and thus he admits the rest, which often presents an adequate reason for giving express color in trespass to land. And where the facts are admitted by both parties, and a legal question only arises on the title, the plea is useful and proper, as the question may thus be put upon record, and may be tried upon a demurrer, and the expense of a trial will thus be avoided. (l)

It is impolitic unnecessarily to venture upon new forms of pleading in any case, but especially when the defendant has recourse to fiction, and so technical a doctrine as that under consideration. The plea should give the color just mentioned, namely, a "*charter of demise to the plaintiff for life,*" &c. averring that nothing passed thereby; as it is the form which is always used. (m) It is a most important rule that the colorable title given must be *plausible*,

(i) Taylor v. Eastwood, 1 East, 213, 215; 3 Salk. 273.

(k) 10 Co. 90 b. See an instance of a plea in such action which was held defective, as giving the plaintiff a real right, viz. by showing a prior deed of gift to him from the

party from whom defendant claimed. Radford v. Harbyn, Cro. Jac. 122.

(l) See Steph. on Pl. 5th ed. 241.

(m) See a form of a deed of feoffment without livery, pleaded by way of color, 2 Rich. C. P. 443.

or afford a *supposititious* right ; — such as might induce an unlearned person to imagine sufficient ; and yet it must be in *legal* strictness inadequate to defeat the defendant's title as shown in the plea. (n) Thus, the * prior charter of demise to the plaintiff for life might, to a non-professional person, seem to confer a superior title, but there is this legal vice that the charter, though a charter of demise for life, is not pleaded as a *feoffment*, and does not appear to have been accompanied by livery of seisin. (o) The plea is bad if the title given be not even specious, and be at the first blush manifestly insufficient : on the other hand, it is defective if the color given be in legal contemplation and strictness sufficient to invest the plaintiff with the legal right ; for in that event, the defendant has no legal title on his own showing. (p) “ The plea ought to have four qualities ; *first*, it ought to be a matter of title, doubtful to a jury, as where the defendant pleads that the plaintiff, claiming by color of a deed of feoffment, &c. that is sufficient, for it is a doubt to lay gents, if lands shall pass by deed only without livery ; (q) *secondly*, that color as such ought to have continuance, although it wants effect ; as if the defendant give color by color of a deed of demise to the plaintiff for the life ‘ of J. S.’ who it appears by the pleadings was dead before the trespass, this is not sufficient, because the color doth not continue ; but the defendant may well deny the effect of it, viz. that the plaintiff claims by color of a deed of demise ‘ to him for his life ; ’ whereas nothing passed thereby : therefor there is a difference between the continuance of the color and the effect of it ; *thirdly*, it ought to be such a color as if it were of effect would maintain the nature of the action, as in an assize (where the disseisin of a *freehold* is complained of), color of a *freehold* (not of a demise for years), ought to be given, &c. ; *fourthly*, color ought to be given by the *first* conveyance, otherwise all the conveyance before is waived.” (r) Therefore, where the defendant derived a title to himself by divers mesne conveyances, and gave color to the plaintiff by one who was last named in the conveyance, this was held insufficient, and he should have given color by him who was first named in the conveyance ; (s) and in giving color under a feoffment the word *charter* or *deed* must not be omitted. (t) The omission to give express color when necessary will be aided if the plaintiff reply (u) instead of demurring ; (x) and it will as a mere matter of form, be

(n) Bac. Abr. Pleas, I. 8 ; Com. Dig. Pleader, 3 M. 41 ; Keilw. 103 b ; Smith v. Adkins, 8 M. & W. 362 ; 1 Dowl. N. S. 129.

(o) Doct. Pl. 73 ; 10 Co. 89 b ; Steph. 2d ed. 249.

(p) Doct. Pl. 73 ; 10 Co. 89 b ; Steph. 2d ed. 252.

(q) It should be shown affirmatively in the plea that it was a charter of demise for life, or a feoffment without livery ; for it

seems that in pleading, the term feoffment or enfeofed means and includes the necessary livery of seisin. See *ante*, 244 ; Co. Litt. 303 b ; 2 Saund. 305 a, note (13) ; Doct. Pl. 73.

(r) 10 Co. 91 b.

(s) 2 Rol. Rep. 140.

(t) *Ib.*

(u) Ashmead v. Ranger, 1 Ld. Raym. 551, 552.

(x) *Ib.*

aided upon *general* demurrer; (*y*) and the defect is expressly rendered immaterial after verdict by the statute 32 Hen. 8, c. 30. (*z*) We have before remarked that as the *law allows the fictitious statement of a colorable title for a particular purpose, such allegation is not traversable: (*a*) and the giving unnecessary color may be rejected as surplusage. (*b*)

5thly, The fault of *duplicity* in pleading, which we have already considered in examining the structure of, and as it affects a declaration, may equally occur in a plea. (*c*) Every plea ^{5thly. Must be single.} must in general be *single*; and if it contain two distinct matters, either of which would bar the action, and each of which requires a separate answer, it will in general be subject to a *special* demurrer for duplicity. (*c'*) Thus, if *several* outlawries be pleaded in the same plea to the same matter, or if *son assault demesne*, and a release, be relied upon in one plea to the same trespass, as either of these would defeat the action, the plea would be considered double. (*d*) But the defendant is not, as before explained, precluded from introducing several facts into one plea, if they be constituent parts of the same entire defence, and form one connected proposition, (*d'*) or be alleged as in-

(*y*) 4 Ann. c. 16, s. 1; *Bowdell v. Parsons*, 10 East, 363; *Patrickson v. Barton*, Cro. Jac. 229.

(*z*) 1 Saund. 228 c.

(*a*) *Ante*, 556; Steph. 5th ed. 243; *Tidd*, 9th ed. 653, 654.

(*b*) *Ante*, 555.

(*c*) See *ante*, 249, and the authorities cited Ib. 249, note (*y*). See *Vivian v. Jenkins*, 5 Nev. & Man. 14; 3 Ad. & El. 741, S. C. To render a plea bad for duplicity, it is not necessary that it should contain two defences well pleaded. To render it double, it is enough if it sets up two defences. *Wright v. Watts*, 2 G. & D. 386.

(*c'*) [See *Kennedy v. Strong*, 10 John. 289; *Bradner v. Demick*, 20 John. 405; *United States v. Gurney*, 1 Wash. C. C. 446; *Craig v. Brown*, Peters C. C. 443; *Schehan v. Malone*, 71 N. Car. 443; *Armstrong v. Webster*, 30 Ill. 333. Duplicity in a plea cannot be taken advantage of on a general demurrer. *Walker v. Sergeant*, 14 Vt. 247; *Franklin Bank v. Bartlett*, *Wright*, 71; *Wynne v. Whisenant*, 1 Ala. N. S. 282. "The only safe test of duplicity is to see whether a single issue can be made to convert the pleading, by denying any one material fact." *Campbell J. in People v. River Raisin & Lake Erie R. R. Co.* 12 Mich. 390, 397. A plea which first sets up an excuse for non-performance of a contract, and then avers full performance thereof, is void for duplicity. *Star Brick Co. v. Ridsdale*, 34 N. J. (Law) 428.]

(*d*) Ib.; Co. Litt. 304 a. See instances Vin. Abr. Double Pleas, A. 23; 1 M. & P. 102, 112. Duplicity in a plea to an action

by indorsee against acceptor of a bill of exchange. *Pursford v. Peek*, 9 M. & W. 196; *Stephens v. Underwood*, 4 Bing. N. C. 655; *Deacon v. Stodhart*, 5 Bing. N. C. 594. To an action on a promise by the defendant to pay the plaintiff £500 on obtaining the release of S. from custody on a *ca. sa.*, the defendant pleaded that S. obtained his release on the ground of his privilege of parliament only, and also averred that the defendant's promise was not in writing; the plea was held bad for duplicity. *Butcher v. Stewart*, 9 M. & W. 405; 1 Dowl. N. S. 620. So a plea that an attorney had not obtained or entered his certificate is bad on special demurrer, as involving two distinct allegations. *Eyre v. Shelley*, 6 M. & W. 274. See, also, *Williams v. Jones*, 1 G. & D. 649. To an action for penalties on the statute against a deputy clerk of the peace for practising as an attorney, a plea that the defendant was not a deputy clerk of the peace, nor did commit any of the supposed offences, is bad for duplicity. *Faulkner v. Chevell*, 5 Ad. & El. 213. See other examples, *Rawlinson v. Shand*, 5 M. & W. 468; *Smith v. Dixon*, 7 Ad. & El. 1.

(*d'*) [See *Strong v. Smith*, 3 Caines, 162; *Cooper v. Heermance*, 3 John. 318; *Fletcher v. Sprague*, 2 John. 462; *Thomas v. Rumsey*, 6 John. 33; *Bradner v. Demick*, 20 John. 404; *Tuttle v. Smith*, 10 Wend. 386; *Satterlee v. Stirling*, 8 Cowen, 133; *Tubbs v. Caswell*, 8 Wend. 130; *Waddams v. Burnham*, 1 Tyler, 232; *Torrey v. Field*, 10 Vt. 353; *Currie v. Henry*, 2 John. 433; *Lord v. Tyler*, 14 Pick. 164; *Tebbets v. Tilton*, 24 N. H. 122.]

ducement to or as a consequence of another fact. (e) Thus in detinue at the suit of a feme, the defendant pleaded that after bailment of the goods to him by the plaintiff, she married E. F., and that during such marriage E. F. released to him all actions, it was objected that the plea was double, viz. property in the husband by the intermarriage, and a release by him; but it was resolved not to be double, because he could not plead the release without showing the marriage. (f) So it will be no duplicity to set out several matters, as a will or deed and a fine constituting a title; although one of those matters would defeat the action. (g) So, to a declaration in slander, stating that the plaintiff had been guilty of fraud or felony, several offences may be stated in a plea of justification, although it would not be necessary to prove the whole. And at common law the defendant may plead to a part of the declaration one ground of defence, and to another part a different ground; (i) and one defendant may plead one matter, and the other defendant another matter to the same cause of action. (k) So, a defendant may plead in abatement to part, and in bar to other part, and may demur to the residue. (l) The rule that a plea must be single also precludes the defendant from pleading and demurring to the same part, especially as such duplicity would draw the matter to a different inquiry; the demurrer to be tried by the court, and the fact by a jury. (m) So, a plea confessing and avoiding, and also traversing the same point, is in the nature of a double plea. (n) An executor, however, may and ought to plead several judgments, &c. outstanding: (o) and in a plea of set-off the defendant may rely on a debt on record, and a debt on simple contract, though one will create an issue of law, and the other an issue of fact. (p) The statute of Anne, allowing several pleas, (q) and the particular effect of which will hereafter be considered, does not aid a duplicity in one and the same plea, though it allows of different grounds of defence being stated in different pleas. Duplicity can only be objected to by *special* demurrer, and the particular duplicity must be distinctly pointed out; (r) and if the plaintiff do not demur, he must reply to both material parts of the plea. (s)

(e) *Ante*, 250. When defendant need not prove all he has alleged. *Spilsbury v. Mickeithwaite*, 1 Taunt. 146; [*Currie v. Henry*, 2 John. 433; *Potter v. Titcomb*, 1 Fairf. 53.]

(f) *Bac. Abr. Pleas*, K. 2; *Dame Audley's case*, Sir F. Moore's Rep. 25, pl. 85; *Dalis*, 30, pl. 9; 1 M. & P. 112.

(g) 1 M. & P. 102.

(i) *Bac. Abr. Pleas*, K. 1; *Co. Litt.* 304 a. See *Hodges v. Holder*, 3 Campb. 366.

(k) *Com. Dig. Pleader*, E. 2; *Pursford v. Peek*, 9 M. & W. 196.

(l) *Ante*, 474.

(m) 11 Co. 52; *Bac. Abr. Pleas*, N.

(n) *Denny v. Mazey*, 2 Vent. 212; 3 Mod. 313; *Co. Ent.* 504.

(o) 1 Saund. 336 c, 337, and notes.

(p) *Solomons v. Lyon*, 1 East, 370.

(q) 4 & 5 Ann. c. 16.

(r) 1 Saund. 337 b, note (3); *Doct. Plac.* 147; *Bac. Abr. Pleas*, K. 1; *Com. Dig. Pleader*, E. 2; *Griffiths v. Eyles*, 1 B. & P. 415, 416; *Smith v. Clinch*, 2 G. & D. 225; [*See Currie v. Henry*, 2 John. 433.]

(s) *Bolton v. Cannon*, 1 Vent. 272; *Eyre v. Shelley*, 6 M. & W. 274; *Reynolds v. Blackburne*, 7 Ad. & El. 161.

6thly. A plea in bar must also be *certain*, (*t*) or it will be defective upon demurrer. (*u*) We have already attempted to define the different degrees of certainty in pleading, and to show the application of each, and we have seen that it is a general rule that the minor degree of certainty, viz. that to a *common intent*, that is, if the matter be clear enough according to the natural sense of the words used, (*x*) is sufficient in a plea in bar. (*y*) Thus, in debt on bond conditioned to procure A. S. to surrender a copyhold "to the use of the plaintiff," a plea that A. S. surrendered and released the copyhold to the plaintiff in full court, &c. and the plaintiff accepted it, without alleging that the surrender was *to the plaintiff's use*, is sufficient; for this shall be intended. (*z*) So, in debt on bond conditioned that the plaintiff shall *enjoy certain land, &c. a plea that after the making of the bond until the commencement of the suit the plaintiff did enjoy, is good, though it be not said that *always* after the making until, &c. he enjoyed, for this shall be intended. (*a*)

There, however, appear to be some instances in which greater certainty is necessary in a plea than in a declaration. Thus, in a declaration on a promise to pay the debt of another in consideration of forbearance, it is not necessary to show that the promise was in writing, according to the statute of frauds, but it is said to be otherwise in a plea. (*b*) So, we have seen that in a declaration claiming a right of way or other easement, it is sufficient to state that the plaintiff by virtue of his possession of a messuage, &c. is intitled to such easement, without setting forth the particulars of the plaintiff's title; but in a plea justifying an entry into land, &c. in respect of such easement, it is necessary to set forth the right by prescription or grant, &c. (*c*) And in trespass, where the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth particularly in his plea, and it is not sufficient to allege generally that he committed the act complained of by virtue of a certain writ or warrant directed to him, but he must set it forth specially, (*c*¹) and the defendant ought further to aver in his plea that he has substan-

(*t*) Com. Dig. Pleader, E. 5, C. 41, E. 7, 8, 9, 10, 11, *per totum*.

(*u*) See *ante*, 259; *Elliott v. Hardy*, 3 Bing. 61.

(*x*) *Ante*, 256, 257. See *Steph. on Plead.* 5th ed. 417.

(*y*) *Ib.*; [*Jackson J. in Oystead v. Shed*, 12 Mass. 509; *Rockefeller v. Donnelly*, 8 Cowen, 623; *Hildreth v. Baker*, 2 John. Cas. 339; *Speepeer v. Southwick*, 9 John. 314; *Van Ness v. Hamilton*, 19 John. 344; *Schehan v. Malone*, 71 N. Car. 440, 443. As to the certainty required in notices, specifications, and brief statements of special matters, to be given in evidence under the

general issue, provided for by statute in some of the states, see *ante*, 491, note (*a*¹), 547 note (*a*¹).] And see 1 Saund. 49, note (1); 346, note (2); *Cooper v. Monke, Willes*, 52. As to an ungrammatical averment, 13 Price, 172.

(*z*) *Hamond v. Dod*, Cro. Car. 6.

(*a*) *Harlow v. Wright*, Cro. Car. 195.

(*b*) *Ante*, 244, 310.

(*c*) *Ante*, 394; *Rider v. Smith*, 3 T. R. 768; *Grimstead v. Marlowe*, 4 T. R. 719.

(*c*¹) [*See Stoyel v. Westcott*, 2 Day, 418; *Cruger v. Cropsey*, 3 John. 242; *Currie v. Henry*, 2 John. 433.]

tially pursued such authority. (*d*) And a justification in trespass "as servant" must also state that the act was done "by the command" of the principal. (*e*) So, in a declaration on a deed, whether in debt or covenant, it is sufficient in setting out the deed to allege that "*it was thereby witnessed*," that, &c. (*testatum existit*); but in pleas and avowries the deed must not be stated by way of recital or argument, (*f*) but the neglect of this rule can be objected to only by a special demurrer. (*g*) The rules with regard to the mode of setting out a deed in words, or according to its legal import or substance, have already been explained. (*h*) Where the defendant states his right only as *inducement* or conveyance, so much certainty is not required. (*i*) Thus, it is sufficient to allege in a plea to a declaration in trespass, that the defendant was possessed of a close, from which his cattle escaped into the close of the plaintiff, in consequence of the defect of a fence which the latter ought to have repaired. (*k*)

The doctrine of certainty in pleading is open to a very important *exception, applicable to pleas as well as other pleadings, namely, that a general mode of pleading shall often be permitted where the matter is of so intricate and complicated a nature, and embraces such a variety and extent of minute circumstances, that a particular statement would cause great prolixity. (*l*)

A plea of *performance* of a condition or covenant should in general show specially the time and manner of performance of the specific matters required to be done; and it is not in general sufficient to aver merely that the defendant "performed the matter," or "paid the money," &c. (*m*) Thus, if the condition be to pay £5 to A. and £10 to B. as each attains twenty-one years of age, the plea must show when each came of age, and that each was then paid; not that the defendant paid the sums when they came of age. (*n*) So, if a bond be conditioned for the performance of a specific act, as that the defendant should indemnify the plaintiff against a certain liability he was under to a third person, "by paying the latter that sum," the plea will be equivocal and uncertain, and therefore insufficient if it

(*d*) Co. Litt. 283 *a*, 303 *b*; 1 Saund. 298, note (1). When a return of a process must be shown. *Shorland v. Govett*, 5 B. & C. 488.

(*e*) Chubb and Mallock, Hil. Term, 51 G. 3, K. B. MS.

(*f*) 1 Saund. 274, note (1); Moore v. Jones, 2 Id. Raym. 1539; 1 Leon. 242; Com. Dig. Pleader, E. 3; Bac. Abr. Pleas, I. 5; and see Baynon v. Batley, 8 Bing. 256.

(*g*) 1 Saund. and Com. Dig. *ubi supra*.

(*h*) *Ante*, 312.

(*i*) *Ante*, 297.

(*k*) 1 Saund. 346 *e*, note (2). See another reason assigned for this instance, Steph. 358, note (*p*), 2d ed.

(*l*) *Ante*, 258. [See *Postmaster General v. Cochran*, 2 John. 415, 416; *Hughes v. Smith*, 5 John. 168; *Frery v. Dakin*, 7 John. 79; *Service v. Heermance*, 1 John. 91; *Peebles v. Kittle*, 2 John. 363; *Cantillon v. Graves*, 8 John. 472; *Roosevelt v. Kellogg*, 20 John. 208; *Smith v. Mumford*, 9 Cowen, 26; *Wheeler v. Townsend*, 3 Wend. 247; *Cleveland v. Rogers*, 6 Wend. 438.] The words reasonable and seasonable times of the year will often suffice *per se* on this ground. *Elliott v. Hardy*, 3 Bing. 61, 65, &c.

(*m*) *Wimbleton v. Holdrip*, 1 Lev. 303; Com. Dig. Pleader, E. 25; 2 W. 33; 1 Saund. 116, note (1); Steph. 5th ed. 370.

(*n*) *Halsey v. Carpenter*, Cro. Jac. 359.

merely state that the defendant "indemnified the plaintiff" without alleging a payment of the money. (*o*) Where, however, the thing required to be performed includes matter of the multifarious nature alluded to, there, to prevent inconvenient prolixity, a general form of plea will be allowed. Thus, in debt on bond to pay over "from time to time all such moneys as he should receive, &c." a plea that the defendant paid over all such moneys as he received is good, without showing when and of whom he received each particular sum. (*p*)

As well in virtue of the rule that less particularity is required in cases where excessive prolixity is thereby avoided, as in consequence of the principle that it is for the *plaintiff* complaining of the breach of the condition of a bond to show on the record in what instances it has been violated, it is competent to a defendant, in an action on a bond conditioned for the performance of covenants of an *affirmative* nature, contained in another instrument, and not set out in the condition, to plead *generally* "that he hath performed all and singular the said covenants, &c. according to the condition, &c." (*q*) In this case there is no occasion to allege a specific performance of each of the covenants in detail, and it is for the plaintiff to show in his replication a specific breach of such of the covenants as he contends have been broken. (*r*) It is plain, however, that if any of the covenants are of * a *negative* nature, viz. that the defendant shall not perform an act, or are in the *alternative* or *disjunctive*, a general plea that the defendant has performed such covenants is illogical and argumentative in the first instance, and in the second is ambiguous, and is therefore defective. (*s*) In these cases the plea of performance should be more specific, viz. that the defendant "did not," as regards the negative covenant, "commit the act forbidden," and as respects the covenant to perform one thing or another, that he performed *one* of those matters, showing *which* of them was completed. (*t*) Mispleading in these instances must be pointed out by a *special* demurrer, and is not otherwise objectionable. (*u*) An obligor, who binds himself to perform certain works according to a specification and other detailed and working drawings to be furnished during the progress of the works, with power for the obligee, by his surveyor, to direct *additions* or omissions, must in a plea of performance, *quoad* such parts in which no orders were given by the surveyor to *vary* and *deviate* from

(*o*) *Holmes v. Rhodes*, 1 B. & P. 638. See other similar instances, Steph. 5th ed. 399; 1 Saund. 117, note (1).

(*p*) 1 Sid. 334; *Mint v. Bethell*, Cro. Eliz. 749.

(*q*) 2 Saund. 403 *b*; 410, note (3); 1 Saund. 55, 117, note (1); *Earl of Kerry v. Baxter*, 4 East, 340; [*Smith v. Boston* &

Conc. & M. R. R. 36 N. H. 485.] See the form, *post*, vol. ii. 352; Steph. 5th ed. 400.

(*r*) *Ib.*; *Plomer v. Ross*, 5 Taunt. 386; *Sayre v. Minns*, Cowp. 578.

(*s*) *Ib.*; Steph. 5th ed. 403.

(*t*) *Ib.*; *Brunkhorn's case*, Cro. Eliz. 233; *Hodgson v. The East India Company*, 8 T. R. 280; *Taylor v. Needham*, 2 Taunt. 278.

(*u*) *Ib.*

the original plan, show an authority in the surveyor to give such directions, or aver that the *deviation* or *variation* was an *omission* or *addition*. (x) The plea of *non damnificatus*, in the general form, applies to cases where the condition is general to indemnify or discharge the plaintiff from any damage by a reason of a certain thing, as in the ordinary case of a bastardy bond, &c. (y)

Where, in an action of replevin, an avowry was made in respect of a right-of common claimed by the corporation of Alnwick, under a grant from the De Vesci; and the plaintiff pleaded that the corporation had been accustomed to appoint a *reasonable* number of herds for, *amongst other things*, superintending the common and cattle thereon, and also to appoint for the pains of each herd a *reasonable* and proper number of stints of each such herd to be depastured upon the common; the court held that the plea in bar was good after verdict, and Best C. J. and Burrough J. appear to have been of opinion that it would not have been bad on demurrer, because the allegation could not easily have been made with greater certainty, as the reasonableness of the number of herds must vary at times. (z)

Where the covenant is to do some act of record, (a) or any matter of law, as to convey, discharge an obligation, ratify or confirm, &c. performance must be pleaded specially; because being a matter of *law* to be performed, it ought to be exhibited to the court, who are judges of the law, to see if it be well performed, and not to a jury, who are judges only of the fact. (b)

* General pleading is not allowed in a plea justifying the truth of a libel or slander. (c) Therefore where a defendant pleaded "that the plaintiff had been illegally connected with a gang of swindlers, and had been guilty of defrauding divers persons," without stating the particular instances of fraud, and thereby following the terms of the libel, the plea was held bad on demurrer. (d) So, where a libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the defendant, it was held that a plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, was insufficient on special demurrer; although it was objected that the charge related only to private transactions between the parties themselves, of which it might be presumed

(x) *Rex v. Peto*, 1 Y. & J. 37.

(y) See *post*, vol. ii. 353; 2 Saund. 84; 1 Saund. 117, note (1); *Hays v. Bryant*, 1 H. Bl. 253.

(z) *Elliott v. Hardy*, 3 Bing. 61.

(a) Co. Litt. 303 b; Bac. Abr. Pleas, I. 3; Show. P. C. 97.

(b) *Ib.*

(c) 1 Saund. 244 a, 244 b, note (m); 1 Stark. Slander, 2d ed. 478; [*ante*, 522, 523, and notes.] See, as to general pleas, justifying a libel, as being a correct report of a trial, &c. *ante*, 524.

(d) *J'Anson v. Stuart*, 1 T. R. 748; *Jones v. Stevens*, 11 Price, 235, 273; [*Van Ness v. Hamilton*, 19 John. 349.]

the plaintiff was conusant. (e) And in a later case, (f) Mr. Baron Wood strongly reprobated general pleas of justification aspersing the plaintiff's general character, without disclosing instances of misconduct, said it was the duty of the plaintiff to demur to them; and that by so doing the plaintiff did not admit the truth of the matters thus indefinitely justified. Where, however, the charge contained in the slander is in itself specific, the defendant need not further particularize it in his plea: as where the words were, "he stole two sheep of J. S.," a plea that the plaintiff "stole the said sheep," is sufficient. (g)

So a general plea of usury, not stating the particulars of the contract, the time of forbearance, or the sum to be forborne, is bad on special demurrer. (h) But a general plea that a deed was "obtained by the plaintiff by fraud and misrepresentation" has been holden sufficient, on the ground that fraud usually consists of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth. (i) In trespass for an assault and imprisonment a plea justifying on the ground that a felony had been committed, and that there was reason to suspect the plaintiff, must set forth the facts or reasons which gave rise to and justify the suspicion. (k) And in a plea justifying a trespass to the person, every *part of the matter which the plea professes to answer must be stated with great precision, as if a wounding or handcuffing be justified under a latitat, &c. an attempt to rescue, or other resistance, must be fully stated. (l) And if an officer justify breaking an inner door of a house, in order to search for and arrest a party, it must be alleged that he demanded the key, or that no one was present of whom such demand could be made, and it is not sufficient to say that the door was locked, so that without breaking open the same the defendant could not enter, without alleging the particular circumstances which rendered the breaking neces-

(e) *Holmes v. Catesby*, 1 Taunt. 543; and see *Newman v. Bailey*, 2 Chit. Rep. 665; *Duncan v. Thwaites*, 3 B. & C. 566. A plea justifying a libel in respect of the occasion on which it was published must also be specific as to the names of third persons, &c. *Rowe v. Roach*, 1 M. & Sel. 304. And in an action for slander, charging the plaintiff, as pawnbroker, with the practice of "duffing," i. e. replenishing damaged goods, and pledging them with other pawnbrokers, the defendant in justifying must state the specific instances. *Hickinbotham v. Leach*, 2 Dowl. N. S. 270.

(f) *Jones v. Stevens*, 11 Price, 235, 255, 277, 278.

(g) Bro. Action sur Cas.; 27 H. 8, 22, pl. 3; 1 Rol. Abr. 87.

(h) *Hill v. Montague*, 2 M. & Sel. 377.

(i) *Tresham's case*, 9 Co. 110; per *Ld. Ellenborough*, *Hill v. Montague*, 2 M. & Sel. 378; [*Webb v. Steele*, 13 N. H. 230; *Weld v. Locke*, 18 N. H. 141. In *Hoitt v. Hol-*

combe, 23 N. H. 535, it was held that a replication to a plea of release, that the release was obtained by fraud and misrepresentation of the defendant, without setting out the particulars of the fraud, is good; and in the opinion given by *Bell J.* the cases on this point are carefully reviewed. See *Bell v. Lamprey*, 52 N. H. 41; *Slack v. McLagan*, 15 Ill. 242; *Abraham v. Gray*, 14 Ark. 301, where it was held that the facts constituting an alleged fraud must be set forth in the pleadings. So held in *Darnell v. Rowland*, 30 Ind. 342.] But see 1 Tyrw. & Gr. 87. A plea to debt on bond that after its execution a material addition was made to the condition, must state that the addition was made in writing to the condition itself. *Harden v. Clifton*, 1 G. & D. 22.

(k) *Ante*, 535, 536.

(l) 1 Saund. 296, note (1); *Gregory v. Hill*, 8 T. R. 299; *Wright v. Court*, 4 B. & C. 596.

sary. (m) And a plea in trover for taking a ship, that the defendant as captain of a man-of-war seized it "as a prize," without showing how it became such, is demurrable. (n) So, in pleading matters in excuse, all the circumstances should be shown. (o)

Necessary circumstances will, however, in general, be intended in a plea; as if a feoffment be pleaded, livery need not be alleged, for it shall be intended, and is included in the word *feoffment* or *enfeoffed*; (p) and it is not requisite to have so much certainty in pleading a matter which is only conveyance or inducement, (q) or matter in the negative. (r) And in a plea, as well as a declaration, less certainty is required in stating a matter which is more properly and peculiarly within the knowledge of the opponent. (s)

With regard to the *certainty* required in a plea in the statement of the *time* and *place* when and where material facts have happened, we shall hereafter see that it was an ancient rule that the time and place mentioned in the declaration should be adhered to, unless it be necessary for the defence to vary therefrom. (t) Matter of discharge, as a release, &c. must be shown to have taken place after the trespass, &c.; (u) and at common law, in pleading payment of a bond, &c. it was necessary to show that it was made on a named day. (x) Unless a particular place was material to the defence, it does not appear to have ever been necessary to state *any place* where the facts happened, (x¹) for though a distinction was formerly taken between a plea in abatement and a plea in bar, a venue was afterwards deemed to be unnecessary in both. (y) The doctrine of venues was clearly * and correctly stated by Eyre C. J. in *Ilderton v. Ilderton*, (b) who said, "that as defendants, with respect to transitory matters, are obliged to lay the venue in their plea in the place laid in the declaration, and since the statute (c) has directed that the jury shall come *de corpore comitatus*, the law of venues will be found to be very substantially altered, and to lie in a narrow compass, and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as in the declaration, will be a distinction without a difference; and the principle now is, that

(m) *Ratcliffe v. Burton*, 3 B. & P. 223; *sed vide Sprigg v. Neal*, 3 Lev. 92. So where to a declaration for entering plaintiff's dwelling-house and assaulting and imprisoning him; the defendants pleaded a justification under a writ of *ca. sa.* by virtue of which they entered the house, *the outer door being open*, and arrested the plaintiff, it was held that the statement that the outer door was open was a material averment, for that was a *condition precedent* to the defendants' right to enter and arrest the plaintiff in his house. *Kerby v. Denby*, 1 M. & W. 336; 1 T. & G. 685, S. C.

(n) *Beak v. Tyrrell*, Carth. 31.

(o) Bac. Abr. Trespass, 1.

(p) Com. Dig. Pleader, E. 9; *ante*, 244.

(q) Com. Dig. Pleader, E. 10; 1 Saund. 346, note (2); *ante*, 297.

(r) Com. Dig. Pleader, E. 11.

(s) *Ante*, 245, 258, 398.

(t) 2 Saund. 5, note (3).

(u) Plowd. 46.

(x) Plowd. 104; Com. Dig. Pleader, E. 6.

(x¹) [*Thomas v. Rumsey*, 6 John. 33, 34; *Farman v. Haskins*, 2 Caines, 373.]

(y) 1 Saund. 8 a, note (1).

(b) 2 H. Bl. 161.

(c) 4 Ann. c. 16, s. 6.

the place laid in the declaration draws to it the trial of everything that is transitory, and it should seem that neither forms of pleading, nor ancient rules of pleading established on a different principle ought now to prevail." (d) We have seen that the pleading rule, Hil. T. 4 W. 4, reg. 8, orders that no venue shall be stated in the body of the declaration, or in any subsequent pleading, but provides that in cases where local description is now required, such local description shall be given.

A plea need not state facts of which the court will *ex officio* take notice. (e)

7thly. We have already seen that pleading is a statement of *facts*, and not a statement of argument; it is therefore a rule that a plea should be direct and positive, and advance its position of fact in an absolute form, and not by way of rehearsal, (f) reasoning, or argument, (f¹) which would lead the fact to be collected by inference and argument only, and thereby tend to create unnecessary prolixity and expense. (g) If *scire facias* be brought against a parson for the arrears of an annuity recovered against him, and he plead that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof, this plea is argumentative, for he should have pleaded directly that he was not parson on the day of the writ brought, instead of merely pleading facts from which that conclusion was to be drawn. (h) A plea in debt for an escape that "if the party escaped, he escaped without the defendant's knowledge, and returned, &c." is bad. (i) So a surrender by operation of law should be pleaded as a surrender, and not merely circumstantially; thus, if a surrender be by acceptance of a new lease, it is not sufficient to say "that the lessee being possessed under a former lease, the lessor demised to him," but the plea should be that the lessee "surrendered," and then * that the lessor demised, or that the lessor entered and demised. (k) In trespass for taking goods, a plea

7thly. Must be direct and positive, and not argumentative.

(d) 1 Saund. 8 a, note (1).

(e) *Ante*, 236.

(f) The *testatum existit*, in setting out a deed in a plea, seems incorrect on this ground. See Stephen, 5th ed. 428; *ante*, 560; *Isherwood v. Whitmore*, 12 L. J. R. N. S. Exch. 98.

(f¹) [See *Fletcher v. Peck*, 6 Cranch, 126; *Spencer v. Southwick*, 9 John. 313; *Savary v. Goe*, 3 Wash. C. C. 140; *Steuken County Bank v. Mathewson*, 5 Hill, 249; *Church v. Gilman*, 15 Wend. 650; *Dyett v. Pendleton*, 8 Cowen, 727; *Fidler v. Delavan*, 20 Wend. 57; *Atwood v. Caswell*, 19 Pick. 495; *Austin v. Parker*, 13 Pick. 224, 225; *Bean v. Farnham*, 6 Pick. 272; *Rakes v. Pope*, 7 Ala. 161; *Hurst v. Purvis*, 5 Blackf. 557. In an action for injuries resulting from a defective highway, a denial that the highway

was "in a dangerous condition to travellers exercising ordinary care and diligence," was held not to be a sufficient denial that it was out of repair. *Cuthbert v. Appleton*, 24 Wisc. 383.]

(g) *Ante*, 260; Co. Litt. 303 a, 304 a; Com. Dig. Pleader, E. 3; *Liverpool Waterworks Company v. Atkinson*, 6 East, 507; *Slade v. Drake*, Hob. 295. See Steph. on Pl. 5th ed. 422, where some excellent instances are given relating to this quality of a plea. [See *Suit v. Woodhull*, 116 Mass. 547, 549, 550; *Cassidy v. Farrell*, 109 Mass. 397.]

(h) 2 Anders. 179, 180; Bac. Abr. Pleas, I. 5.

(i) *Griffiths v. Eyles*, 1 B. & P. 413.

(k) Com. Dig. Surrender, N.

that the plaintiff "never had any goods" is argumentative, and therefore bad. (*l*) And it was held that a plea to debt on a bail bond that there was no *proper* affidavit of debt made and filed of record before issuing the process against the bail, was bad, on the ground that issues tendered in pleading must not be alleged argumentatively, but in terms on which a direct issue can be taken. (*m*)

Special pleas which amount to the general issue, without professing to be so, seem to be defective chiefly on account of their being opposed to the rule under consideration. (*n*) The general rule that deeds and other matters should be pleaded according to their legal effect and meaning, (*o*) seems also to be partly founded on the maxim that pleading should not be circuitous and argumentative. This fault sometimes occurs in a *traverse*, as will be explained when we consider the nature of traverses. An argumentative plea is aided after verdict, and upon a *general* demurrer. (*p*)

8thly. Every plea should be so pleaded as to be *capable of trial*, and therefore must consist of matter of *fact*, (*p*¹) the *existence* of which may be tried by a *jury* on an issue, (*p*²) or the *sufficiency* of which as a defence may be determined by the *court* upon *demurrer* (*p*³) or of matter of *record*, which is triable by the record itself. (*q*) And if fact be improperly confounded or mixed in the plea with matter of law so that it cannot be tried by the court or jury, the plea is bad; as if the defendant pleaded that A. *lawfully* enjoyed the goods of felons, it will be bad; for the jury cannot determine whether he *lawfully* enjoyed, nor the court whether he in *fact* enjoyed, and the plea should have stated the particular facts and title by virtue of which A. did enjoy. (*r*) So if the condition of a bond be that the defendant will show a *sufficient* discharge of an annuity, it seems that it cannot be pleaded merely that he showed a *sufficient* discharge; for the jury cannot try whether it is sufficient, and he ought to show what discharge he gave, in order that the court may judge whether it was

(*l*) Doct. Pl. 41; Dyer, 43 a. So to a declaration on a replevin bond, assigning as a breach that the distrainee did not appear at the next county court, a plea that the *distrainers* entered their appearance at such county court, without stating that the *distrainee* was thereby discharged from appearing, according to the practice of the county court, is bad. Rider v. Edwards, 3 M. & Gr. 202.

(*m*) Hume v. Liversedge, 3 Tyrw. 257.

(*n*) See *ante*, 552.

(*o*) *Ante*, 312; 2 Saund. 97 b, note (2); Bac. Abr. Pleas, I. 7; Steph. 5th ed. 347, 428.

(*p*) Com. Dig. Pleader, E. 3; Alleyn, 48; 2 Saund. 319, note (6); [Spencer v. Southwick, 9 John. 313.]

(*p*¹) [And not mere evidence to prove the

fact. Hobbs v. Henning, 17 C. B. (N. S.) 791.]

(*p*²) [Van Ness v. Hamilton, 19 John. 371.]

(*p*³) [Frery v. Dakin, 7 John. 78.]

(*q*) Co. Litt. 303 b; Com. Dig. Pleader, E. 34; 9 Co. 24 b, 25 a; [Watriss v. Pierce, 36 N. H. 236; Schehan v. Malone, 71 N. Car. 440, 443.]

(*r*) 9 Co. 25. [Where there is in a pleading the averment of a legal conclusion against a previously admitted fact, the fact is of the most importance, and must stand, while the conclusion will be disregarded. Jones v. Phoenix Bank, 8 N. Y. 238; Robinson v. Stewart, 10 N. Y. 189. The defendant cannot introduce evidence to disprove or contradict what they have admitted to be true in their answer. Sandford v. Smith 5 Bush. 471.]

sufficient. (s) But where the effect of the words presents a matter triable, it is sufficient, though according to the precise words it would not be triable; as in covenant for quiet enjoyment free from arrears of rent, a plea that he delivered money to the plaintiff with *intent* *that he should therewith discharge the arrears will be sufficient, though the intent is not triable, for it is equivalent to the allegation that the defendant delivered the money to pay. (t) A defect in this respect in a plea may be aided by the plaintiff's taking issue upon a triable point; but if he should take issue upon an immaterial matter, it might be necessary to award a repleader.

9thly. Every plea should be true and capable of proof, for as it has been quaintly said, "true is the goodness and virtue of pleading, as certainty is the grace and beauty of it," and if it appear judicially to the court on the defendant's own showing that he hath pleaded a false plea, this is a good cause of demurrer. (u) Thus, where the defendant pleaded to an action of debt upon bond conditioned for performance of covenants contained in an indenture, of which he made a profert, that there were no covenants contained in the indenture, and upon oyer by the plaintiff it appeared that the deed did contain divers covenants on the part of the defendant, the plea on demurrer was held insufficient. (x) The plea must not be too large, and claim more than the defendant is capable of proving to support his defence. Thus, where the defendant pleaded that a close called A. had been separated and inclosed from a waste for twenty years, to support the allegation, it was held necessary to prove that every part of the close had been so long inclosed, and only part of the close having been so inclosed, the defendant failed in the plea. (y) This subject will be further explained when the doctrine of traverses comes under consideration.

9thly. Must be true, and must not be too large.

Sham pleading, that is, the pleading a matter known by the party to be false, for the purpose of delay or other unworthy object, has always been considered a very culpable abuse of justice, and has often been censured and set aside with costs. (a)

Of sham pleas. (z)

(s) 9 Co. 25 a; *ante*, 248, and 235, 236.

(t) 4 Mod. 249, as to traversing a local justification. 2 Saund. 5 b, c, d, e.

(u) *Slade v. Drake*, Hob. 295; Bac. Abr. Pleas, G. 4; *Johnson v. Alston*, 1 Campb. 176; *Hole v. Finch*, 2 Wils. 394. There appears no means of enforcing this rule, because regularly there is no proper way of proving the falsehood of an allegation till issue has been joined and trial had upon it. Steph. 5th ed. 488.

(z) 1 Saund. 316, 317; 1 Saund. 9 b, note (1).

(y) *Hawke v. Bacon*, 2 Taunt. 156; and

see *Richards v. Peake*, 2 B. & C. 918; *Arlett v. Ellis*, 7 Taunt. 346. A plea justifying a libel must be true in toto. See *Weaver v. Lloyd*, 2 B. & C. 678; 4 D. & R. 230, S. C.; *Edwards v. Bell*, 1 Bing. 403; *Basan v. Arnold*, 8 Dowl. 356; *Stubbs v. Lainson*, 5 Dowl. 162; 1 M. & W. 728, S. C.

(z) See, further, as to sham pleas, 3 Chitty's Gen. Pr. by Lush, 618, 619. As to whether attorney is liable to pay the costs of a sham plea, *Vincent v. Groome*, 1 Chit. Rep. 182; *Bones v. Bunter*, 1 Chit. Rep. 584.

(a) Bac. Abr. Pleas, G. 4; *Hole v. Finch*, 2 Wils. 394; *Pierce v. Blake*, Salb. 515;

It is of course in general the sole province of the jury to decide upon the truth or falsity of a matter of *fact* pleaded by a defendant; and unless the plea be a *nullity*, the plaintiff will not be justified in signing judgment as for want of a plea without a previous application to the court or a judge. But there are many instances * in which a plea may be so palpably and manifestly untrue, that the court will *assume* that it is so, or will, on an affidavit *that it is false*, permit the plaintiff to sign judgment as for want of a plea, and make the defendant or his attorney pay the costs occasioned by the plea, with the costs of the application. (*f*)

The following are instances in which false pleas have been treated as falling within the description of sham pleas which shall be regarded as a nullity, (*f*¹) although the defendant may not be under terms of pleading issuably. (*g*)

Thomas v. Vandermoolen, 2 B. & Ald. 198; [Tucker v. Ladd, 4 Cowen, 47; Brewster v. Bostwick, 6 Cowen, 34; Cox v. Higbee, 6 Halst. 395; Falls v. Stickney, 2 John. 541; Anon. 2 Halst. 160; Bowen v. Bissell, 6 Wend. 511; Caswell v. Bushnell, 14 Barb. 393; Roome v. Nicholson, 8 Abb. Pr. (N. S.) 343; Conway v. Wharton, 13 Minn. 158; Hayward v. Grant, 13 Minn. 165. As to a sham or fictitious action, see Smith v. Junction R. R. Co. 29 Ind. 546. Under the New York Code (§ 152), sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may, in their discretion, impose. McCarty v. O'Donnell, 7 Rob. (N. Y.) 431. This section is merely declaratory of the power which previously existed in the court. Manufacturers' Bank of Rochester v. Hitchcock, 14 How. Pr. 406. The whole of an entire answer must be struck out, or none. Winslow v. Ferguson, 1 Lansing, 436. For cases showing when an answer may be struck out as sham or false, see Wait N. Y. Annotated Code, 273, 274; Fasnacht v. Stehn, 53 Barb. 650; Collins v. Coggill, 7 Rob. (N. Y.) 81. But the court cannot strike out as sham, an answer consisting of a general denial. Claflin v. Jaroslowski, 64 Barb. 463.]

(*f*) Thomas v. Vandermoolen, 2 B. & Ald. 197; Vincent v. Groome, 1 Chit. Rep. 182; Bones v. Bunter, 1 Chit. Rep. 564 a; Tidd, 9th ed. 565; and see 1 M. & P. 643; Jones v. Studd, 4 Bing. 663; Balmanno v. Thompson, 6 Bing. N. C. 153; 8 Dowl. 76, S. C. Where in debt on a judgment the defendant pleaded a release destroyed by accident, upon affidavit that the plea was false, the court allowed the plaintiff to sign judgment as for want of a plea. Smith v. Hardy, 8 Bing. 435; but see Smith v. Backwell, 4 Bing. 512; 1 M. & P. 538. Where the court of C. P. refused leave to sign judgment on an affidavit that a plea of delivery of a pipe of wine in satisfaction was false. As to sham pleas, see, further, 3 Chitty's Gen. Prac. by Lush, 618, 619; Chitty's Arch. Prac. 7th

ed. 167. [Special pleas, if false, will be stricken out on motion. Oakley v. Devoe, 12 Wend. 196; Henderson v. Reed, 1 Blackf. 347; Maury v. Van Arnum, 1 Hill, 370; Fisher v. Pond, 1 Hill, 672. But a plea will not be stricken out as frivolous unless it is obviously grossly so. Hogenkamp v. Ackerman, 4 Zab. (N. J.) 133.]

(*f*¹) [It is not the usual course to reject a plea on motion, because it is found on examination to be bad. The plaintiff is usually left to his demurrer. This is the method which the law provides in ordinary cases for referring the sufficiency of a plea to the determination of the court. In some jurisdictions, where a plea is irregularly pleaded, or is manifestly frivolous, the plaintiff is allowed to treat the plea as a nullity, and sign judgment; but the courts do not entertain motions to reject pleas for insufficiency. Orange v. Berry, 24 N. H. 107. In this case Perley J. said: "We do not mean to disclaim for the court the power to reject a plea in a proper case, though pleaded in due time and otherwise regular. Such a power may be necessary to protect parties against pleas merely frivolous, or manifestly pleaded for delay, or of a catching character, or extended to an unnecessary and oppressive length."]

(*g*) As to issuable pleas, *ante*, 545. [An answer denying "the said complaint, and each and every allegation contained therein," and demanding "judgment against the plaintiff for costs," &c. is a sham plea, which the court should strike out on motion. Schehan v. Malone, 71 N. Car. 441; Flack v. Dawson, 69 N. Car. 43. In Schehan v. Malone, *supra*, Bynum J. said: "The plea disregards the best known and most important rules of pleading. It professes to put in issue several matters of fact, some of which are triable by the court and others by a jury. Such a plea is not issuable. It is a sham plea. The very purpose of the code is defeated, which is to produce an issue upon every material allegation, by having a distinct, issua-

1st. False pleas, calculated to raise issues requiring different modes of trial; as a set-off for money due upon a judgment or recognizance enrolled (the issue upon which is triable by the record), and for money due on simple contract, the truth of which is triable by the country; (*h*) or a plea of judgment recovered as to some of the counts, and another plea of payment as to the other counts. (*i*) But in these cases there must be something to convince the court that the pleas are untrue; "unless the inference be irresistible, the plaintiff is not at liberty to take upon himself to pronounce that the plea is a nullity." (*j*)

2dly. Pleas obviously false on the face of them, and the truth of which is impossible on the defendant's own showing; (*j*¹) as a plea of judgment appearing and shown in the plea to have been recovered in the exchequer in Ireland (or elsewhere) before the cause of action accrued. (*k*)

3dly. False pleas, which, although they might by possibility be true, yet are in all probability fictitious; as a plea of judgment recovered in the court of *pie poudre*, in Bartholomew Fair, couched in terms and showing proceedings palpably fictitious or unlikely. (*l*) And in *Pierce v. Blake*, (*m*) Lord Holt said that he remembered a case where judgment having been given against a defendant above

rate, and precise answer to each separate and material allegation. This object cannot be effected by lumping all the allegations together, and then by giving one lumping answer to the whole." But in *Boston Relief & Submarine Co. v. Burnett*, 1 Allen, 410, a much less strict doctrine was maintained. It was there held that a denial in an answer of each and every allegation in a declaration, except certain specified averments, which are admitted, makes it incumbent on the plaintiff to prove all his material averments except those which are thus admitted. Hoar J. said: "Where 'each and every allegation' is denied, the denial is none the less clear and precise, in its application to each, than it would be if the allegations were repeated in detail, and a formal denial made to each of them. It is not a mere negative of the result of the plaintiff's averments, taken collectively, involving simply a denial of their united legal effect, and so constituting a 'general issue' (which was abolished by the practice act in Massachusetts). We can imagine that so concise and comprehensive form of denial, if commonly adopted, might lead to abuses, and are not surprised to find a difference of opinion as to its admissibility existing among judges at *nisi prius*. If any attorney should adopt it, where he was not instructed by his client that there were sufficient grounds to contest all the averments to which it would apply, the practice would be highly censurable and inconsistent with professional duty. It would also be in the power of the court, where there could be any doubt

as to the facts thus put in issue, to require, upon the plaintiff's motion, a more exact and detailed answer, or to postpone the trial on the ground of surprise. But in the absence of any rule or order of the court upon the subject, we cannot regard this form of denial as so destitute of precision and certainty as to be equivalent to an admission of any substantive fact alleged in the declaration." *Estabrook v. Boyle*, 1 Allen, 412; *Davis v. Travis*, 98 Mass. 222. That "the defendant denies each and every allegation of the complaint" is sufficient as a general denial under the New York Code. *Kellogg v. Church*, 4 How. Pr. 339; S. C. 3 Code R. 39; *Radde v. Ruckgraber*, 3 Duer, 684.]

(*h*) *Draycott v. Pilkington*, 2 M. & Sel. 518; 1 Chit. Rep. 564 *a*, S. C.; *Penfold v. Hawkins*, 2 M. & Sel. 606.

(*i*) *Thomas v. Vandermoolen*, 2 B. & Ald. 197.

(*j*) *Bell v. Alexander*, 6 M. & Sel. 133. See *Phillips v. Bruce*, 6 M. & Sel. 136.

(*j*¹) [But the falsity of a plea cannot be shown by comparing it with another plea or defence in the same answer. *Bachman v. Everding*, 1 Sawyer, 70.]

(*k*) *Phillips v. Bruce*, 6 M. & Sel. 134. See *Idle v. Crutch*, 1 Chit. Rep. 525, 526, notes; *Thomas v. Smithies*, 4 Taunt. 668; 1 D. & R. 577.

(*l*) *Blewitt v. Marsden*, 10 East, 237.

(*m*) 2 Salk. 515; recognized in *Thomas v. Vandermoolen*, 2 B. & Ald. 198; per Bayley and Holroyd, Justices.

forty years of age, he brought a writ of error, and assigned for error, infancy and appearance by attorney, and the court fined the attorney for assigning those errors which were notoriously false and frivolous.

* 4thly. False pleas, which are subtle and ensnaring, and tend to raise nice and intricate points of law, upon which it would be proper for the plaintiff's attorney to consult counsel, whereby delay and expense are occasioned. (*n*) Thus, where to a declaration on a bill of exchange and the money counts, the defendant pleaded that the parties accounted together; that a certain sum was found due; that in satisfaction of part, the defendant indorsed a bill to the plaintiff, which was outstanding in the hands of a third person; and that in satisfaction of the remainder, the defendant assigned to the plaintiff an Irish judgment, which was in force, as appeared by the record; the court, on an affidavit of the falsity of the plea, allowed the plaintiff to sign judgment and directed that the defendant's attorney should pay the costs of the application. (*o*) And a false plea in assumpsit on a bill, that the plaintiff was indebted on a recognizance of bail, as appears by the record, (*p*) is open to objection on the same ground. And where in debt on a bail-bond, the defendant pleaded that the writ was sued out before the assignment was stamped, and before the cause of action accrued, which he averred and prayed judgment, and that the plaintiff might be directed to cause the writ to be returned and filed of record, and that the record might be inspected, &c. the court directed that if the defendant did not amend this subtle plea, the plaintiff might sign judgment. (*q*)

There are some pleas which were long used as sham pleas, for the purposes of procrastination, and which may be pleaded even at the present day with impunity, if the defendant has not subjected himself to the necessity of pleading an issuable plea. Pleas of this kind are simple and concise in their form, and long and inveterate practice has obtained for them this impunity. Pleas of *judgment already recovered for the same cause of action*, and of accord and satisfaction by the creditor's acceptance of goods, were of late years the pleas usually adopted. With regard to the former plea it has been permitted after the defendant had delayed and deluded the plaintiff by promises of payment, (*r*) and had taken out a summons to stay proceedings on payment of debt and costs. (*s*) With respect to the plea of accord and satisfaction, in a case in the court of common pleas, in which it was pleaded to a declaration on a bill of exchange, the court refused

(*n*) See 1 Saund. 327 *a*, where the court reproved Saunders for pleading subtly, to trick the court; and see recital in 38 H. 8, c. 30; [Orange v. Berry, 24 N. H. 107.]

(*o*) Bartley v. Godslake, 2 B. & Ald. 199. See Charles v. Marsden, 1 Taunt. 224, 225.

(*p*) Shadwell v. Berthoud, 5 B. & Ald.

750; 2 Chit. Rep. 335; 1 D. & R. 446, 448, S. C.

(*q*) White v. Howard, 3 Taunt. 339.

(*r*) Young v. Gadderer, 1 Bing. 390; 8 Moore, 437, S. C.

(*s*) Hill v. Tybatt, Hil. Term, 1990, K. B.; 1 Archb. Prac. 137, 2d ed.

to allow the plaintiff to sign judgment upon an affidavit that the plea was utterly false, and intimated that in future such applications would be discharged with costs. (t) In one case the * court (u) set aside a false plea in assumpsit for use and occupation, that the defendant delivered to the plaintiff, and he accepted in satisfaction, Riga hemp and Russia tallow. But in a subsequent case (v) they declined to interfere where a similar plea was pleaded, although its falsity was sworn to.

An executor, by pleading a false plea, may render himself liable *de bonis propriis*. (x)

As a discouragement to sham pleading, the court has suffered a plaintiff to amend a defective replication to a false plea without payment of costs. (y)

Formerly it was the practice for a defendant to gain time by first pleading a sham plea, and when the plaintiff had replied to the same, then the defendant would abandon such plea, and plead only the general issue; but now Reg. Gen. Hil. T. 2 W. 4, reg. 46, precludes a defendant from abandoning his first plea without express leave, which cannot be obtained unless when essential for the purposes of justice. (z) This rule has greatly tended to put an end to the practice of sham pleading.

Rules compelling defendant to abide by his plea.

The Reg. Gen. Hil. T. 4 W. 4, reg. 8, orders that "Where a defendant shall plead a plea of judgment recovered in *another court*, he shall in the margin of such plea state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any, and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea by leave of the court or a judge." (a) This rule entitles a plaintiff to sign judgment as for want of a plea, unless the defendant, in the margin of his plea of judgment recovered in *another*

Reg. Gen. Hil. T. 4 W. 4, reg. 8, as to pleas of judgment recovered.

(t) *Smith v. Backwell*, 1 M. & P. 338; 4 Bing. 512, S. C.

(u) *Richley v. Proone*, 2 D. & R. 661; 1 B. & C. 286, S. C., *coram* Bayley and Holroyd, Justices. See *Merington v. Becket*, 3 D. & R. 232. In 1 B. & C. it is stated that the court assigned no reason for making the rule absolute.

(v) *Merington v. Becket*, 2 B. & C. 81; 3 D. & R. 231, S. C. more fully reported.

(x) 1 Saund. 336, note (10); *Burroughs v. Stephens*, 1 Marsh. 212, 213; *ante*, 516, 517.

(y) *Solomons v. Lyon*, 1 East, 370.

(z) See, further, 3 Chit. Gen. Prac. by Lush, 619.

(a) See *Jervis's Rules*, 89, note (g). [A former recovery, to be sufficient as a defence to a subsequent action for the same cause, must be by the judgment of a court or other

court, truly states the particulars by which the judgment may be found on record. The effect of the rule prevents any such plea from gaining time during a vacation until the next term, and has put an end to the utility of a sham plea of judgment recovered in * ordinary cases. But that rule does not apply to a plea by an executor or administrator of a judgment recovered against him by another creditor. (b)

III. RULES OF CONSTRUCTION, &c.

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&c.

The rules which prevail in the *construction* and allowance of a plea in bar are,—

- 1st, That it is to be construed most strongly against the defendant;
- 2dly, That a general plea, if bad in part is bad for the whole; and
- 3dly, That surplusage will not in general vitiate.

1st. As it is a natural presumption that the party pleading will state his case as favorably for himself as possible, and that if he do not state it with all its legal circumstances, the case is not in fact favorable to him, it is a rule of construction, that if a plea has on the face of it two intendments, it shall be taken most strongly against the defendant; that is, the most unfavorable meaning shall be put upon the plea; (c) a rule which we have seen (d) obtains also in the case of other pleadings. (d¹) Therefore in trespass, if the defendant plead a release, without saying at what time it was made, it shall be intended to have been made before the trespass was committed; (e) and in trespass to land, a plea of *liberum tenementum*, not stating that the close was the defendant's freehold at the time of the trespasses, is insufficient. (f) So at common law, if to a bond the defendant plead payment, it shall be intended to have been made after the day appointed for payment, if he do not aver it to be otherwise; and in pleading a promise by a third person to pay

competent tribunal. *Cashman v. Bean*, 2 Hilton, 341. See *Colburn v. Woodworth*, 31 Barb. 381; *Bellinger v. Cragne*, 31 Barb. 534; S. C. 41 N. Y. 116. An answer which alleges a former recovery as a defence must show the identity of the two causes of action; *Phillips v. Berick*, 16 John. 137; *Secor v. Sturgis*, 16 N. Y. 548; and that they are between the same parties or their privies. *Goddard v. Benson*, 15 Abr. Pr. 191.]

(b) *Power v. Izod*, 1 Bing. N. C. 304; *Power v. Fry*, 3 Dowl. 140; 3 M. & Scott, 119, S. C. Nor does it apply where to an action of assumpsit for money lent the defendant pleads that in an action in which the now defendant was plaintiff, and the now plaintiff was defendant, the now plaintiff set off the same debt for which the present action was brought, and in that action the now

defendant obtained a verdict. *Brokenshir v. Monger*, 9 M. & W. 111; 1 Dowl. N. S. 378, S. C.

(c) Com. Dig. Pleader, E. 6; Co. Litt. 803 b; Plowd. 29, 46.

(d) *Ante*, 261. Effect of pleading over, *ante*, 262.

(d¹) [An equivocal averment in pleading should be construed most strongly against the pleader. *Slocum v. Clark*, 2 Hill, 475; *Ferrias v. N. A. Fire Ins. Co.* 1 Hill, 71; *United States v. Lynn*, 1 How. (U. S.) 104; S. C. 17 Peters, 88; *Burrows v. Yount*, 6 Blackf. 458; *Halligan v. Chicago & Rock Island R. R. Co.* 15 Ill. 558; *Tercy v. Strain*, 2 Carter (Ind.), 113; *ante*, 261, and note (b).]

(e) Plowd. 46.

(f) Com. Dig. Pleader, E. 5.

the debt of another, it seems to be necessary to aver in the *plea* that the promise was in writing. (*g*)

But this rule of construction does not obtain where the unfavorable meaning is inconsistent with another part of the plea. (*h*) And there are some cases in which matters are implied in favor of the plea; thus it is said by Lord Coke, (*i*) that "all necessary circumstances implied by law need not be expressed, as in the plea of a feoffment of a manor, livery and attornment are implied; (*j*) so where * it is pleaded that land was assigned for dower, it is not necessary to say it was by metes and bounds, for it shall be intended a lawful assignment, which is by metes and bounds; (*k*) and where a surrender of a lease for years is pleaded, and that it was agreed to by the lessor, it is not necessary to say that he entered, for it shall be intended, and it is not usual to plead a reëntury upon a surrender, any more than it is to plead livery upon a feoffment; (*l*) so, where it is pleaded that a sheriff made his warrant, it is unnecessary to say that it was under his seal, for it could not be his warrant if it were not." (*m*) And if a man plead that he is heir to A. he need not say either that A. is dead, or had no son. (*n*) Other instances of this rule have been before given. (*o*) And we have seen that if an allegation is *capable* of two meanings, that exposition shall be adopted, which will support, not that which will destroy, the pleading. (*p*)

2dly. If one entire plea be *bad in part, it is insufficient for the whole*. (*q*) We have already in part noticed this doctrine in considering that a plea must contain an answer to all it assumes to answer; and if it fail to do so, it is not an effective bar even as to the part really answered. (*r*) In *assumpsit* on several promises in different counts, if the defendant plead the statute of limitations to the whole, and it is a bad plea as to one of the counts, it will also be insufficient as to the residue; (*s*) and in an action

2dly. Bad in part, bad in whole.

(*g*) *Ante*, 244; 1 Saund. 276 *a*.

(*h*) 10 Co. 59 *b*; *ante*, 255, 260.

(*i*) 8 Co. Rep. 81 *b*; *ante*, 243.

(*j*) Co. Litt. 303 *b*; S. P. *Ferrers v. Wignall*, Cro. Eliz. 401.

(*k*) Com. Dig. Pleader, E. 9.

(*l*) *Peto v. Pemberton*, Cro. Car. 101.

(*m*) *The Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53; Palm. 357, S. P.

(*n*) 2 Saund. 305 *a*, note (13).

(*o*) *Ante*, 243, 244.

(*p*) *Ante*, 261.

(*q*) Com. Dig. Pleader, E. 36, F. 25; *Duffield v. Scott*, 3 T. R. 376; *Macdonnell v. Macdonnell*, 3 B. & P. 174; 1 Saund. 337, note (1); 28, note (2); *Earl of St. Germaines v. Willan*, 2 B. & C. 216; *Clarkson v. Lawson*, 6 Bing. 274. The rule explained, &c. *Steph.* 5th ed. 448; and see *Tremeere v.*

Morison, 1 Bing. N. C. 89; *Ansell v. Smith*, 3 Dowl. 193, 194; *Dyke v. Duke*, 4 Bing. N. C. 197; *Calvert v. Moggs*, 10 Ad. & El. 632; *Sherman v. Thompson*, 11 Ad. & El. 1027; 3 P. & D. 656, S. C.; *Phillips v. Claggatt*, 10 M. & W. 102; [*Ten Eyck v. Waterbury*, 7 Cowen, 51; *Ferrand v. Walker*, 5 Blackf. 424; *Shearman v. Fellows*, 5 Blackf. 459.] As to the divisibility of pleas, see *post*, and *Consins v. Paddon*, 2 Cr., M. & R. 547; 5 Tyr. 547; 4 Dowl. 488, S. C.; [*Montague v. Boson & Fairhaven Iron Works*, 97 Mass. 502, 503; *Douglass v. Satterlee*, 11 John. 16-21.]

(*r*) *Ante*, 548; *Clarkson v. Lawson*, 6 Bing. 274.

(*s*) *Webb v. Martin*, 1 Lev. 48; [*Perkins v. Burbank*, 2 Mass. 81.]

against an executor or administrator, if the defendant plead several judgments recovered against *himself* in that character, and that he has not sufficient to satisfy them, if the plea be bad, or false, or avoided, as to one of the judgments, it will be bad for the whole; but if the judgments pleaded had been against the *testator*, it would be otherwise. (t) In one case, however, it was held that if one of the judgments pleaded were against the testator and a third person, and the defendant do not show that the testator survived, without which the executor is not chargeable, the plea is bad for the whole; (u) but the propriety of this decision was questioned by Lord Vaughan. (x) So, if several persons join in one plea, if it be bad for one, it will be bad for the others. (y) The * extent of this rule will be considered when we treat of pleas by several defendants. (z) It seems that if a special plea amount in part to the general issue, and be to that extent defective, for that reason it is bad *in toto*. (a) The statement of several distinct debts in a plea of *set-off* is an exception, because the statement of the debts in such a plea is in the nature of a declaration containing several counts; and therefore if one of such debts be insufficient, the plaintiff must not demur to the whole plea, but only to that part of it which relates to the objectionable ground of *set-off*. (b) In trespass, if a plea of justification consist of two facts, each of which would, when separately pleaded, amount to a good defence, it will sufficiently support the justification if one of these facts be found by the jury; (c) the other might be rejected as surplusage.

3dly. The rules with regard to surplusage and unnecessary allegations, which we have before considered, prevail in general with respect to pleas and every other part of pleading; (d) and we have explained that surplusage, or unnecessary matter, *repugnant* and contradictory to what went *before* in any point *not material*, will not vitiate the pleadings, according to the maxim, *utile per inutile non vitiatur*; and such surplusage and redundant or repugnant parts shall be rejected, especially after a verdict. (e)

3dly. Surplusage and repugnancy.

(t) 1 Saund. 337, and notes; 5 T. R. 80, 307; [Douglas v. Satterlee, 11 John. 16.]

(u) 2 Saund. 50, 51, note (4); 1 Saund. 337, note (1).

(z) Vaugh. R. 103; 1 Saund. 337, note (1).

(y) Duffield v. Scott, 3 T. R. 376, 377; 1 Saund. 28, note (2); Hedges v. Chapman, 2 Bing. 523, instance of a constable joining in a bad plea in trespass. [Marsh v. Smith, 18 N. H. 366.]

(z) Post, 593.

(a) See 1 Saund. 27; Com. Dig. Pleader, E. 36. See, however, Thomas v. Nichols, 3 Lev. 40.

(b) Dowsland v. Thompson, 2 Bl. Rep. 910.

(c) Spilsbury v. Mickelthwaite, 1 Taunt. 146.

(d) Ante, 252-255.

(e) Ante, 252-255; Bac. Abr. Pleas, I. 4; Com. Dig. Pleader, E. 12; Co. Litt. 303 b; 2 Saund. 305, 306, note (14); 2 Saund. 291; Shearm v. Burnard, 10 Ad. & El. 593; Davis v. Chapman, 2 M. & Gr. 921; 9 Dowl. 645, S. C.; [Carroll v. Peake, 1 Peters, 18; United States v. Burnham, 1 Mason, 57. Immaterial matters, alleged in aggravation of damages merely, will be rejected after verdict as surplusage. Daniels

Various illustrations of the general rule have been given. As an additional instance we may observe that if the defendant in replevin make cognizance as bailiff to A. administrator of B. where A. might have distrained in his own right, the words "administrator of B." shall be rejected as surplusage. (*f*) There is, however, considerable danger in surplusage in the statement of *material* matter; for where a party takes upon himself to state in any pleading a substantive matter, or alleges a precise estate (although not bound to do so), if it be *material* and bear on the question, he gives the other side the advantage of traversing it. (*g*) Thus, in Leake's case, (*h*) it was necessary that the plaintiff should show that he had some right to put his cattle into the close, against which the defendant was bound to repair the fence, but a *seisin in fee* was not necessary to give that right; for a term for life, or years, or even an estate at will, or right of common, or the owner's license, would have conferred that right; (*i*) the plaintiff, however, thought proper to allege that the right he had arose from a *seisin in fee*, therefore the defendant was *at liberty to deny that right as much as any other right which the plaintiff might have had to put his cattle into the close. So, in another case, (*k*) the ground of the plaintiff's action was that the defendant would not permit him to cut down the remaining 200 trees; in order to show that so many trees were left standing in the wood, he stated that at the time of the agreement he had cut down *only* 800 trees, and though it was not necessary for him to have stated that precise number, but having done so, and the number that was left being material to show the damage which the plaintiff had sustained by the defendant's refusal to permit him to cut them down, he gave the defendant an advantage of traversing it. (*l*) It seems, therefore, that a too precise or particular statement of material matter may be taken advantage of upon the trial of a traverse thereof; but in general not by demurrer, as the objection does not appear upon the record, but depends upon the evidence; except where it is repugnant or contrary to matter precedent, (*m*) and though such repugnancy may not in some cases be aided by verdict, (*n*) yet if it appear that the verdict was given on another part of the plea the mistake will be aided. (*o*)

v. Daniels, 7 Mass. 135; *Richards v. Farnham*, 13 Pick. 451. Whatever comes under a *videlicet*, if inconsistent with the precedent matter, may be rejected as surplusage. *Blackwell v. Board of Lawrence Co.* 2 Blackf. 148.]

(*f*) *Brown v. Dunnery*, Hob. 208.

(*g*) *Ante*, 252.

(*h*) *Dyer*, 365; 2 Saund. 206 a, notes (21), (22); and 207, note (24).

(*i*) 1 Saund. 346, note (2).

(*k*) *Tatem v. Perient*, Yelv. 195.

(*l*) 2 Saund. 207, note (24); 2 Saund. 206, note (22); *Williamson v. Allison*, 2 East, 452.

(*m*) Co. Litt. 303 b.

(*n*) Bac. Abr. Pleas, I. 4.

(*o*) *Ib.*

IV. FORMAL PARTS OF PLEAS IN GENERAL.

In framing *every plea*, whether in abatement or in bar, the pleader must constantly keep in view the following formal parts of the plea, and the rules and decisions respecting them, and the opponent, when endeavoring to discover a defect, should pursue the same course of examination.

The following is the outline of the usual form.

Form and parts

- (1) In the queen's bench. (2) On the — day of —, A. D. —.
- (3) Johnson } (4) The defendant, by E. F. his attorney, [or "in his own proper person,"]
 ats. } says that, (5) &c. [*here follows the ground of defence*]. And of this he the
 Davis. } said defendant puts himself upon the country, &c.; (6) [*or if the conclusion*
 } *be with a verification, the form is thus*: "and this he the said defendant is ready to verify,
 } wherefore he prays judgment if the said plaintiff ought [or 'ought further'] to have or
 } maintain his aforesaid action thereof against him, &c." (7) *John Hulme.*

- 1st. The title of court at top.
- 2dly. The date at top.
- 3dly. The names of parties in margin.
- 4thly. The commencement; describing
 - 1st. Defendant's appearance, whether in person or by attorney, or *prochein ami*.
 - 2dly. When he is to make full or half defence.
 - * 3dly. Whether there is to be any preliminary suggestion or statement.
 - 4thly. Whether there is to be any prayer of judgment in the commencement or other *petitio*, or *actionem non*.
 - 5thly. Whether the plea is to be in abatement to the whole or to a part only.
 - 6thly. Whether to be in bar, and whether to the whole or to a part.
- 5thly. The body of the plea.
 - 1st. Statement of time.
 - 2dly. Statement of place.
 - 3dly. Statement of circumstances, and herein of forms of allegations.
- 6thly. The conclusion. (q)
- 7thly. Signature of counsel.
- 8thly. Affidavit when and what to be annexed.
- 9thly. The forms of second or subsequent pleas.

We will consider each part separately.

(q) Every plea in bar must conclude to the country, or with a verification. *Snow v. Stevens*, 2 Dowl. 664; 2 Cr., M. & R. 26, S. C.

1. It was always usual at the head of the plea to state *in what court* it was pleaded, as "In the queen's bench," or "In the common pleas," or "In the exchequer of pleas;" and with-^{1st. Title of the court} out this title *of the court* it might be doubtful, especially if there should happen to be several actions between parties of the same names in different courts at the same time, to what action or declaration the plea referred. There is not, however, any statute or rule prescribing that a *plea* shall be entitled in any court. And it is apprehended that the omission of the statement of the court would not be material, and that the plea would be considered as having reference to the declaration, which must necessarily have been in the same court as the plea.

2. With respect to the *title*, before the Reg. Gen. Hil. T. 4 W. 4, all pleas were entitled to a *term*, and pleas to the jurisdiction, or in abatement, were, as we have seen, in general required to be entitled of the same term as the declaration; (*r*) but^{2dly. Title or date of time.} pleas in bar might be and usually were entitled of the term of which they were pleaded, which was frequently subsequent to that of which the declaration was entitled, (*s*) and where matter of defence had arisen after the first day of the term, the plea was properly to be entitled specially of a subsequent day. (*t*) But the Reg. Gen. Hil. T. 4 W. 4, reg. 1, now * expressly requires *every pleading* to be entitled of the day of the month and the year when the same was pleaded. But there cannot be a *demurrer* on account of an improper date at the top. (*u*)

3. *The names of the parties in the margin* do not strictly constitute any part of the plea. The surnames only are usually inserted, and that of the defendant precedes the plaintiff's, as, "John-^{3dly. The names of the parties in the margin.}son ats. Davis." They should correspond with the names in the declaration, or if the defendant plead in abatement or bar by another name to that in the declaration, the difference should be specified in the margin, thus, "C. D. sued by the name of E. D. ats. A. B." (*u*¹) It has been decided that it is sufficient in a *qui tam* action to entitle the plea of *nil debit* with the names of the parties as above, without the addition of *qui tam*, &c. to the plaintiff's name. (*v*) After the parties have once been named in the previous pleading by Christian and surname, they may in the plea be described as the said defendant and the said plaintiff, without repeating the names. (*x*)

(*r*) *Ante*, 470, 471.

(*s*) *Bac. Abr. Pleas*, C. 2; 2 *Saund.* 1 *f*, 2 *a*, *b*, *c*, *d*.

(*t*) *Post*, vol. ii.; and see, also, a suggestion after imparlance, *post*, vol. ii.

(*u*) *Neal v. Richardson*, 2 *Dowl.* 94.

(*u*¹) [*Cleft v. Hosford*, 12 *Vt.* 296.]

(*v*) *Dale v. Beer*, 7 *East*, 333.

(*x*) So decided as to a declaration in *Mecke v. Oxlade*, 1 *New R.* 289.

4thly. The commencement before the pleading rules.

4. With respect to the *commencement*, we will first state the practice *before* the pleading rules, and then the *present* practice. And *first* the *name* of the defendant. We have seen that when the defendant pleaded misnomer in abatement, a plea commencing with the words, "And the *said* Richard, sued by the name of Robert," or thus, "and *he* against whom the plaintiff hath exhibited his bill by the name of J. S. &c." was insufficient. (y) A plea in bar commencing in the same manner was also bad on special demurrer. (z) When the defendant was sued by a wrong name and wished to defend in his right name without pleading in abatement, it was proper to begin his plea thus: "And C. D. against whom the said A. B. hath exhibited his bill by the name of E. D. comes and defends the wrong and injury, when, &c." (a) A misstatement of the defendant's *Christian* name in the commencement of his plea in bar did not entitle the plaintiff to treat it as a nullity, and sign judgment as for want of a plea. (b)

After the names of the parties in the margin, the defendant's *appearance* and *defence* (*venit et defendit vim et injuriam*) were to be stated. Some observations have already been made on these parts of pleading. (c) The *appearance* might in general be stated to have been either in *person* or by *attorney*, for a defendant was at liberty to appear and defend in person, and this was usual in an action against an attorney or prisoner. (d) As a feme covert, when sued alone, is *incapable of appointing an attorney, she should defend in person; (e) an idiot should also appear in person, and it is said that any one who can make a better defence, shall be admitted to defend for him; but a lunatic, or one who becomes *non compos mentis*, must appear by guardian, if he be within age, and by attorney if of full age. (f) An infant must plead by guardian and not by attorney or *prochein ami*, (g) and if he, whether in the case of a sole or several defendants, pleaded by attorney, it was error; (h) and therefore the plaintiff was bound in such case, for his own security, to take out a summons to compel him to appear by guardian, and to alter his plea, or for leave to do it for him. (i) A plea by a corporation aggregate, which is incapa-

(y) *Ante*, 443, 472.

(z) *Jackson v. Ford*, 3 Wils. 413.

(a) *Post*, vol. ii.; 3 Wentw. 210.

(b) 7 D. & R. 511.

(c) *Ante*, 443, 444.

(d) *Sayer*, 217.

(e) Co. Litt. 125 b; 2 Inst. 390; F. N. B. 27; 2 Saund. 209 c; *ante*, 443. See the forms, *post*, vol. ii.

(f) *Ib.*; 4 Co. 124 b; 2 Saund. 333; note (4), 355; Bac. Abr. Idiots and Lunatics.

(g) *Ante*, 443; *post*, vol. ii.; [*ante*, 444, note (r), and cases cited; Dewitt v. Post, 11

John. 460; *Jeffrie v. Robideaux*, 3 Misson. 33; *Clark v. Turner*, 1 Root, 200; *Knapp v. Crosby*, 1 Mass. 479; *Miles v. Boyden*, 3 Pick. 213; *Alderman v. Tirrell*, 8 John. 418; *Bedell v. Lewis*, 4 J. J. Marsh. 563; *Sheppard v. Hibbard*, 19 Wend. 96.]

(h) But the infant only could bring error, *Bird v. Pegg*, 5 B. & Ald. 418; [*Dewitt v. Post*, 11 John. 460; *Sliver v. Shelback*, 1 Dall. 165; *Moore v. M'Ewen*, 5 Serg. & R. 373; *Arnold v. Sanford*, 14 John. 417.]

(i) *Shipman v. Stevens*, 2 Wils. 50; 2 Saund. 117 f; 1 Moore, 251, S. C.

ble of a personal appearance, must purport to be by attorney. (*k*) In a plea by husband and wife, it was stated that they appear by their attorney. (*l*) The plea should also be in the name of an attorney of the court in which the action is brought, legally competent to practise therein. (*m*) It must also be in the name of the attorney by whom the defendant appeared, unless there has been an order to change the attorney, or the plaintiff may sign judgment. (*n*) Though the appearance has been entered in the name of an agent to a country attorney, the plea may be in the name of the principal attorney; (*o*) it ought not, however, where there are several attorneys in partnership, to be in the name of the firm, but only in the name of one of them. (*p*)

We have already stated the signification of the term *defence*, its nature and the form of it in a plea in bar. (*q*) Before the pleading rules every plea in bar must have begun with the defence; (*r*) and it should seem that if the defendant pleaded only to part, and confessed the residue, the defence should have been confined to the part intended to be pleaded to, and not have covered the whole. (*s*)

In a plea of the *general issue*, or other plea in bar to the whole declaration, which *merely denied* what was alleged in the declaration and did not introduce any *new* matter, it was not usual to insert the allegation, "that the plaintiff ought not to have or maintain his aforesaid action against the defendant;" but after stating the defendant's * appearance and his defence, the plea immediately denied the matter stated in the declaration, and concluded to the country. (*t*) But special pleas, after stating the appearance and defence, began with this allegation, *actio non habere debet*; (*u*) which always alluded to the commencement of the action, and not to the time of the plea, (*x*) and payment of the debt without costs, after action brought, was therefore no defence. (*y*) No defence which arose after action

(*k*) Bro. Ab. Corporation, 28; Co. Litt. 66 b; Com. Dig. Pleader, 2 B. 2.

(*l*) 2 Saund. 219; Com. Dig. Pleader, 2 A. But the objection would not entitle the plaintiff to treat the plea as a nullity. Hill v. Mills, 2 Dowl. 696.

(*m*) Barnes, 259. By an uncertificated attorney. Tidd, 9th ed. 77.

(*n*) Margerum v. Mickilwaine, 2 New Rep. 509; Parry v. Fisher, 6 East, 549; Tidd, 9th ed. 94; *sed vide* 13 Ves. 161, 195, in chancery.

(*o*) Buckle v. Rawlins, 3 B. & P. 111; Barnes, 339.

(*p*) Bunn v. Guy, 4 East, 195.

(*q*) *Ante*, 444. And see, further, Hampson v. Bill, 3 Lev. 240; Com. Dig. Abatement, I. 16.

(*r*) Com. Dig. Pleader, E. 27; Hosier v. Arundell, 3 B. & P. 9 a; Co. Litt. 127 b; *ante*, 443, 444.

(*s*) Com. Dig. Pleader, E. 27. See, as to qualities of a plea, *ante*, 547, 548.

(*t*) Brown v. Cornish, Salk. 516; *post*, vol. ii.

(*u*) Medina v. Stoughton, Salk. 211; *post*, vol. ii. [A plea which has *actio non*, in the place where it is usually said, the plaintiff's action ought not to maintain, will not be rejected, because these words are not English, but they will be regarded as merely insensible, and will be rejected. Berry v. Osborn, 28 N. H. 279.]

(*x*) Toms v. Powell, 7 East, 536; Page v. Wiple, 3 East, 316; Lee v. Levy, 4 B. & C. 393.

(*y*) Evans v. Prosser, 3 T. R. 186; Le Bret v. Papillon, 4 East, 502; Horsburgh v. Orme, 1 Campb. 558, 559, note. Payment of debt and costs in full satisfaction, after action brought, if specially pleaded, was a good plea. Holland v. Jourdain, Holt's C. N. P. 6; Francis v. Crywell, 5 B. & Ald. 886; 1 D. & R. 546, S. C.

brought could be given in evidence under the general issue: such defences always were required to be specially pleaded. (z) In debt on bond, if the defendant by his plea denied the validity of the deed, or if an heir pleaded *rien per descent*, it was more formally correct to say *onerari non debet*, and not *actio non*; (a) and in that case the plea should describe the deed as a *writing*, or "*supposed writing obligatory*," and should not admit that it was a deed. (b) In replevin, if the defendant said "*he well avows*," instead of well *acknowledges* the caption, no objection could be taken. (c) When the matter of defence arose before the commencement of the suit, *actio non*, &c. was generally the proper commencement; but matter of defence, arising after action brought, must have been specially pleaded in bar of the further maintenance of the suit. (d) If the matter of defence arose after issue joined, it must have been pleaded *puis darrein continuance*; (e) and if it arose after trial, an *audita querela* was in general the only remedy; (e¹) although in some instances the court would afford relief on a summary application. In an action against husband and wife, both must have defended and joined in the plea, or the plaintiff should demur, or there would be a repleader, although the action were merely for the tort of the wife. (f) Where the plea was only to a part of the declaration, it must not in the commencement profess to cover the whole declaration; (g) and it must designate specifically the part to which it was to be applied, or the plaintiff might demur. (h) The mode of pleading in these cases was thus: "And the said defendant, by E. F. *his attorney, comes and defends the wrong and injury, when, &c." and "as to the said first count of the said declaration" (or, if in *covenant*, "as to the said supposed breach of covenant first &c." above assigned," or if in *trespass*, "as to the breaking and entering, enumerating the particular trespasses mentioned in the declaration intended to be justified), (i) "the said C. D. says, that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says, that, &c."

(z) *Holland v. Jourdine*, Holt's C. N. P. 6; *Page v. Bauer*, 4 B. & Ald. 345; *Francis v. Crywell*, 5 B. & Ald. 886; *Lee v. Levy*, 4 B. & C. 390.

(a) 1 Saund. 290, note (3); *Brown v. Cornish*, 1 Ld. Raym. 217; 2 Salk. 516, S. C.

(b) *Cospey v. Turner*, Cro. Eliz. 800; 1 Saund. 290, note (3); 291, note (1); *Moore v. Jones*, 2 Ld. Raym. 1541; 2 Roll. Rep. 140; Com. Dig. Pleader, E. 27.

(c) 1 Saund. 347 c, note (4); and see *Nicholson v. Lightfoot*, E. T. 3 May, 1831, K. B.

(d) *Le Bret v. Papillon*, 4 East, 502; *Tower v. Cameron*, 6 East, 414; *ante*. As to pleading bankruptcy after action brought and before plea, see *Harris v. Jamer*, 9 East,

82. After issue, *Todd v. Mansfield*, 6 B. & C. 105.

(e) See *post*, as to these pleas. [*Cobb v. Curtis*, 8 John. 470; *Kunzler v. Kohaus*, 5 Hill, 319; *Boyd v. Weeks*, 5 Hill, 393.]

(e¹) [*See Baker v. Ulster*, 4 John. 191.]

(f) Com. Dig. Pleader, 2 A. e.; *Tampion v. Newson*, Cro. Jac. 288; *Putney v. Swann*, 2 M. & W. 72; *Wood v. Farr*, 7 Dowl. 263; 5 Bing. N. C. 247, S. C.

(g) As to this rule, *ante*, 548.

(h) Com. Dig. Pleader, E. 27; 1 Sid. 338; *Swinburn v. Agle*, Lutw. 241; *Macdonnell v. Macdonnell*, 3 B. & P. 174; *ante*, 548, 549; [*Gillespie v. Thomas*, 15 Wend. 464, and the cases cited in the opinion of the court.]

(i) As to the effect of this on the replication in trespass, see *Monprieatt v. Smith*, 2 Campb. 175.

At common law, before the statute of Anne, which introduced several pleas, it was usual, particularly in actions of trespass, for the defendant to plead as to the force and arms, and whatever else was against the peace of the king, not guilty, and as to the residue of the supposed trespasses, a justification. (*k*) And the defendant must take care to state in the commencement the whole of the trespasses he intends to justify, and if he omit any *material* part, the plaintiff will be entitled to recover *pro tanto*, (*l*) as where the declaration *inter alia* alleged that the defendant dragged the plaintiff through a pond, and the special plea only covered other trespasses; it was held that the plaintiff was entitled to recover for such dragging through the pond, although it was insisted that he ought to have new assigned. (*l*)

In actions of trespass to personal or real property, where the declaration contains several counts, varying the statement of the injury to the *same* personal chattels, or to the *same* closes, it has been usual, in order to save the expense of several distinct pleas to each count, to render the same plea applicable to all the counts. (*m*) In this case the trespasses complained of in the different counts, and which were intended to be justified, were first enumerated in the introductory part of the plea; and then followed the statement of *actio non*, &c.; and it was then alleged that the close and grass, &c. mentioned in the first count, and the close and grass, &c. mentioned in the last count, at the several times when, &c. were the *same* close and grass, &c. and *not other or different*, and that the seizing and taking, &c. mentioned in the first count, and the seizing and taking, &c. mentioned in the last count, were the *same*, and *not other or different*. (*n*) But, as before observed, these allegations identifying the trespasses were traversable; and this mode of pleading could not * in strictness be supported, but was demurrable. (*o*) Where it is certain that the different counts were for the same trespass, and it is expected that the plaintiff would not demur, it was considered advisable, in order to save expense, to risk that concise mode of pleading; but the plaintiff should demur or traverse the allegation if he really contended that several distinct trespasses thus united in the plea were committed. (*p*)

(*k*) See 1 Saund. 10, 24, 82, 296.

(*l*) Bush v. Parker, 1 Bing. N. C. 72.

(*m*) See *ante*, 429, 553; Aitkenhead v. Blades, 1 Marsh. 17, 18; 5 Taunt. 198, S. C.; 11 Moore, 43. But where there had been but one trespass, &c. it sufficed to plead specially to one of the counts which contained the fullest description of the injury, and to plead only the general issue to the rest, or generally, in which case the plaintiff could not proceed on the other counts so as to avoid the defence on the special plea. See *ante*, 295, note (*f*).

(*n*) See Plead. As. 401; *post*, vol. ii.; 9

Wentw. 47, 57; Sheldon v. Clipsham, Sir T. Raym. 449, but see *ante*, 429, 553.

(*o*) *Ib.*; Aitkenhead v. Blades, 5 Taunt. 200; 1 Marsh. 17, 18, S. C. So to a declaration containing two counts, as for two different libels, a plea of justification to the whole declaration, alleging that the libel in each count was one and the same, and that the publications thereof was but one act, and then justifying one libel, was holden bad. Edmonds v. Walter, 2 Chit. Rep. 429; but see Mee v. Tomlinson, 4 Ad. & El. 262.

(*p*) *Ante*, 552, 553.

Forms of commencement prescribed by Reg. Gen. Hil. T. 4 W. 4, reg. 9. *Actionem non* to be unnecessary.

The Reg. Gen. Hil. T. 4 W. 4, reg. 9, 10, 11, have introduced material alterations as well respecting the *commencements* as the *conclusions* of pleas, and have put an end to the subtle distinctions respecting *half* and *full defence*. The reg. 9 orders that "In a plea or subsequent pleading intended to be pleaded *in bar* of the *whole action* generally, it shall not be *necessary* to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading, intended to be pleaded in maintenance of the whole action, to use any allegation of *precludi non*, or to the like effect, or any prayer of judgment; and *all* pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, *shall be taken*, unless otherwise expressed, as pleaded respectively in bar of the whole action, provided that nothing herein contained shall extend to cases where an estoppel is pleaded."

Although it would certainly appear from the language of this rule that the allegation of *actionem non* would have continued necessary where the plea was not to the *whole action*, yet it has been decided that these words in the rule were used only in contradistinction to pleas in bar of the *further maintenance* of the action, and consequently that a plea in bar, whether pleaded to the whole of the declaration or to part of a count, need not commence with an allegation of this nature, nor conclude with a prayer of judgment. (q)

It will be observed that this rule is expressly confined to pleas *in bar*, and does not therefore extend to pleas in *abatement*, and which according to the antecedent rules of pleading must always be *expressly limited* when the matter in abatement only affects *part* of the alleged cause of action.

It is necessary and proper when a plea is pleaded, or when the matter pleaded is properly applicable only to a part of the declaration, that the commencement of the plea should be expressly and in terms limited to that part; or it may be open to a special *demurrer. (t) But where a declaration containing two counts, first on a bill of exchange, and secondly on an account stated, the defendant, without a rule to plead several matters, pleaded "that he did not accept the bill," and for a further plea that "he did not account," it was held that the informality of omitting to confine each plea to the count to which it applied did not authorize the plaintiff to sign judgment. (u)

The Reg. Gen. Hil. T. 4 W. 4, reg. 10, orders "that no formal *defence* shall be *required* in a plea, and it *shall commence as follows*: 'The said defendant, by Y. Z. his attorney,' (or 'in person,') says that, &c."

(q) *Ratton v. Davis*, 1 G. & D. 21.
(t) *Worley v. Harrison*, 1 Harr. & Woll.
326; 4 Nev. & Man. 173; 3 Ad. & El. 669,

S. C.; *Vere v. Goldsborough*, 1 Bing. N. C. 353; *Neville v. Cooper*, 2 Cr. & M. 331.

(u) *Vere v. Goldsborough*, 1 Bing. N. C. 453.

Reg. 11 orders that "It shall not be *necessary* to state in a second or other plea or avowry that it is pleaded by leave of the court, (v) or according to the form of the statute, or to that effect."

By leave of court, &c. not essential in case of several pleas.

5. With respect to the *body of the plea*, which states the *substance of the defence*, the allegations depend on the circumstances of each particular case. The forms of those pleas which usually occur in practice are given in the second volume; and the *qualities* of a plea, as well in respect to certainty of time and place, &c. as in relation to more material matters, have already been considered. (x) As a *protestando*, (y) and a *formal traverse*, (z) more frequently occur in *replications*, we will postpone the particular consideration of them till that part of the work.

54thly. The body of the plea.

In point of form in trespass and other actions, when the plea necessarily states the trespass to have been committed at some other time or place than that laid in the declaration, (a) it is proper, immediately preceding the conclusion of the plea, to allege that the supposed trespasses mentioned in the plea are the *same* as those whereof the plaintiff hath complained. This allegation is usually termed *quæ est eadem*, (a¹) and when it is adopted in the above case, if the plea *also* conclude with a *traverse* that the defendant was guilty at any other time or place, the plaintiff may demur specially. (b) But when it is unnecessary, and consequently improper, to vary from the time or *place laid in the declaration, and the declaration and plea are in these respects conformable with each other, the *quæ est eadem* need not be inserted, (c) though the insertion will not prejudice: but that in case if a traverse were added, the plea would be informal. (d) If, however, the traverse were defective, it was holden that it would be rejected as surplusage; (e) but it was held that an

Quæ est eadem.

(v) [In Mississippi, when leave of the court is necessary to the filing of a plea, the record should show the order granting leave. A recital in the plea, that leave was granted, is not enough. *Poole v. Pill*, 44 Miss. 306.]

(x) See *ante*, 546.

(y) Com. Dig. Pleader, N.

(z) Com. Dig. Pleader, G. 1, &c.

(a) The plea should follow the time and place laid in the declaration, unless either be from the nature of the case material and the gist of the dispute, and by pursuing the declaration there would be an incongruity in the plea in this respect. See *ante*, 548; 2 Saund. 5 a, note.

(a¹) [Nevins v. Keeler, 6 John. 63.]

(b) Com. Dig. Pleader, E. 31; Bateman v. Woodcock, Cro. Jac. 372; 2 Saund. 5, note (3); Mostyn v. Fabrigas, Cowp. 162; 1

Saund. 297; Bell v. Wardell, Willes, 202; Carwardine v. Watkins, 5 M. & W. 333. Where the plea varies from the day laid in the declaration, either the averment of *quæ est eadem*, or the traverse of the time laid in the declaration is proper, and will suffice; but it is superfluous and improper to have both the *quæ est eadem* and the traverse. *Ib.* The averment of *quæ est eadem* is a good traverse of the place in the declaration as well as of the time. Carwardine v. Watkins, 5 M. & W. 333.

(c) Skin. 387; Com. Dig. Pleader, E. 31; King v. Phippard, Carth. 281; 2 Saund. 5, 6, note (1).

(d) 2 Saund. 5, note (3); Com. Dig. Pleader, E. 31.

(e) *Ib.*; Green v. Goddard, Salk. 641, 642; 2 Saund. 5, note (3).

unnecessary traverse after the *quæ est eadem* is bad on special demurrer. (*f*) •

A plea of illegal consideration or contract contrary to any express statute should, like a declaration on a statute for a penalty incurred, in strictness conclude *contrary to the form of the statute*. It has nevertheless been decided that if such conclusion be omitted the plea may be sustained. (*g*)

Every plea in bar must have its proper conclusion, (*h*) which is either *to the country*, or *with a verification*; and the latter is either of *fact* or of *matter of record*. (*h*) An avowry or cognizance in replevin, in which the defendant is an actor, is an exception to this rule, and need not have any conclusion. (*i*) In an action against husband and wife, both should join in the concluding part of the plea. (*j*)

When there is a complete issue between the parties, viz. a direct affirmative and negative; as if the general issue be pleaded; (*j*¹) or the defendant simply deny some material fact alleged in the declaration, (*j*²) as where the plaintiff declares on an award, and the defendant pleads no such award; the plea should conclude to the country. (*k*) And such conclusion seems to be proper, although the plea unnecessarily contain a formal traverse. (*l*) This rule equally prevails whether the affirmative be first in the pleading, and the negative subsequent, or *vice versa*; (*m*) and therefore, though the negative be asserted by the plaintiff, and the affirmative by the defendant, as where the plaintiff in his declaration alleges a breach of non-payment of a sum of money on a particular day, or in not repairing, &c. and the defendant pleads *solvit ad diem*, or that he did repair, the plea should conclude to the country; but in debt on bond, if the declaration be general, and no particular breach be assigned, a plea of performance of the condition must conclude with a verification. (*n*) So, where a * plea puts in issue matter of fact as well as matter of record, it should conclude to the country; (*n*¹) as if it be alleged in a declara-

(*f*) *Hembro v. Bailey*, 3 Tyr. 152; *Carwardine v. Watkins*, 5 M. & W. 333.

(*g*) *Peate v. Dicken*, 1 Cr. M. & R. 427.

(*h*) *Knowles v. Stevens*, 2 Dowl. 664; 1 Cr. M. & R. 26, S. C.; Com. Dig. Pleader, E. 28, &c.; Co. Litt. 303 b.

(*i*) 1 Saund. 348, note 7; Co. Litt. 303 a; *Plowd. Com.* 163 a, 342; *Harvey v. Stokes*, Willes, 6.

(*j*) Com. Dig. Pleader, 2 A. 3; *Watkinson v. Turner*, Cro. Car. 594.

(*j*¹) [*Gazley v. Price*, 16 John. 267.]

(*j*²) [*Manhattan Co. v. Miller*, 2 Caines, 60; *Snider v. Croy*, 2 John. 428.]

(*k*) Com. Dig. Pleader, E. 32; 2 Saund. 337, note (1), 196, and 1 Saund. 103, note (1), 103, a, b, note (3); [*Sherwin v. Bliss*, 4

Vt. 99; *Sampson v. Henry*, 11 Pick. 379; *Hooper v. Jellison*, 22 Pick. 250; *Wait v. Maxwell*, 4 Pick. 87; *Hartwell v. Hemmenway*, 7 Pick. 117; *M'Clure v. Erwin*, 3 Cowen, 313.] A plea in bar of *riens en arere* to an avowry for rent should so conclude. *Horne v. Lewin*, 1 Ld. Raym. 641.

(*l*) 1 Saund. 113 b; Com. Dig. Pleader, E. 33.

(*m*) *Skinner v. Kilby*, Carth. 88, 89; Com. Dig. Pleader, E. 32.

(*n*) Ib.

(*n*¹) [*Allen v. Crofoot*, 7 Cowen, 46; *Lytle v. Lee*, 5 John. 112; *Thomas v. Rumsey*, 6 John. 26; *Everett v. Bartlett*, 1 Spencer, 117; *Bennington Iron Co. v. Rutherford*, 3 Harr. 468. A plea concluding with a verifi-

tion that the plaintiff procured letters patent, and the defendant plead that the plaintiff did not procure them, the plea should conclude to the country; because the procurement is the principal point in issue: so, if the issuing of a *feri facias* and a levy under it be put in issue, the matter may be referred to the country by the party traversing those facts. (o) And if a plea conclude with a special negative to the affirmative in the declaration, it should conclude to the country: (o¹) as, for instance, in debt on bond, the allegation in the declaration of the making of the bond includes the allegation of the delivery as a deed; and therefore, if the defendant plead that he delivered the deed as an escrow, he may conclude to the country. (p) But where there is not a direct negative and affirmative the plea need not so conclude; as if in debt on a bond to account, the declaration allege that the defendant received £20 for which he did not account, and the defendant plead that he accounted in manner following, viz. that he was robbed of it, and gave notice to the plaintiff; this plea giving color to the plaintiff, and referring the sufficiency of the mode of accounting to the court, may conclude with a verification. (q) And where the declaration is founded on matter of record, which is traversed in the plea, the plea should not in general conclude to the country, but should allege that there is no such record, and usually concludes with a verification, and prayer of judgment, *si actio*, &c.; (r) but a verification appears to be unnecessary in this case as the plea is in the negative: (s) and if an action of debt be brought here on a judgment in Ireland, the plea of *nul tiel record* must conclude to the country. (t)

It is an established rule in pleading, that whenever *new matter* is introduced on either side, the pleading must *conclude with a verification or averment*, in order that the other party may have an opportunity of answering it. (u) The usual verifi-

Conclusion
with a verifi-
cation.

cation, which ought to conclude to the country, will be stricken out on motion. *Coppenhwait v. Dummer*, 3 Harr. 258. See *Stevens v. Bowers*, 1 Harr. 16; *Carthrae v. Clarke*, 5 Leigh, 268.]

(o) 3 Mod. 79; Com. Dig. Pleader, E. 32; *Sayers* Rep. 208, 209; *Peter v. Stafford*, Hobb. 244; *Curwen v. Fletcher*, 1 Stra. 522; *Rowles v. Lusty*, 1 M. & P. 102; 4 Bing. 428, S. C.; *post*.

(o¹) [*Burgess v. Lloyd*, 7 Md. 178.]

(p) *Watts v. Rosewell*, 1 Salk. 274; *Stoyles v. Pearson*, 4 Esp. Rep. 255; Com. Dig. Pleader, E. 32; *post*, vol. ii. 352.

(q) *Vere v. Smith*, 2 Lev. 5; Com. Dig. Pleader, E. 32.

(r) *Sandford v. Rogers*, 2 Wils. 114; *Lil. Ent.* 182, 404, 473.

(s) *Fortes*. 339; Com. Dig. Pleader, E. 29; *Fanshaw v. Morison*, Salk. 520.

(t) *Collins v. Mathew*, 5 East, 473; 2 Smith R. 25, S. C.; *Harris v. Saunders*, 4 B. & C. 411.

(u) 1 Saund. 103 a, note (3), and cases there cited; Com. Dig. Pleader, E. 33; [*Hord v. Dishman*, 3 H. & M. 595; *Smith v. Walker*, 1 Wash. 135; *Service v. Heermance*, 1 John. 91; *Bailey v. Smith*, 1 Root 243; *Shafer v. Stonebraker*, 4 Gill & J. 345; *M'Clure v. Irwin*, 3 Conn. 313.] Where an act of parliament gives power to declare in a particular mode without setting forth the special matter, any averment necessary to support the action must be taken to be impliedly contained in the declaration; therefore, where notice is necessary to be proved, before the plaintiff can recover, a plea denying such notice shall conclude to the country. *Edinburgh & Leith Railway Company v. Hebblewhite*, 6 M. & W. 707.

cation of a plea containing * matter of *fact* runs thus, "and this the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him," &c.; and if the word "*certify*," be inserted instead of "*verify*," no advantage can be taken of the mistake. (y) An avowry, we have seen, does not require any conclusion. (z) A plea of bankruptcy pleaded under the statute, though introductory of new matter, should pursue the terms of the act, and conclude to the country. (a) If matter of *record* be pleaded, as a judgment recovered for the same demand, &c. the plea should conclude with a *prout patet per recordum*, and a verification by the record; and if several records be pleaded, they should be respectively verified. (b) But if matter of fact as well as matter of record be jointly put in issue, the trial may be by jury, and the plea may conclude to the country. (c) So, if matter of record, as a fine, be pleaded with other matters not of record and constituting one entire defence, although that part of the pleading which states the fine should refer to the record thereof, yet the plea may conclude with the general verification, without verifying by the record. (d) To a *scire facias* upon a recognizance against bail in error, if the defendant plead that the judgment is pending and not determined, he need not conclude *prout patet*, the plea being in the negative. (e) The usage and practice of the court is not matter of conclusion to the country, for such usage is not admissible in a plea which puts it in issue. (f)

Where the plea contained a verification, it generally concluded with a *prayer of judgment* in favor of the defendant, which was termed the *demand or petition* of the plea, (g) as "wherefore the defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof (h) against him, &c." This prayer ought properly to have corresponded with, and be founded on,

It seems unnecessary to conclude a plea to an action by an attorney for his fees, that no signed bill was delivered pursuant to the statute, with a verification. *Millner v. Croudall*, 1 Show. 338. So a verification seems also unnecessary in the following cases, although usually inscribed after a plea of *non damnificatus — riens per descent*; no award made, no memorial enrolled, the statute of limitations. *Bodenham v. Hill*, 7 M. & W. 274; 2 Vin. Abr. 361, pl. 13, 15. It is also usual to verify an avowry or cognizance, but this seems unnecessary. *Co. Litt.* 303; *Bret's case*, Plowd. 342; *Throckmorton v. Tracy*, Plowd. 163; *Bro. Abr. Averment*, pl. 81. See an excellent note on this subject to the case of *Attwood v. Taylor*, 1 M. & Gr. 288. See, also, *Smith v. Tanner*, 1 M. & Gr. 806.

(y) *Harvey v. Stokes*, Willles, 6.

(z) *Ante*, 583; 1 Saund. 103, note (7).

(a) *Miles v. Williams*, 1 P. Wms. 253, 259; 10 Mod. 160, 247; *Fortes*, 334; *Barnes*, 330; *Charlton v. King*, 4 T. R. 156; *Pitcher v. Martin*, 3 B. & P. 171; *Sheen v. Garrett*, 6 Bing. 686; [*Lytle v. Lee*, 5 John. 112; *Thomas v. Rumsey*, 6 John. 26.]

(b) *Com. Dig. Pleader*, E. 29; *Morse v. James*, Willles, 126. A plea of *nil tid record* need not be verified. *Obin v. Knott*, *Fortes*, 334; *Bro. Abr. Averment*, pl. 20, 58.

(c) *Ante*, 583.

(d) *Rowles v. Lusty*, 1 M. & P. 102; 4 Bing. 423, S. C.

(e) *Fanshaw v. Morrison*, Salk. 520.

(f) See *ante*, 486.

(g) *Powell v. Fullerton*, 2 B. & P. 423; 2 Saund. 210 d; *Le Bret v. Papillon*, 4 East, 502.

(h) See 1 M. & P. 114.

the commencement of the plea, and the effect of the matters contained in the body of it; and therefore it was necessary that a plea of matter of defence arising after the commencement of the suit should be concluded with a prayer as to the *further* maintenance of the * suit: (i) and a plea in abatement, which contained matters in part abatement of the writ, must be pleaded accordingly. (k) But as the court would *ex officio* give judgment in favor of the defendant according to the substance of the plea, without reference to its conclusion, an error with regard to the prayer of judgment in the concluding part of the plea was not material, except in the case of a plea in *abatement*. (l) In an action of *debt* the defendant, in pleading a tender, ought to have concluded his plea by praying judgment if the plaintiff ought to have or maintain his action to recover *any* damages against him; for in that action the debt is the principal, and the damages were only accessory: but in *assumpsit* the damages are the principal, and therefore in pleading a tender in that action, the defendant ought to have concluded his plea with a prayer of judgment if the plaintiff ought to have or maintain his action, to recover any *more* or *greater* damages than the sum tendered, or any damages by reason of the non-payment thereof. (m) In pleading matter of *estoppel*, the defendant in the conclusion of his plea should rely upon it; (n) and that established rule as applied to *estoppel* was expressly continued by Reg. Gen. Hil. T. 4 W. 4, reg. 9.

It was enacted by the statute of 4 & 5 Ann. c. 16, s. 1, "that no advantage or exception shall be taken of or for the want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum*; or of or for not alleging *prout patet per recordum*, or any other matter of like nature, except the same shall be specially and particularly set down, and shown for cause of demurrer." Since the statute, a wrong or defective conclusion, either to the country or with a verification, &c. can only be objected to by *special demurrer*. (o)

How and when to object to conclusion of plea.

We have just seen that Reg. Gen. Hil. T. 4 W. 4, reg. 9, orders that "in a plea or subsequent pleading intended to be pleaded *in bar* of the *whole action generally*, (p) it shall not be necessary to use *any prayer of judgment*, but the case of an *estoppel* is excepted." (p)

When no prayer of judgment is necessary since Reg. Gen. Hil. T. 4 W. 4, reg. 9.

(i) *Le Bret v. Papillon*, 4 East, 502; *ante*, 579. See Steph. 2d. ed. 445.

(k) *Ante*, 474, 476.

(l) *Ante*, 476; *Rowles v. Lusty*, 1 M. & P. 124, 125; 4 Bing. 428, S. C.

(m) *Giles v. Hartis*, 2 Salk. 622, 623; 1 Ld. Raym. 254, S. C.; *Shelley v. Wright, Willes*, 13.

(n) Co. Litt. 303 b; Com. Dig. Pleader, E. 31; *Estoppel*, E.; *vide*, also, 1 Saund. 325 a, note (4); *Shelley v. Wright, Willes*, 13; Steph. 2d. ed. 443; *post*; 2 C. & P. 148.

(o) 2 Saund. 190, note (5); *Smith v. Smith*, 5 Dowl. 84.

(p) See the rule, and meaning of these words, *ante*, 580.

Reg. Gen. Hil. T. 4 W. 4, reg. 13, orders that "all special traverses, or traverses with an inducement of affirmative matter, shall *conclude to the country*, provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial."

Conclusion
of traverses.

Reg. 12 orders that "no *protestation* shall hereafter be made in *any pleading, but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made."

No protesta-
tion to be
made.

Conso-
quences of
defect in a
plea.

A defendant has a right to give evidence in support of his plea on which an issue in fact has been taken, however defective such plea may be. (q)

V. OF SEVERAL PLEAS.

With respect to the pleading of *several* pleas to the *same declaration*, we will *first* consider the former practice, and, *secondly*, the practice since Reg. Gen. Hil. T. 4 W. 4.

With respect to the *former* practice we have already fully considered the doctrine of *duplicity* in pleading, not only as it affects pleading in general, but also as it more immediately relates to pleas in bar. (r) Each plea, taken separately, is still open to objection if it be double, that is, if it contain two or more perfectly distinct and independent answers to the same charge, either of which would defeat it. (s) At *common law* a defendant could not plead several distinct pleas to the same declaration or a part thereof, (t) which often led to much inartificial and repugnant pleading, as it naturally induced the defendant to endeavor to crowd as many facts and arguments into his plea as he possibly could. (u) At length it was provided by the statute 4 & 5 Ann. c. 16, s. 4 and 5 (x) (but which does not extend to actions at the suit of the queen), (y) "that it shall be lawful for any *defendant* or tenant in any action or suit, or for any *plaintiff in replevin*, in any court of *record*, with the *leave of the court*, (y¹) to plead as many several matters thereto as he shall think necessary for his defence; (z)

(q) *Bowman v. Rostrow*, 4 Nev. & Man. 551.

(r) *Ante*, 251, 559.

(s) *Ib.*

(t) *Ante*, 559; *Gully v. Bishop of Exeter*, 5 Bing. 45, 47.

(u) 2 *Eunomus*, 141. See *Boote's Suit at Law*, 104; *Cowp. Eq. Pl.* 227; and *Beames's Pl. Eq. Index*, Plea.

(x) The construction of, and practice upon, this statute, are stated in *Com. Dig. Pleader*, E. 2, and *Tidd*, 9th ed. 654, 657; [*Peters v. Ulmer*, 74 Penn. St. 402.]

(y) *Rex v. Cadwell, Forrest*, 57; *The Attorney General v. Allgood, Parker*, 15; *Attorney General v. Donaldson*, 7 M. & W. 422.

(y¹) ["The asking leave of court was formerly actually practised in England; *Tidd's Practice*, 657; but it soon became a matter of course there, and so here in this state [Rhode Island]. But the power still remains in the court, to be exercised on a proper occasion. The court have power, in a proper case, to prevent frivolous, or dilatory, or catching pleas." *Potter J. in Slocomb v. Powers*, 10 R. I. 255, 256.]

(z) The statute does not extend to pleas in abatement. [*Wilton Man. Co. v. Woodman*, 32 Maine, 185; *Little v. Blunt*, 13 Pick. 473; *Granite State Bank v. Otis*, 53 Maine, 133; *Gordon v. Pierce*, 11 Maine, 215. A defendant may plead one plea to one part of the declaration, and a different plea to another part; but

provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in like manner; unless the judge who tried the said issue shall certify that the defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the issue shall be found against him. Provided also, that nothing in this act shall extend to any writ, declaration or suit of appeal of felony, &c. or to any writ, bill, action, or information upon *any penal statute*."

The liberty to plead several pleas is confined to courts of *record*; *and therefore if in the county court, and other inferior courts not of record, (a) the defendant plead two or more pleas to the same part of the declaration, the plaintiff may demur for duplicity, or treat the second plea as a nullity, and proceed to trial on the first. (b) And in courts of record the defendant cannot plead *non assumpsit*, (c) or *non est factum*, (d) to the whole declaration, and a *tender* as to part, (d¹) for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other absolutely admits it to the extent of the sum tendered and paid into court. (d²) In an action on a deed made beyond seas, the defendant relying in some of his pleas on matters of defence which necessarily imported the execution of the deed, the court would not permit him to plead *non est factum*; (e) and the defendant will not be allowed to plead *non assumpsit*, and the stock-jobbing act; (f) or *non assumpsit*, and alien enemy. (g) The court of common pleas refused to allow the assignees of a bankrupt to plead in covenant on a lease *non est factum*, and that the premises did not come to them by assignment. (h) And in the exercise of their discretion, that court, in *scire facias* on a judgment, would not permit the defendant to plead, 1st, payment; 2dly, judgment by fraud; and 3dly, That the judgment was upon a warrant of attorney obtained by fraud. (i) And where the plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the defendant's claim arose on the alleged invalidity of a deed of 1672, the court would not allow him to traverse all the allegations in the declaration,

the pleas must show with certainty what part of the declaration each plea is intended to answer. *Orange v. Berry*, 24 N. H. 107.]

(a) See *Bac. Abr. Courts*.

(b) *Chitty v. Dandy*, 1 Harr. & Woll. 169.

(c) *Maclellan v. Howard*, 4 T. R. 194.

(d) *Fox v. Chandler*, 2 Bl. Rep. 905; *Jenkins v. Edwards*, 5 T. R. 97; *Orgill v. Kemshead*, 4 Taunt. 459.

(d¹) [See *Jackson v. Webster*, 6 Munf. 462; *Jackson v. Stetson*, 15 Mass. 54, 55; *Livingston v. Harrison*, 2 E. D. Smith, 197. Payment at the day and payment before the day cannot be pleaded together. *Thayer v. Rogers*, 2 John. Cas. 152.]

(d²) [See *Dow v. Epping*, 48 N. H. 75; *Union Bank v. Ridgely*, 1 H. & Gill, 324; *Cutts v. United States*, 1 Gall. 19; *Merry v. Gay*, 3 Pick. 388.]

(e) *Laughton v. Ritchie*, 3 Taunt. 385.

(f) 1 M. & P. 148; *Shaw v. Everett*, 1 B. & P. 222.

(g) *Shaw v. Everett*, 1 B. & P. 222, note (a); *Thyatt v. Young*, 2 B. & P. 72; *Truckenbrodt v. Payne*, 12 East, 206; *Shombeck v. De la Cour*, 10 East, 326.

(h) *Whale v. Lenny*, 5 Bing. 12.

(i) *Shaw v. Lord Alvanly*, 2 Bing. 325.

or to plead more pleas than were necessary to contest the deed of 1672. (*k*) Nor can the defendant plead several matters which require different trials, as in dower, *ne unques accouple en loyal matrimonie*, and *ne unques seisie que dower*; (*l*) for the first matter is triable by the bishop, and the other by a jury, and if the former be found against the defendant, the judge cannot certify that he had a probable cause for pleading it. Nor is the queen bound by this statute; and where she is plaintiff, the defendant cannot plead double without leave of the attorney general. (*m*) Nor does *this statute extend to any action or information upon a penal statute*; (*n*) and as the queen is not bound by this statute, (*o*) the defendant cannot plead double to an information of *intrusion, (*p*) in *quare impedit*, where the queen is a party; (*q*) or in *scire facias* for a bond debt to the queen; (*r*) nor could he plead double till the 32 Geo. 3, c. 58, in an information in nature of a *quo warranto*. (*s*) And a defendant will not be permitted to plead the general issue and also a plea of justification, where a statute allows him to give the special matter in evidence under the general issue. (*t*)

With the above exceptions, the defendant may in general in *different* pleas state as many *substantially different grounds of defence* as may be thought necessary, though they may appear to be contradictory or inconsistent. (*u*) Thus, infancy, a release, or the statute of limitations might be pleaded with *non assumpsit*; (*u*¹) and the *statute of gaming or usury might be joined with non est factum*. (*x*) So, in tres-

(*k*) Gully v. The Bishop of Exeter, 5 Bing. 42; S. C. in 2 M. & P. 105, and 4 Bing. 525.

(*l*) Anderson v. Anderson, 2 Bl. Rep. 1157; Hillier v. Fletcher, 2 Bl. Rep. 1207.

(*m*) The King v. The Archbishop of York, Willes, 533; Forr. Rep. Ex. 57, A. D. 1801.

(*n*) Morgan v. Luckup, 2 Stra. 1044; Rep. temp. Hardw. 262, S. C.; Hevrick v. Foster, 4 T. R. 701; The King v. Richardson, 9 East, 469; Tidd, 9th ed. 655.

(*o*) Reg. v. The Bailiffs &c. of Bewdley, 1 P. Wms. 220; Forr. 57.

(*p*) Parker, 1, 16.

(*q*) The King v. The Archbishop of York, Willes, 533; Barnes, 353, S. C.

(*r*) Forrest, 57; Parker, 1.

(*s*) Reg. v. The Bailiffs &c. of Bewdley, 1 P. Wms. 220; Parker, 10; decisions on the act, see 8 T. R. 467; The King v. Richardson, 9 East, 469; 1 D. & R. 438, S. C.; Tidd, 9th ed. 656. See Rules of Court, Hil. T. 7 & 8 Geo. 4, 6 B. & C. 267.

(*t*) Neale v. Mackenzie, 4 Tyr. 670. But since the 1 W. 4, c. 21, s. 1, several pleas may be pleaded in prohibition as in common actions between subjects. See Hall v. Maule, 4 Ad. & El. 283.

(*u*) See the instances, Com. Dig. Pleader, E. 2; Tidd, 9th ed. 655, 656; (Watriss v. Pierce, 36 N. H. 236, 237; Gordon v. Pierce, 2 Fairf. 213; Cain v. Flynn, 1 Dana, 143. Under the practice act of Massachusetts (Genl. Sta. c. 129, § 16), different consistent

defences may be separately stated in the same answer; and thus, by a single answer, the defendant may set up as many defences as he might have done by double pleading. Chapman J. in Montague v. Boston & Fairhaven Iron Works, 97 Mass. 502, 503; Payson v. Macomber, 3 Allen, 69; Wheaton v. Nelson, 11 Gray, 15; McIntyre v. Fuller, 3 Allen, 345. In Pennsylvania the defendant may plead several pleas though inconsistent. Peters v. Ulmer, 74 Penn. St. 402. It is not necessary, under a brief specification of defence in Maine, that the several grounds of defence should be consistent with each other. The defendant may specify as many grounds of defence as he chooses. Granite State Bank v. Otis, 53 Maine, 138. Under the New York Code (§ 150) the defendant may set forth by answer as many defences and counter claims as he may have. They must each be separately stated, and refer to the causes of action which they were intended to answer, in such manner that they may be intelligibly distinguished. See Boyce v. Brown, 7 Barb. 80; Otis v. Ross, 8 How. Pr. 193; Willet v. Metropolitan Ins. Co. 2 Bosw. 679; Blake v. Eldred, 18 How. Pr. 240; Longworthy v. Knapp, 4 Abb. Fr. 115; Hollenbeck v. Clow, 9 How. Pr. 289; Lansing v. Parker, 9 How. Pr. 288.

(*u*¹) [Mott v. Burnett, 2 E. D. Smith, 52; Kellogg v. Baker, 15 Abb. Fr. 287.]

(*x*) Tidd, 9th ed. 656. See other instances, Ib. 657.

pass, not guilty, a justification, (x^1) and accord and satisfaction; or not guilty, and *son assault demesne*, (x^2) may be pleaded together; (y) and not guilty and *liberum tenementum* may be joined. (z) So, *non tenuit*, no rent in arrear, and infancy may be separately pleaded in bar to the same avowry. (a)

When, however, the various pleas are clearly repugnant, and would create unjust delay, the court will sometimes rescind the rule to plead double, and compel the defendant to rely on one of his pleas. (b) And in the common pleas a second perplexing plea, containing matter which might be given in evidence under the general issue, is not allowed to be pleaded therewith. (c) We have already alluded to the instances in which it is impolitic to plead the general issue. (d) As the defendant will not be entitled to the costs of unnecessary pleas, though he succeed on the trial upon one of them, unless the judge certify that he had probable cause for pleading them, care should in general be taken to plead only defences which will probably be sustained. (e)

It is hardly necessary to observe, that if a defendant succeed on either of his several pleas, he is entitled to judgment, and will defeat the action, as regards the matters covered by such his successful *plea, although he may be unable to substantiate his other pleas to the same matters charged in the declaration. (f)

Before the pleading rules, when several pleas were pleaded under the statutes, each second and subsequent plea should in strictness, in the introductory parts of each, have stated that the same was pleaded "*by leave of the court first had and obtained*," (f^1) but the omission, though untechnical, appears to have been no cause of demurrer. (g) If, in fact, no leave had been obtained, the proper course was either to sign judgment, or to *apply to the court to strike out* all but one of the pleas; (h) and the latter course should be adopted where several pleas were im-

Form of
pleading a
second or
subsequent
plea before
Reg. Gen.
Hil. T. 4 W.
4, reg. 6.

(x^1) [Buhler v. Wentworth, 17 Barb. 649; Ormsby v. Douglas, 5 Duer, 665; Hackley v. Ogmun, 10 How. Pr. 44.]

(x^2) [Lansing v. Parker, 9 How. Pr. 288.]

(y) 5 Bac. Ab. 448, and other instances, Ib.

(z) Tidd, 9th ed. 656.

(a) Wilson v. Ames, 1 Marsh. 74; 5 Taunt. 340, S. C. [In replevin, pleas of *non cepit* and property in another may be joined. Whitwell v. Wells, 24 Pick. 25.]

(b) Chitty v. Hume, 18 East, 255; and see Anon. 3 Bing. 635; 1 M. & P. 345; Gully v. The Bishop of Exeter, 4 Bing. 525; 5 Bing. 42, S. C. And where several pleas in covenant traversing title were pleaded, after defendant had paid prior rent to the plaintiff, the rule to plead double was rescinded. Per Bailey J. in Craig v. Struch, 25th Feb. 1830.

(c) Hammond v. Teague, 6 Bing. 197. What are pleas of this nature, and as to sham pleas, ante, 552, 567.

(d) Ante, 542.

(e) 4 & 5 Ann. c. 16, s. 5; Tidd, 9th ed. 658; 7 Moore, 351.

(f) The defendant is entitled to the general costs if he succeed on one plea, which is a complete answer to the action. Edwards v. Bethel, 1 B. & Ald. 254; Ragg v. Wells, 8 Taunt. 129.

(f^1) [See Richardson v. Whitfield, 2 McCord, 150. In all cases of double pleading by leave of the court, the several pleas should each be an answer to the plaintiff's action. Sevey v. Blacklin, 2 Mass. 545; Currie v. Henry, 2 John. 431; Clements v. Cribbs, 19 Ala. 241.]

(g) Andr. 108; Ryley v. Parkhurst, 1 Wils. 219; Symneers v. Ragem, Cowp. 500, 501; *sed vide* Duke of St. Albans v. Shore, 1 H. Bl. 275, 278.

(h) Ib.; Tidd, 9th ed. 658; Griffiths v. Eyles, 1 B. & P. 415.

properly pleaded on a rule improperly obtained. Where there were several pleas, it was advisable, in order to avoid prolixity and expense, if practicable, to refer, in subsequent pleas, to a statement of the same matter in a preceding plea, the same as in the case of several counts in a declaration. (i) But one plea could not be taken advantage of to help or vitiate another, for every plea must stand or fall by itself, unless expressly referred to by an appropriate allegation; (k) and the plaintiff cannot use one plea as evidence of the fact which the defendant disputes in another plea. (l) So, where there was a demurrer to part only of the pleadings, the court, in considering what judgment should be pronounced upon the demurrer, could look only to that part of the record upon which the demurrer arose, and not at other collateral parts of the record not connected with it; and therefore upon a demurrer to a defective plea, the defendant could not claim in aid a replication to another plea, by which the plaintiff admitted that he had become a bankrupt and assigned his estate to an assignee, &c. (m) Where one plea refers expressly to the exception in another plea, and also contains an averment of performance of covenants in the *said* deed, which deed is set forth in the plea referred to, but not mentioned in the exception to that plea, both pleas may be taken together. (n)

Where the plaintiff signed judgment for want of a plea, because the rule to plead several matters was erroneously entitled C. and W. instead of C. and W. *and another*, the court of C. P. set aside the judgment without costs, on an affidavit that the pleas were true, and that the defendant had a good defence. (o)

Rule to
plead
double.

(i) *Grills v. Mannell*, Willes, 380; *Harrington v. Macmorris*, 1 Marsh. 33, 35; 5 Taunt. 228, S. C.

(k) *Grills v. Mannell*, Willes, 380; *Harrington v. Macmorris*, 1 Marsh. 33; 5 Taunt. 228, S. C.; *Robertson v. M'Dougall*, 1 M. & P. 147, 175; S. C. in 4 Bing. 435, and 2 Y. & J. 11. [In *Potter v. Earnest*, 45 Ind. 416, it was held that facts averred in one paragraph of a pleading cannot be adopted and made a part of another paragraph by reference; such facts must be set out by averments. *Silvers v. The Junction R. R. Co.* 43 Ind. 435. In *Ayrault v. Chamberlain*, 33 Barb. 229, it was held that several pleas cannot help each other except by express reference from one to the other. So as to declarations, it was decided in *Dorr v. McKinney*, 9 Allen, 359, that a count for money had and received, which refers to another count where the particulars of the claim are set forth, is not subject to demurrer for the reason that no bill of particulars is filed with it.]

(l) *Harrington v. Macmorris*, 5 Taunt. 228; 1 Marsh. 33, S. C. [In *Bartlett v. Prescott*, 41 N. H. 499, Bell J. said: "It is

well settled doctrine in our court, that each plea and pleading stands on its own ground, and is not affected by any other plea, and the admissions made in pleading one plea, or found in one set of pleadings, cannot be used as cause of demurrer, or as matter of evidence, in issues joined in other pleadings." *Cilley v. Jenness*, 2 N. H. 89; *Chapman v. Sloan*, 2 N. H. 464; *Kimball v. Bellows*, 13 N. H. 68; *Buzzell v. Snell*, 25 N. H. 480; *Bump v. Smith*, 11 N. H. 48; *Nye v. Spencer*, 41 N. H. 272, 276; *Mellen C. J. in Swett v. Patrick*, 2 Fairf. 181; *Alderman v. French*, 1 Pick. 1. By the Massachusetts practice act, neither the declaration, answer, nor any subsequent allegation, shall be deemed evidence on the trial, but allegations only whereby the party making them is bound. Genl. Sta. c. 129, § 72; *Walcott v. Kimball*, 13 Allen, 460; *Brooks v. Wright*, 13 Allen, 72; *Bliss v. Nichols*, 12 Allen, 443, 445.]

(m) *Davies v. Penton*, 6 B. & C. 216; 9 D. & R. 369, S. C.

(n) *Macdougall v. Robertson*, 2 Y. & J. 11.

(o) *Christie v. Walker*, 1 Bing. 187; 7 Moore, 599, S. C.

* The liberty to plead *several pleas* having been abused, and the usual excuse for several varying pleas, to avoid the risk of variance having been in a great measure removed by the power afforded to the judge trying a cause to amend even during the trial, in case of variances, the judges thought it advisable, by a *general* rule, to qualify the liberty of pleading several pleas, given by 4 & 5 Ann. c. 16, and therefore promulgated the rule of Hil. T. 4 W. 4, which in terms prohibits more than one plea, stating the *same subject-matter of defence*, but varying only in *statement, description*, or circumstances. Formerly, and when the 4 Ann. c. 16, was first enacted, the practice was in all cases for the defendant's counsel actually to move the court for leave to plead more than one plea, and the court in each case *actually* exercised its discretion whether or not to allow the several pleas. But it soon became, especially in the court of queen's bench, too much as of course for a defendant to plead as many pleas as he might think fit; and it became expedient to repress the practice by the express Reg. Gen. Hil. T. 4 W. 4, reg. 5. However, *inconsistent* pleas may still be pleaded under the new rules, if intended *bond fide* to support different substantial grounds of defence; (p) for per Bosanquet J. "The word '*inconsistent*' was studiously kept out of the rules, for the subject was discussed, and it was felt that there might be cases in which pleas might be inconsistent with each other, and sustain substantially different defences. The object had in view was to prevent the *same* defence being pleaded in *different forms*." (q)

However, since these pleading rules prohibiting several pleas of the *same subject-matter* of defence, a defendant may still plead *as many pleas* of *different* matters of defence *as may be reasonable*. (r)

The Reg. Gen. Hil. T. 4 W. 4, reg. 5, expressly orders "that several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall *several* pleas, or *avowries*, or *cognizances* be allowed, unless a *distinct ground* of answer or defence is intended to be established in respect of

(p) [Under the statute of Indiana (2 Gav. & H. 88), which provides that the "defendant may set forth in his answer as many grounds of defence, &c. as he shall have" — the defendant, in an action for slander, may in one paragraph of his answer deny the speaking of the words, and in another paragraph admit the speaking, and justify them upon the ground that they were true. *Weston v. Lumley*, 33 Ind. 486. So in Massachusetts, under practice act. Genl. Sts. c. 129, § 16; *Payson v. Macomber*, 3 Allen, 69. So in New York. *Butler v. Wentworth*, 9 How. Pr. 282; S. C. 17 Barb. 649. The true rule is to let the defendant put in as many defences as he may have, whether consistent with each other, or otherwise. *Sciles v. Comstock*, 9 How. Pr. 48. But in

an action for slander, the defendant cannot deny uttering the words, and then allege that if he did utter them, he did it in reference to a certain contract. *Porter v. Creedy*, 1 Code (N. Y.) R. N. S. 88; *Sayles v. Wooden*, 6 How. Pr. 84; *Lewis v. Kendall*, 6 How. Pr. 59; S. C. 1 Code (N. Y.) R. N. S. 402.]

(q) *Duere v. Triebner*, 5 M. & Scott, 103; 1 Bing. N. C. 266; 3 Dowl. 133, S. C.

(r) *Hart v. Bell*, 1 Hodges Rep. 6, 16, 18; 3 Dowl. 133, 135, 415; 1 Bing. N. C. 266, 323, 326, 509; *Duere v. Triebner*, 3 Dowl. 133, 135; 1 Bing. N. C. 266, S. C.; *Leuchhart v. Cooper*, 3 Dowl. 415; 1 Bing. N. C. 509, S. C.; *Thompson v. Bradbury*, 1 Bing. N. C. 326.

each." The rule then gives several instances when or not a second count shall or not be allowed, (s) and proceeds thus as to pleas.

Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed.

Ex. gr. Pleas of *solvit ad diem* and of *solvit post diem*, are both pleas of payment, varied in the circumstances of time only, and are not to be allowed.

* But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there — pleas right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But pleas of right of common all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of right of way over the *locus in quo*, varying the *termini* or the purposes, are not be allowed.

Avowries for distress for rent, and for distress for damage *feasant*, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the time at which the rent is payable are not to be allowed.

The examples in this and other places specified are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

The 6th and 7th rules then provide the remedy for the violation of

(s) See *ante*, 429-431; and see the rule at length, *post*, Appendix.

this 5th rule, as well in the case of an improper second count as in the case of an improper *second plea*. (t) The *practice* as to the *permitting* or *refusing* several pleas is stated in the author's work on General Practice. (u)

* The Reg. Gen. Hil. T. 4 W. 4, reg. 11, orders, that "it shall not be necessary to state in a second or other plea or avowry that it is pleaded by leave of the court, or according to the form of the statute, or to that effect." But still Reg. Gen. Hil. T. 2 W. 4, reg. 34, orders, "that if a party plead several pleas, avowries, or cognizances, without a rule for that purpose, the opposite party shall be at liberty to sign judgment." But where a rule to plead several matters had in fact been obtained, though by mistake intituled *C. v. W.* instead of *C. v. W. and another*, the court of C. P. set aside the judgment without costs, on an affidavit that the pleas were true, and that the defendants had a good defence, (y) and which decision, although before this rule, would still apply in practice.

A second plea need not state that it is pleaded by leave, &c.

VI. OF PLEAS BY SEVERAL DEFENDANTS.

In general when the defence is in its nature joint, *several defendants* may join in the same plea, or they may sever, without committing the fault of duplicity in pleading; (a) and one defendant may plead in abatement, (b) another in bar, and the other may demur; (c) except in an action against husband and wife, when the husband must join in the plea with his wife. (d) And by way of defence two may join, although the subject-matter of their plea be several, as in an *audita querela*, (e) or though their different defences may be inconsistent; (f) and in trespass against

OF PLEAS BY SEVERAL DEFENDANTS. (z)

(t) See the rules, *post*, Appendix.

(u) 3 Chitty's Gen. Prac. by Lush. In the case of *Curry v. Arnott*, 7 Dowl. 250, Tindal C. J. lays down the following explanation of this rule: "Where the same facts and circumstances are differently stated in distinct pleas the rule applies, but where the same facts lead to different conclusions in law, it is material to the defendant, and it is of advantage to the plaintiff, that the different views of the facts which are relied on should be put upon the record." It is no objection to the allowance of pleas that they are inconsistent. *Williams v. Small*, 3 Dowl. 564; *Duere v. Triebner*, 1 Bing. N. C. 266; 3 Dowl. 133, S. C. As to what pleas will be allowed in an action for railway calls, where a form of declaration is given by the statute, see *The South Eastern Railway Company v. Hebblewhite*, 12 Ad. & EL. 497. In an action of trespass to land, the defendant may plead: 1, not guilty; 2, that the plaintiff was not possessed; 3, that the defendant was seised in fee; 4, that another party was seised in fee, and he committed the trespasses by his command.

Morse v. Apperley, 6 M. & W. 141. See, further, *Leuckart v. Cooper*, 1 Bing. N. C. 509; 3 Dowl. 415, S. C.; *Evans v. Davis*, 8 Ad. & EL. 362; *Bulley v. Foulkes*, 7 Dowl. 339; *Bulley v. Cathrey*, 1 Dowl. N. R. 456; *Johnstone v. Knowles*, 1 Dowl. N. R. 30.

(y) *Christie v. Walker*, 1 Bing. 187; 7 Moore, 599, S. C.

(z) As to several defendants joining or severing in their pleas, 3 Chitty's Gen. Prac. by Lush.

(a) *Ante*, 249, 558; *Steph.* 5th ed. 292; [*Stillwell v. Hasbrouck*, 1 Hill, 561.]

(b) It is said *arguendo* in *Essington v. Boucher*, Hob. 245, that defendants cannot sever in *dilatory* pleas; *sed quere*, see *Ib.* 250; *Steph.* 5th ed. 292, note (i). The practice is quite otherwise.

(c) 2 Vin. Abr. 75, Action, Joinder, H. D.; *Com. Dig. Pleader*, E. 35.

(d) *Com. Dig. Pleader*, 2 A. 3; *Watson v. Thorpe*, Cro. Jac. 239; *Tampion v. Newson*, Cro. Jac. 288.

(e) *Worsley v. Charnock*, Cro. Eliz. 473.

(f) *Fitch v. Rawling*, 2 H. Bl. 396: 2 Mod. 67.

two for a battery, they may jointly plead that the plaintiff assaulted them, and that they in self-defence beat the plaintiff; or they may sever; (g) or they may jointly plead that they were servants of N. and committed the assault in his defence. So, two may jointly justify an arrest under a joint warrant. (h) And one of several defendants may plead not guilty, and the other a justification as his servant, for one defendant cannot by pleading oust the other of his defence. (i)

Joint-tenants and co-parceners must join in an avowry, and a cognizance as their bailiff should be for the entire rent; (j) but tenants in common must sever, (j¹) and the avowry of each must be *de und medietate* of the whole rent, and not of a certain sum which amounts to *a moiety. (k) When the action is against one of several tenants in common, he should avow for his own proportion, and in general he makes cognizance as bailiff of his companion for the residue; (l) or he may avow for his undivided share of the rent. (m) If the action of replevin be against two tenants in common, they should join, one avowing, and the other as his bailiff making cognizance, for an undivided moiety of the rent; and then the one who first made cognizance avowing in his own right, and the other who first avowed making cognizance as his bailiff for the other undivided moiety. (n) If three tenants in common distrain thirty beasts, it is said they each should avow separately for ten; (o) and one tenant in common cannot avow alone, for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. (p) And where two persons are defendants in replevin they cannot, it seems, make several avowries in their own right for distinct matters; thus if one avow for rent-service, and the other for rent-charge, both the avowries shall abate, for the court would be in doubt to which of them return should be awarded. (q) Several persons having several estates cannot join in prescribing because the prescription of one does not concern the other; (r) though an exception has been allowed where two persons commit a joint trespass. (s) So personal defences, as coverture, infancy, &c. should be pleaded separately; and one of several defendants may justify by command of another defendant who suffers judgment

(g) 2 Vin. Abr. 76, pl. 14.

(h) 2 Vin. Abr. 76, pl. 15, 16.

(i) 2 Mod. 67.

(j) Bac. Abr. Joint Tenant, K.; Replevin, K.; Harrison v. Barnby, 5 T. R. 246; Kitchen v. Buckley, 1 Lev. 109; Sir T. Raym. 80, S. C.

(j¹) [Decker v. Livingston, 15 John. 482.]

(k) *Aliter* in covenant for rent; Henniher v. Turner, 4 B. & C. 157; 6 D. & R. 72, S. C.

(l) Harrison v. Barnby, 5 T. R. 246; 11, *sed quare*.

Kitchen v. Buckley, 1 Lev. 109; Sir T. Raym. 80, S. C.; 2 Vin. Abr. 59, pl. 27.

(m) Harrison v. Barnby, 5 T. R. 246; Culley v. Spearman, 2 H. Bl. 387.

(n) Harrison v. Barnby, 5 T. R. 247. See the form, *post*, vol. ii. 686, note (g).

(o) *Ib.*; Co. Litt. s. 314, 317.

(p) Culley v. Spearman, 2 H. Bl. 386.

(q) 5 Co. 19 a, 38 b.

(r) 2 Vin. Abr. 56, pl. 47; 76, pl. 18.

(s) 2 Vin. Abr. 76, pl. 18. See *ante*, 10,

by default, for his act shall not take away the ground of defence from his servant. (t)

A plea which is bad in part is bad *in toto*; (u) if, therefore, two defendants join in a plea, which is sufficient for one, but not for the other, the plea is bad as to both, for the court cannot sever it and say that one is guilty, and that the other is not, when they all put themselves on the same terms. (x) Thus, it has been held that if an officer plead separately under a writ of *fi. fa.* or other process, he need not state the judgment on which the writ was founded; but if he join in the plea with the plaintiff in the former action, and the judgment be not stated, the plea will be bad as to both the defendants, unless the plaintiff in the former suit justify merely in aid of the * officer. (z) But this rule does not apply where the objection to the plea is merely on account of surplusage. (a) And if several executors join in the same plea of *plene administravit*, each will only be liable to pay the assets found by the jury to be in his own hands, though it is more usual for each executor to plead separately. (b) In an action of trespass against several defendants, if it be expected that one of them will be acquitted, and that the others will be found guilty, it is advisable for the former to plead separately. If several defendants join in the plea, and it is in the singular number, it will be bad on demurrer. (c)

The plaintiff may in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* as to one of them; (d) but in actions in form *ex contractu*, unless the defence be merely in the *personal* discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the others, for the cause of action is entire and indivisible. (e) And upon the same principle, in the latter form of action, the success of one defendant upon a plea which goes to the merits, will preclude the plaintiff from obtaining any benefit from a judgment by default suffered by another defendant. (f) If the defendants plead severally, the plaintiff may demur to one plea, and join issue on the other, (g) and may in an ac-

(t) 2 Mod. 67.

(u) *Ante*, 572; [Montague v. Boston & Fairhaven Iron Works, 97 Mass. 502, 503; Moore v. Parker, 3 Mass. 310, 312; Schermerhorn v. Tripp, 2 Caines, 108; Marsteller v. M'Lean, 7 Cranch, 158; Bradley v. Hunt, 7 Cowen, 330; Hayden v. Nort, 9 Conn. 367.] (x) 1 Saund. 28, note (2); Duffield v. Scott, 3 T. R. 376, 377; Phillips v. Biron, 1 Stra. 509; Smith v. Dr. Bouchier, 2 Stra. 994; Middleton v. Price, 2 Stra. 1184; Parsons v. Lloyd, 3 Wils. 344; Grant v. Bagge, 3 East, 182, 133; Collett v. Lord Keith, 2 East, 263; [Higby v. Williams, 16 John. 217.]

(z) Collett v. Lord Keith, 2 East, 263, 270; Grant v. Bagge, 3 East, 132, 133, 142; Bar-

ker v. Braham, 3 Wils. 376. Constable joining in bad special plea. Hedges v. Chapman, 2 Bing. 523.

(a) Duffield v. Scott, 3 T. R. 377.

(b) 1 Saund. 336, note (10).

(c) Ford v. Edgcombe, Lutw. 1531.

(d) Greaves v. Rolls, Salk. 457; Dale v. Eyre, 1 Wils. 306.

(e) Noke v. Chiswell, 1 Wils. 89; 3 Esp. Rep. 76; Bovill v. Wood, 2 M. & Sel. 23; Moravia v. Hunter, 2 M. & Sel. 474; Tidd, 9th ed. 682; *ante*, 52; [Biedman v. Vander-slice, 2 Rawle, 334.]

(f) *Ante*, 51.

(g) Walsh v. Bishop, Cro. Car. 239, 243; Parker v. Lawrence, Hob. 70; Com. Dig.

tion *ex delicto* afterwards enter a *nolle prosequi* on the demurer, and proceed against the other defendant, (*h*) or if several issues are joined, he may enter a *nolle prosequi* to one before or after judgment. (*i*) If defendants join in a plea, they should not sever in the rejoinder; and they cannot unite in the latter pleading if they did not concur in the plea to the declaration. (*k*)

As a defective declaration may be aided at common law by the plea or by the verdict, so a *defective plea may be aided* in some Defects when aided. cases by the replication or verdict; (*k*¹) and the statute of jeofails and the statute for the amendment of the law also aid many mistakes after verdict or judgment. (*l*) These rules will be fully considered hereafter

* VII. OF PLEAS OF SET-OFF

In actions upon *simple contracts*, or *specialties*, for the payment of money, the defence frequently is a cross demand for a debt due from the plaintiff to the defendant. We will therefore now examine the law of *set-off* and *mutual credit*, (*m*) but so far only as it is connected with the subject of pleading.

At common law, and independently of the statutes of set-off, a defendant is in general entitled to retain, or claim by way of *deduction*, all just allowances or demands accruing to him, or payments made by him, in respect of the *same* transaction or account, which forms the ground of action. But this cannot be termed a *set-off* in the strict legal sense of the word, because it is not in the nature of a *cross* demand or *mutual* debt, but rather constitutes a *deduction*, rendering the sum to be recovered by the plaintiff so much less. (*n*) So, where demands, originally cross, and not arising out of the same transaction, have by subsequent *express agreement* been stipulated to be deducted, or set off against each other, only the *balance* is the debt and sum recoverable, without any special plea of set-off; though it is *advisable* in most cases, and *necessary* when the action is on a specialty, to plead

Pleader, E. 35; [Lansing v. Montgomery, 2 John. 382.]

(*h*) *Ib.* When not, see Drummond v. Dorant, 4 T. R. 360; 1 Saund. 285, note (5); Tidd, 9th ed. 681.

(*i*) *Ib.*

(*k*) Monow v. Belcher, 4 B. & C. 704; 7 D. & R. 187, S. C.; Steph. 2d ed. 298, 299.

(*k*¹) [Cavene v. M'Michael, 8 Serg. & R. 441; Rockfellow v. Donnelly, 8 Cowen, 655.]

(*l*) 4 & 5 Anne, c. 16; Com. Dig. Pleader, E. 37-39; Vin. Abr. Replication; 1 Saund. 228 a, note (1).

(*m*) Set-off must be pleaded though credit be given for the amount in the plaintiff's particulars of demand. Rowland v. Blakesley,

2 G. & D. 734. As to the law of set-off in general, see Montague on Set-off; Tidd, 9th ed. 662-668; 3 Chit. Com. Law, 669; and see Chit. Col. of Statutes, 874, tit. Set-off, a full note; Eden's Bank. Law, 2d ed. 186; Montag. & Greg. Bank. Law, 242-261; Manning's Index, tit. Set-off; Chitty jr. on Contr. 3d ed.; Selw. N. P. tit. Assumpsit; Gibson v. Bell, 1 Bing. N. C. 746. Set-off cannot be pleaded to an action for not repairing. Seal v. Burrell, 4 Nev. & Man. 300, 201; Auber v. Lewis, Man. Dig. 2d ed. 251.

(*n*) Green v. Farmer, 1 Bl. Rep. 632; Burr. 2221¹; Dale v. Sollett, 4 Burr. 2133¹ and other cases in Montague's Law of Set-off, 1-3.

it; (o) and since Reg. Gen. Hil. T. 4 W. 4, a special plea claiming such *deduction* would in most cases be requisite. A defendant cannot reduce a plaintiff's demand for goods sold, by producing a debtor and creditor account in the handwriting of the plaintiff's clerk, showing goods to have been sold by the defendant to plaintiff, unless he has pleaded a set-off. (p)

In an action for work and labor, or goods sold, though the contract was at a certain price, the defendant may prove under the general issue, in reduction of the claim, that the work was improperly done; (q) or that the goods were not so good as warranted. (r) And where in an action for the price of seed sold, and which was warranted to be good new growing seed, it appeared that soon after the sale the buyer was told that it did not correspond with the warranty, but afterwards sowed part, and sold the residue, it was * held to be an answer to the action upon the general issue that the seed was *wholly* unproductive and worthless. (s) But it has been held that negligence in the conduct of a cause cannot be set up as a defence to an action on an attorney's bill, at least unless it was such negligence as to deprive the defendant of *all possible benefit* from the cause. (t) And if a consignee of goods accept any benefit from the carriage, he cannot defend himself from the payment of freight, on the ground that the goods have been damaged by the master in carrying them, although the damage exceed the amount of the freight. (u)

So, in an action by a servant against his master for wages, the latter cannot in general set off or deduct the value of goods lost or damaged by the negligence of the former, unless it can be proved to have been part of the original agreement between them that the servant should pay, out of his wages, for all his master's goods lost through his negligence, in which case the value of the goods lost may, under the general issue, be deducted from the amount of the wages. (x) Where by

(o) *Dobson v. Lockhart*, 5 T. R. 135; *Stardy v. Arnaud*, 3 T. R. 599; *Roper v. Bamford*, 3 Taunt. 76; *Kinnerley v. Hosack*, 3 Taunt. 170; *Green v. Farmer*, 1 Bl. Rep. 651; *Dale v. Sollett*, 4 Burr. 2133; *Montague's Law of Set-off*, 1-3, and 28, note (2 p).

(p) 1 C. & P. 138.

(q) *Basten v. Butter*, 7 East, 479; *Farnsworth v. Garrard*, 1 Campb. 38; *Kist v. Atkinson*, 2 Campb. 63; *Duncan v. Blandell*, 3 Stark. Rep. 6; *Cousins v. Paddon*, 2 Cr. M. & R. 547; *ante*, 495; [*Heck v. Sheener*, 4 Serg. & R. 249. See 2 Chitty Contr. (11th Am. ed.) 825, and notes.]

(r) *Fisher v. Samuda*, 1 Campb. 190; *Germaine v. Burton*, 3 Stark. Rep. 32; and see *ante*, 495. [See 1 Chitty Contr. (11th Am. ed.) 647, 652, and notes (d') and (e), and cases cited; *Steigleman v. Jefferies*, 1 Serg. & R. 477; *Cornell v. Green*, 10 Serg. & R.

14; *Shaw v. Badger*, 12 Serg. & R. 275; *Light v. Stoevers*, 12 Serg. & R. 431; *Harper v. Kean*, 11 Serg. & R. 280.]

(s) *Poulton v. Latimore*, 9 B. & C. 259; 4 M. & Ry. 208, S. C. See *ante*, 495.

(t) *Templer v. M'Lachlan*, 2 New Rep. 136; *Allison v. Rayner*, 7 B. & C. 443; 1 M. & Ry. 241, S. C.; *Montrion v. Jefferys*, 1 R. & M. 317; *Denew v. Daverell*, 3 Campb. 451; *Kannen v. M'Mullen*, Peake N. P. R. 59. See *Bracey v. Carter*, 12 Ad. & El. 373; *ante*, 495. Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employers, the amount of the latter work is matter of deduction and not set-off. *Turner v. Diaper*, 2 M. & Gr. 241; *ante*, 496.

(u) *Shields v. Davis*, 6 Taunt. 65; 4 Campb. 119, S. C.

(x) *Le Loir v. Bristow*, 4 Campb. 134; *Cleworth v. Pickford*, 7 M. & W. 320. In

When or not deductions may be made under non assumpsit.

the custom of the hat trade, the amount of the injury sustained by the hats in the process of dyeing, is always to be deducted from the charge of dyeing, the defendant is entitled to such deduction, in an action brought by the dyer, without pleading a set-off, and although there has not been any previous adjustment of the amount of the damage done. (y) And it is a clear rule at common law that if a principal permit his factor to assume the apparent ownership of goods, and to sell them in his, the factor's, own name, the vendee, who bought them in ignorance that the factor acted merely as an agent, may, to an action by the principal for the price, set off a debt due to him from the agent; (z) and this defence may be given in evidence under the general issue, or specially pleaded in bar. (a)

But before the statutes of set-off, where there were *cross demands unconnected with each other*, a defendant could not in a court of law defeat the action by establishing that the plaintiff was indebted to him even in a larger sum than that sought to be recovered, and relief * could only be obtained in a court of equity. (b) To remedy this injustice, it was enacted by the 2 Geo. 2, c. 22, s. 13, (c) "that where there are mutual debts between the plaintiff and defendant, or if either part sue or be sued as *executor or administrator*, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other; and such matter may be given in evidence upon the *general issue*, or *pleaded in bar*, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, *notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue." This clause was made perpetual by 8 Geo. 2, c. 24, s. 4; and it having been doubted whether mutual debts of a *different* nature could be set against each other, (d) it was by the last-mentioned statute (e) further declared, "that by virtue of the said clause *mutual debts* may be set against each other, either by being pleaded in bar or given in evi-

The statutes
2 G. 2, c. 22,
s. 13, and 8
G. 2, c. 24, as
to set-off.

such a case it seems that the declaration should set forth the terms of the original contract, and that the plaintiff cannot maintain an action of indebitatus assumpsit. Per Lord Abinger C. B. *Cleworth v. Pickford*, 7 M. & W. 320, 321.

(y) *Bamford v. Harris*, 1 Stark. Rep. 343.

(z) See the statute 6 Geo. 4, c. 94; *George v. Claggett*, 7 T. R. 359, 360, note; *Morris v. Cleasby*, 1 M. & Sel. 576; *Coppin v. Craig*, 2 Marsh. 501; *Westwood v. Bell*, Holt N. P. C. 124, note; *Baring v. Corrie*, 2 B. & Ald. 137; *Chit. Col. of Stat.* 876, note, tit. Set-off.

(a) *Carr v. Hinchliff*, 4 B. & C. 547; 7 D.

& R. 42, S. C. See *Hayselden v. Staff*, 5 Ad. & El. 158.

(b) *Collins v. Collins*, 2 Burr. 820; *Bas-kerville v. Brown*, 2 Burr. 1230; *Green v. Farmer*, 4 Burr. 2230; *Montague on Set-off*, 1-3, 15.

(c) This is intitled "An act for the relief of debtors with respect to the relief of their persons." It is singular that the important provisions in this and the following act respecting *set-off* should be introduced in statutes in all other respects relating only to insolvent debtors.

(d) *Hutchinson v. Sturges*, Willes, 262.

(e) Sect. 5.

dence under the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a *different nature*, unless in cases where either of the said debts shall accrue by reason of a *penalty* contained in any bond or specialty, and in all cases where either the debts for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued or shall accrue by reason of any such *penalty*, the debt intended to be set off shall be *pleaded in bar*, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid."

These statutes were passed for the benefit of defendants, and they are not imperative, so that a defendant may waive his right to set off, and bring a cross action for the debt due to him from the plaintiff; (*f*) and where he is not prepared at the time the plaintiff sues him to prove his cross demand, it is most advisable not to plead or give notice of set-off, for in case he should go into evidence upon the trial in support of his cross demand, and fail in the attempt, he cannot afterwards proceed in a cross action for the amount; and a party cannot bring an action for money which he has succeeded in setting * off in a former action against him, although, if the set-off were more than sufficient to cover the plaintiff's demand in the former action, the defendant therein may maintain an action for the surplus. (*g*)

The principal rules upon the subject of set-off may perhaps be here concisely alluded to with propriety. The statutes require, 1st, That the debt sued for, and that sought to be set off, should be *mutual* debts, and due to each of the parties respectively in the *same right* or *character*; (*h*) so that a joint debt cannot, by virtue of the statutes, and in the absence of an express agreement to that effect, be set off against a separate demand, nor a separate debt against a joint one; (*i*) but a debt due to a defendant as sur-

The rules
respecting
set-off.

(*f*) *Brown v. Pigeon*, 2 Campb. 595; *Brisbane v. Dacres*, 5 Taunt. 148; [*Carpenter v. Butterfield*, 3 John. Cas. 146. But see in New Jersey, *Schenck v. Schenck*, 5 Halst. 276.] But the plaintiff may prevent such cross action by allowing the set-off, and having it indorsed on the *postea*. See *Laing v. Chatham*, 1 Campb. 252.

(*g*) *Hennell v. Fairlamb*, 3 Esp. Rep. 104. Plea to an action of debt, alleging that in a former action brought by the defendant against the plaintiff the latter had pleaded a set-off in respect of the same money now sought to be recovered, but the jury had found for the plaintiff, on which judgment was given, is a good plea of estoppel, and the plaintiff cannot reply that he was not prepared to support his plea of set-off at the

former trial. *Eastmure v. Laws*, 7 Dowl. 431.

(*h*) See, further, upon this rule, Chit. Col. of Statutes, 876, tit. Set-off, note. As to set-off between *principal* and *agent*, *ib.*; *policy broker* and *underwriter*, *ib.*; *Davies v. Wilkinson*, 1 M. & P. 502; 4 Bing. 573, S. C. In actions by and against husband and wife, or the husband only, or by or against *executors*, or *administrators*, or *trustees*, &c. see Chit. Col. of Stat. *ubi supra*.

(*i*) *Grant v. Royal Exchange Assurance Company*, 5 M. & Sel. 439; *Kinnerley v. Hossack*, 2 Taunt. 173; *Montague*, 23; *Eden*, 2d ed. 197; 10 Ves. 105; 11 Ves. 517; *Gale v. Luttrell*, 1 Y. & J. 180; [*Francis v. Rand*, 7 Conn. 221; but see *Crist v. Brindle*, 2 Rawle, 121; and *Stewart v. Coulter*, 12 Serg. & R. 252.] But a claim on a joint and

viving partner may be set off against a demand on him in his own right, and *vice versa*. (k) Nor can there be any set-off at law or in equity if one of the debts be due to the party in his *private* right, and the other be claimable by his opponent in *autre droit*, that is, as assignee of a bankrupt, executor, &c. (l) 2dly. With respect to the nature of the demands to be set off against each other, it will be remarked, that the statutes speak only of mutual *debts*; consequently the demand of each party must be in the nature of a *debt*, so that a set-off is excluded in all actions *ex delicto*; and it cannot be admitted, even in actions *ex contractu*, if the claim of either party be for uncertain or unliquidated *damages*, as for not delivering goods according to contract, &c. (m) But if the * plaintiff declare specially in assumpsit, with the common counts (as in assumpsit for not accounting, with a count for money had and received), and he might recover his whole demand, as well upon the common count as upon the special count, the benefit of a set-off may be obtained upon the common count, and the plaintiff shall not be permitted to exclude it by professing to rely upon the special count only. (n) It has been held that a debt of *inferior degree* cannot be set off against one of *higher degree*, not even a bond against rent, because the latter is higher than the former. (o) And 3dly. The debt attempted to be set off must be *completely due* and in *arrear* at the time the action *was commenced*, not merely at the time of *pleading*; (p) and it must, at the former period, have been a legal and *subsisting* debt, and not barred by the statute of limita-

several bond executed by the plaintiff may be set off to an action brought by him. *Fletcher v. Dyche*, 2 T. R. 32. See, further, *Chit. Col. of Stat. tit. Set-off*, 876, note. A plea of set-off in an action of assumpsit, averring that the promises in the declaration mentioned were made by the defendant jointly with one L. who is still alive; and that the plaintiff was and is indebted to the defendant and L. in a large sum, out of which said sum so due and owing by the plaintiff to the defendant and the said L. as aforesaid, the defendant and the said L. offer to set off, was held good on special demurrer. *Stackwood v. Dunn*, 12 L. J. R. N. S. Q. B. 3.

(k) *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 T. R. 582; *Smith v. Barrow*, 2 T. R. 476; [*Lewis v. Culbertson*, 11 Serg. & R. 48.]

(l) *Supra*, note (k); and see *Gale v. Luttrell*, 1 Y. & J. 180. [See *Turner v. Plowden*, 2 Gill & J. 455.]

(m) *Howlet v. Strickland*, Cowp. 56, 57; *Freeman v. Hyett*, 1 Bl. Rep. 394; *Bul. N. P.* 181; *Gillingham v. Waskett*, M'Clel. 198; 13 Price, 434; *Hardcastle v. Netherwood*, 5 B. & Ald. 93; *Hutchinson v. Reid*, 3 Campb. 329; *Morley v. Inglis*, 4 Bing. N. C. 58; [*Gould v. Kelley*, 16 N. H. 560.] In *replevin*, however, though a set-off cannot, in

general, be pleaded to an avowry for rent yet the plaintiff may plead in bar to an avowry or cognizance the payment of ground-rent; *Sapsford v. Fletcher*, 4 T. R. 511; *Alchorne v. Gomme*, 2 Bing. 54; *Pope v. Biggs*, 9 B. & C. 245; 4 M. & R. 193, S. C.; or of an annuity charged upon the premises; *Taylor v. Zamira*, 6 Taunt. 524; 2 Marsh. 220, S. C.; or of land tax, &c. paid for the same after the rent distrained for had become due, or whilst it was accruing, though any previous payment of land tax, &c. cannot be pleaded to an avowry for rent subsequently due, though it may be sued for. *Deaby v. Moore*, 1 B. & Ald. 123; 3 Moore, 278; *Andrew v. Hancock*, 1 B. & B. 37; *Stabbs v. Parsons*, 3 B. & Ald. 516; 4 Moore, 431; *Spragg v. Hammond*, 2 B. & B. 59; *Laycock v. Tufnell*, 2 Chit. Rep. 531; *Smith v. Alsop*, M'Clel. 622; *Bramston v. Robins*, 4 Bing. 11.

(n) *Birch v. Depeyster*, 4 Campb. 385; *ante*, 426, 579, note (m).

(o) Per Denman C. J. in *Davis v. Gyde*, 1 Harr. R. 52, citing *Gage v. Acton*, 1 Salk. 326, *sed quere*.

(p) *Evans v. Prosser*, 3 T. R. 186; *Rogerson v. Ladbroke*, 1 Bing. 93; 7 Moore, 412; *Braithwaite v. Coleman*, 4 N. & M. 654; and see *Penny v. Fox*, 8 B. & C. 11; 2 M. & R. 181, S. C.

tions, (q) or satisfied in law in consequence of the debtor having been taken in execution upon a judgment by which it was recovered. (r) But an attorney may set off his bill although it was not delivered a month before the commencement of the action; but it ought, if possible, to be delivered time enough to be taxed, and at least should be delivered sufficiently early to prevent the plaintiff from being taken by surprise at the trial. (s) The pendency of an action for the debt set off, (t) or of a writ of error where the set-off is upon a judgment, (u) will not however defeat the right.

The *bankrupt act* (x) provides, that where there has been *mutual credit* given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the *commissioners* shall state the account between them, and one debt or demand may be set against another, *notwithstanding any prior act of bankruptcy* committed by such bankrupt before the *credit* given to, or the *debt* contracted by him, and *what shall appear due* on either side on the *balance* of such account, and *no more, shall be claimed* or * paid on either side respectively, and every debt or demand hereby made payable against the estate of the bankrupt may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed; and the powers vested in the commissioners under that act were transferred to the commissioners of the courts of bankruptcy by 1 & 2 W. 4, c. 56, s. 7; and 5 & 6 Vict. c. 122, s. 66.

With respect to the *mode* by which the defendant should avail himself of a strict legal *set-off*, we have seen (y) that when either the debt sued for, or that which is the subject of the *set-off*, accrued by reason of a *penalty* contained in any bond or spe-

Set-off, &c.
in cases of
bankruptcy.

Mode of
setting off.

(q) *Remington v. Stevens*, 2 Stra. 1271; *Bul. N. P.* 180; 1 C. & J. 1.

(r) *Taylor v. Waters*, 5 M. & Sel. 103; *sed vide Peacock v. Jeffery*, 1 Taunt. 426; *Simpson v. Hanley*, 1 M. & Sel. 696; *Drake v. Mitchell*, 3 East, 258.

(s) *Bulman v. Birkett*, 1 Esp. Rep. 449; *Montag*, 36.

(t) *Baskerville v. Brown*, 2 Burr. 1229; *Knibbs v. Hall*, *Peake's Rep.* 210; *Evans v. Prosser*, 3 T. R. 186; *Le Bret v. Papillon*, 4 East, 507.

(u) *Evans v. Prosser*, 3 T. R. 188, notes; *Sullivan v. Montague*, *Dougl.* 112, notes; *Montag*, 36; *sed vide Curling v. Innes*, 3 H. Bl. 372.

(z) 6 Geo. 4, c. 16, s. 50. There are two modes of balancing an account in the case of *bankruptcy*; 1st, Upon an action at law; or, 2dly, By the commissioners, who have

jurisdiction to state the account without the assignees. It seems the chancellor will restrain any attempt to reopen the account by bringing an action after the commissioners have adjusted it. See 1 Rose, 395. See in general, as to *set-off* and as to *mutual credit* (which is more comprehensive than the word *debt* in the statutes of *set-off*) in cases of *bankruptcy*, *Eden*, 2d ed. 186-206; *Chit. Col. of Stat.* 879, note (c); *Buchanan v. Findley*, 9 B. & C. 738; 4 M. & Ry. 593, S. C. *Mutual credit* must, since *Reg. Gen. Hil. T. 4 W. 4*, be pleaded specially. To assume it by assignees for money had and received to their use as assignees, the defendant cannot plead a *set-off* for money due to him from the bankrupt. *Groome v. Mealey*, 2 Bing. N. C. 138.

(y) *Ante*, 597.

cialty, the statute enacts that the debt intended to be set off shall be *pleaded* in bar, and a notice of set-off is not then allowed. The plea in that case must show how much is truly due on either side, and the sum admitted in the plea to be due to the plaintiff is traversable, though laid under a *videlicet*; (z) and therefore the plaintiff may in such case either take issue on the amount of the debt alleged to be due to himself, or may deny the defendant's set-off; (a) and if the plaintiff reply that more was due on the bond than the sum named in the plea, and fail in proving that allegation, he will be nonsuited. (b) But in cases where neither the plaintiff's nor the defendant's debt accrued by reason of a *penalty*, the defendant had the election to *plead*, or *give notice* of his set-off. It was said, that if at the time of the action brought, a larger sum was due from the plaintiff to the defendant, it was more proper to *plead* the set-off, but that where the sum intended to be set off was less than that for which the action was brought, a *notice* of set-off should be given; (c) but the statutes of set-off do not seem to warrant this distinction. In general a notice of set-off was less expensive than a plea; but where the plaintiff in his replication must necessarily have admitted a part of the defendant's case, a plea was preferable; and a set-off was usually pleaded in country causes, to save the trouble and expense of proving the service of notice. (d)

When a set-off is not pursuant to the enactment *pleaded*, the statute (e) provides that the defendant's demand may be given in evidence under the *general issue*, so as at the time of pleading such plea *notice* shall be given of the particular debt intended to be insisted upon by the defendant, and upon what account it became due. But *as there is no general issue in an action on a specialty, and a plea of *non est factum* to an action of covenant on an indenture for non-payment of money only puts in issue the deed, such plea is not a general issue within the meaning of this act, and therefore in an action of covenant or debt on a deed, though no penalty be proceeded for, a set-off should be specially pleaded. (h)

Semble, set-off and mutual credit now to be pleaded. The Reg. Gen. Hil. T. 4 W. 4, Pleadings in Assumpsit, reg. 3, orders that "*set-off* and *mutual credit* must be pleaded," and this rule abolishes a *notice of set-off*. (i)

In cases of *bankruptcy* the accounts may be balanced either upon

(z) *Symmons v. Knox*, 3 T. R. 65; *Grimwood v. Barrit*, 6 T. R. 460.

(a) *Bell v. Shaw*, Holt N. P. 293. See the forms, *post*, vol. ii. 465.

(b) *Ib. Ibid.*

(c) *Bul. N. P.* 179; *Tidd*, 9th ed. 667; *Montague*, 41, *acc.*; *Laws on Assumpsit*, 538, *contra*.

(d) *Tidd*, 9th ed. 667.

(e) 2 Geo. 2, c. 22, s. 13.

(h) *Oldershaw v. Thompson*, 1 Stark. 311; 2 M. & Sel. 164; 2 Chit. R. 338, S. C.; *Selw. N. P.* 6th ed. 535; but see *Bul. N. P.* 181; *Barnes*, 191.

(i) *Graham v. Partridge*, 1 M. & W. 395. A set-off must be pleaded though credit be given in the particulars of the plaintiff's demand for the amount. *Rowland v. Blackley*, 2 G. & D. 734.

an action at law, or before the commissioners. (*k*) And in an action at the suit of assignees, a set-off or mutual credit might formerly be given in evidence under the general issue, without a plea or notice of set-off. (*l*) But now since Reg. Gen. Hil. T. 4 W. 4, each should be pleaded. And to an action by assignee for a debt due to the bankrupt, the defendant might have pleaded a tender as to part, and given evidence of a set-off as to the rest without a plea of set-off. (*m*) But it has been observed, that the practice was to plead or give notice of set-off in an action at law in the case of bankruptcy, in the same manner as under the general statutes relating to set-off, and that that practice seems to be just, because it apprises the plaintiff of the intended defence. (*n*)

In point of form, the *plea of set-off* should not only contain all the requisites essential to the validity of other pleas in bar, but must of course show that the debt is of a nature which entitles the defendant to set it off against the plaintiff's claim: (*o*) and must describe the debt intended to be set off with the same certainty as in a declaration for the like demand. Where the demand would have been recoverable under the common money counts in a declaration, the amount may be set off under a similar description of the debt, however particular the circumstances may have been. A plea of set-off so much resembles a declaration, that two parts of a plea of set-off, stating distinct debts, are considered as two counts in a declaration, and if one part be good, a demurrer for the mispleading in the other part must be confined to the defective statement, and a general demurrer to the whole is not sustainable; (*p*) though we have seen, that in general if one part of a plea in bar be bad, the whole is *insufficient. (*q*) So, in a plea of set-off, an imperfect statement of one debt intended to be set off, will not prejudice a sufficient allegation of another ground of set-off. To the plea of set-off the plaintiff may *reply* the statute of limitations; (*t*) but if both the demands of the plaintiff and defendant accrued more than six years before the time of pleading, and the plaintiff issued process to prevent the statute of limitations affecting his demand, it will equally prevent the statute from barring the defendant's set-off, although the latter issued no process. (*u*) The statute of limitations cannot be relied upon under the usual replication to the plea of set-off. (*x*)

(*k*) *Ante*, 599; *Ib.* note (*x*).

(*l*) *Grove v. Dubois*, 1 T. R. 115, 116; *Dickson v. Evans*, 6 T. R. 58, 59; *Mont.* 61.

(*m*) 4 C. & P. 332.

(*n*) *Montag.* 61, *in notis*.

(*o*) *Ante*, 599.

(*p*) *Dowland v. Thompson*, 2 Bl. Rep. 910.

(*q*) *Ante*, 572, 593.

(*t*) *Remington v. Stevens*, 2 Stra. 1271; *Bul. N. P.* 180.

(*u*) *Ord v. Ruspini*, 2 Esp. Rep. 569; *Catlin v. Skoulding*, 6 T. R. 189; 2 Saund. 127 c, d; *Montag.* 20, 21.

(*x*) *Chapple v. Darlston*, 1 C. & J. 1.

When the defendant has a cross demand against the plaintiff, in support of which he does not offer any evidence on the trial, *Of nū debet.* the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the debt intended to be set off, or he may take a verdict for the smaller sum, with a special indorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the amount of the set-off. (y)

Besides these modes of deduction in cases of connected accounts at common law, and of set-off and mutual credit in cases of bankruptcy, of which we have seen the defendant may avail himself as a matter of right in defence of the action, opposite demands, as well for debts as for costs, founded on *cross judgments*, may, by the practice of the court, in many cases, be set off against each other on a summary application to the court; but this is rather a matter of *practice* than of *pleading*, and therefore it will suffice to refer to the practical works on the subject. (z)

(y) Laing v. Chatham, 1 Campb. 252; of Set-off, 5-15; Philipson v. Caldwell, 6 Chapman v. Dunning, 1 Chit. B. 178. Taunt. 176; Chitty's Arch. Prac. 7th ed.

(z) Tidd, 9th ed. 991; Montague's Law 457.

OF REPLICATIONS. (a¹)

BEFORE the plaintiff *replies* or *demurs* to the plea, he should consider whether or not he *may* treat it as a nullity, and sign judgment with or without leave of the court or a judge, as on account of the plea being such a description of *sham plea*, that the court will not permit to be pleaded, (a) or as being totally *inappropriate* to the form of action. (b) If objectionable pleas be attempted to be pleaded, the plaintiff should oppose the application for leave to plead several matters; and sometimes it may be material to consider whether the pleas are not so wholly inconsistent that the court will on application restrain the defendant from pleading all of them. (c) Sometimes it becomes necessary to apply to the court to set aside the plea, or one or more of several pleas, as having been pleaded contrary to good faith, &c.; as where the defendant pleads a release fraudulently given by a *nominal* plaintiff to the prejudice of the real claimant. (d) It is sometimes necessary to apply to the court of chancery to prevent the defendant from relying on a plea, as where the statute of limitations is pleaded, and the plaintiff did not

GENERAL
OBSERVA-
TIONS.
Steps to be
taken before
replying.

(a¹) [In Massachusetts, under the practice act (Genl. Sts. c. 129, § 23), no further pleading shall be required after the answer, except by order of the court; but if the answer contains any new matter in avoidance of the action, such new matter shall be deemed to be denied by the plaintiff; or the court may, on motion of the defendant, require the plaintiff to reply thereto, and state whether he admits or denies any, and if any, what parts thereof. The plaintiff may, if he pleases, without such order, at any time before trial, file a replication to the answer, clearly and specifically stating any facts in reply to the new matter therein. See *School District in Medfield v. Boston, Hartford & Erie Railroad Co.* 102 Mass. 552; *Burke v. Miller*, 4 Gray, 114, 117; *Cook v. Shearman* 103 Mass. 21, 23. It is no objection to a demurrer to a part of an answer, that the other parts of the answer are not replied to. When no replication has been ordered, the cause is at issue to the jury upon the declaration and answer, except as to the part demurred to, which is at issue to the court. *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502, 503. The New York Code (§ 153) pro-

vides for a replication, when the answer contains new matter, constituting a counter claim; and in other cases, when an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter. See *Wait's Annotated Code*, 277. So in Kansas and Nebraska, a reply is necessary only when the answer contains new matter constituting a counter-claim or set-off. *Wilson v. Fuller*, 9 Kansas, 176; *McCann v. McLennan*, 2 Neb. 286.]

(a) *Ante*, 567.

(b) See *ante*, 547.

(c) *Ante*, 547; *Whale v. Lenny*, 2 M. & P. 19; 5 Bing. 12, S. C.; *Gully v. The Bishop of Exeter*, 2 M. & P. 105; 5 Bing. 42, S. C.; *Hammond v. Teague*, 6 Bing. 197.

(d) *Legh v. Legh*, 1 B. & P. 447; 7 Moore, 617; 1 Y. & J. 362; *Alner v. George*, 1 Campb. 392; *Mountstephen v. Brooke*, 1 Chit. Rep. 390, and notes; see, further, *Tidd*, 9th ed. 677; fraudulent release by one of several plaintiffs, *Barker v. Richardson*, 1 Y. & J. 362.

sue before in consequence of a bill in equity having been filed and injunction obtained by the defendant. (e)

If the plaintiff perceive that he cannot support his action to any extent, he should either obtain leave to *discontinue*, (i) or he may enter a *nolle prosequi* as to the whole or a part of the cause of action, (k) unless there has been a demurrer for misjoinder. (l) Where there are several defendants in an action for a *tort*, or if in an action *ex contractu*, the plea of one of the defendants is merely in *his* particular discharge, as bankruptcy, &c. the plaintiff may enter a *nolle prosequi* as to him. (m) So the plaintiff might enter a *stet processus* or *cassetur billa vel breve*. (n) The points relating to *discontinuing* * the action (o) and entering a *nolle prosequi*, &c. (p) are fully treated of in the books of practice.

Of plaintiff's
discontinuing
and
nolle prosequi.
(k)

As the replication is in general influenced by the plea, and most frequently *denies it*, the pleader has not often much difficulty in deciding what replication he should adopt. If the plea does not profess to answer the *whole* action, and leaves a part unanswered, the plaintiff should sign judgment *pro tanto*. (q) And if a plea do not cover the whole of the alleged trespasses, the plaintiff is entitled on proof of part to a verdict *pro tanto*, and need not new assign. (q)

What answers to the
plea the
plaintiff
may reply.

When the plea properly *concludes to the country*, which we have seen can only be when the allegations in the declaration have merely been traversed or denied, then the plaintiff cannot in general reply otherwise than by adding what is termed the *similiter*; (r) but when the plea has introduced *new matter*, and has therefore *concluded with a verification*, and the plaintiff does not *demur*, the replication must then either, *first*, insist that the defendant could not so plead by showing matter of *estoppel*; or, *secondly*, may *traverse* or *deny* the

(e) 1 Vern. 73; 2 Y. & J. 75. But of late application to a court of equity has been considered by many of very limited utility.

(h) See 3 Chitty's Gen. Prac. by Lush.

(i) Tidd, 9th ed. 678.

(k) Tidd, 9th ed. 681; [Bell v. Hutchinson, 2 McCord, 409; Lambert v. Sanford, 2 Blackf. 137. Where one co-defendant pleads infancy, the plaintiff may enter a *nolle prosequi* as to him, and proceed to judgment as to the other defendants. See *ante*, 50, note (y).] See the form, *post*, vol. ii. 442. A *nolle prosequi* to one count does not bar evidence upon another count for the same demand. *Ante*, 427. If a *nolle prosequi* be entered before final judgment, it will be no bar to a fresh action, but otherwise if entered afterwards. Cooper v. Tiffin, 3 T. R. 511; Bowden v. Horne, 7 Bing. 716.

(l) Rose v. Bowles, 1 H. Bl. 108; 1 Saund.

285, note (5); Bertram v. Gordon, 2 Marsh. 144.

(m) *Ante*, 594; Tidd, 9th ed. 682.

(n) Tidd, 9th ed. 682, 683; *ante*, 480.

(o) Tidd, 9th ed. 678; 2 Saund. 73, note (1); 3 Chitty's Gen. Prac. by Lush.

(p) Tidd, 9th ed. 681-683; 1 Saund. 207, note (2); Moravia v. Hunter, 2 M. & Sel. 444.

(q) Bush v. Parker, 1 Bing. N. C. 72.

(r) Com. Dig. Pleader, R. 1. See observations on the *similiter*, Boote's Suit at Law, 103, note (*). If a defendant, at the end of his plea, concluding to the country, add the &c. that may supply the want of a formal *similiter*. Rawlinson v. Rountree, 6 C. & P. 712. See, also, Siboni v. Kirkman, 6 Dowl. 98; 3 M. & W. 46, S. C.; Stockdale v. Chapman, 4 Ad. & El. 419.

truth of the matter alleged in the plea *either in whole or in part*; (*r*¹) in the first case by a general replication *de injuriâ*, and in the second by a *denial of a part*, according to the facts of the particular case; or, *thirdly*, the replication may *confess and avoid* the plea; in which case, as will be fully explained when we consider the *qualities* of replications in general, the truth of the matter alleged in the plea must be admitted; or, *fourthly*, in the case of an evasive plea, may *new assign* the cause of action. (*r*²) And though at common law a replication cannot be double, or contain two or more answers to the same plea, and the statute 4 Ann. c. 16, does not extend to replications (except in the instance of a plea in bar to an avowry in replevin, which is in the nature of a replication), yet the plaintiff in many cases has an *election* of different replications; thus, if infancy be pleaded in assumpsit, the plaintiff may reply, either that the defendant was of age, or that the goods, &c. were necessaries, or that the defendant after he came of age ratified and confirmed the promise; or he may reply as to part of his demand, that it was for necessaries, and to other part, that the defendant was of full age at the time of the contract, and to the residue, that he confirmed it after he came of age. So, if an executor or administrator plead several judgments outstanding and no assets *ultra*, the plaintiff may reply as to one of the judgments, *nul tiel record*, and to another, that it was obtained or kept on foot * by fraud. (*s*) So, if a set-off on a recognizance or judgment, and also on simple contract, be pleaded, the plaintiff may reply as to the first, *nul tiel record*, and as to the residue of the plea, *nil debet*. (*t*) And if a tender be pleaded, the plaintiff may either deny the tender or its sufficiency, or may reply a demand before or after the tender, or that a writ was previously issued. (*u*) And in the case of a set-off, the plaintiff may either deny the existence of the debt, or may reply the statute of limitations. And if the statute of limitations be pleaded, the plaintiff may reply either that the defendant did undertake, or that the cause of action did accrue, within six years, in the negative of the words of the plea, or that the accounts were between merchants, (*x*) or that the writ was issued within six years. In short, in almost every form of action, the plaintiff has frequently the choice of one of several replications, viz. either, 1st, to deny the allegations

(*r*¹) [The facts of the plea should be traversed by the replication, unless matter in avoidance is set up, and the issue must be taken on the material allegations. *United States v. Buford*, 3 Peters, 31. The replication must not depart from the declaration in any material matter. *Lindsay v. Jamison*, 4 McCord, 23; *Collins v. Waggoner*, Breese, 96.]

(*r*²) [*Gaylord v. Van Loan*, 15 Wend. 312.]

(*s*) 1 Saund. 337 b, note (2); *Ashton v. Sherman*, 1 Salk. 298; 1 Ld. Raym. 263, S. C.

(*t*) *Solomons v. Lyon*, 1 East, 369. But the plaintiff should not reply *nul tiel record* if the recognizance be not of record, but merely deny the set-off. *Flynn v. Thorp*, 1 B. & Ald. 153.

(*u*) 1 Saund. 33.

(*x*) This replication has lately been decided to be inapplicable to the common counts in assumpsit or debt, and only to apply to an action of account, or perhaps to an action on the case for not accounting. *Inglis v. Haigh*, 8 M. & W. 769.

in the plea, or one of them; 2dly, to insist that the defendant was *estopped* or precluded from setting up the defence relied upon in the plea; or, 3dly, admitting the allegation in the plea, the plaintiff may reply setting up new matter, as where the defendant in trespass *quare clausum fregit* pleads *liberum tenementum*, or that the close was his freehold, the replication may state a lease from the defendant to the plaintiff, which entitles him to the present action, and to sue the defendant for the trespass pending such lease.

As to replications merely in denial of the plea, as the replication *de injuriâ*, and when it is admissible.

When a defendant has pleaded a *special plea*, and the plaintiff denies the *whole of the several grounds of defence* stated in such plea, then it is obvious that the most general and comprehensive replication, putting the defendant on the proof of all the material allegations in his plea, is the most advantageous to the plaintiff, because it imposes most difficulty on the defendant. In trespass to persons and personal property, where a special plea of justification or excuse had been pleaded, the plaintiff was allowed to put in issue the *whole plea*, by replying generally that the defendant committed the said alleged trespasses of his own wrong, and without the cause (*i. e.* excuse) alleged in the plea. That comprehensive mode of replying was not anciently adopted in any other form of action; but at length it has been considered that such a replication is admissible *in covenant* or *assumpsit*, in answer to a special plea in excuse of performance; for instance, a replication that the defendant *committed* the said breach or breaches of covenant, or committed or suffered the said * breach of the said promises of his own wrong and without the cause alleged in the said plea, and concluding to the country. (*y*) The pleader should well consider when a common replication traversing the plea will suffice, or when it must state new facts, either by special replication or new assignment; for if the latter when requisite be omitted, the plaintiff may fail *in toto*. (*z*) Where the plaintiff, instead of demurring or taking advantage of matter of estoppel, takes issue on the plea or pleas, he will lose the advantage of such estoppel. (*a*)

Subdivision of subjects relative to replications.

We will consider the points relating to replications under the following divisions:—

(*y*) *Griffin v. Yates*, 2 Bing. N. C. 579; and *Isaac v. Farrar*, 1 M. & W. 65; 4 Dowl. 750, S. C. See *post*, 634, 635, 636, as to where *de injuriâ* is proper.

(*z*) *Price v. Peek*, 1 Bing. N. C. 386, 387.

But as to when a new assignment is not necessary, see *Nevill v. Cooper*, 2 C. & M. 339; *Reece v. Templar*, 1 Har. & Wol. 15, 16. (*a*) 4 Nev. & Man. 276.

- I. The several replications which usually occur in practice,
- 1st. In *assumpsit*.
 - 2dly. In debt.
 - 3dly. In covenant.
 - 4thly. In detinue.
 - 5thly. In actions against executors and heirs.
 - 6thly. In case.
 - 7thly. In trover.
 - 8thly. Pleas in bar in replevin.
 - 9thly. In trespass.
- II. Their forms and parts.
- III. Their qualities and requisites in general.

I. OF THE SEVERAL REPLICATIONS.

IN ASSUMPSIT.

In *assumpsit* as well as in other actions the replication may, if the plea properly conclude to the country, add the similiter, or if the plea conclude with a verification may deny the alleged ^{IN ASSUMPSIT.} matter of defence, or may confess and avoid it by replying new matter.

In *assumpsit*, if the defendant has pleaded *infancy* in bar, the plaintiff may, if the plea be untrue, reply, denying the fact, (b) or if true, he may reply, that the goods mentioned in some of the counts of the declaration to have been sold to the defendant were necessities, which fact will not be intended unless alleged, and that the money mentioned in the count for money paid was paid in the purchase of * necessities for the defendant, and may enter a *nolle prosequi* as to the counts for money lent, had, and received, and upon an account stated; (c) or he may reply to the whole or part, that the defendant ratified and confirmed the promise after he came of age; (d) and a ratification by defendant of his acceptance of a bill of exchange after he came of age and before the bill fell due, will support a count on a promise to pay according to the tenor and effect of the bill. (e) But to a plea in bar of *coverture* at the time the promises were made, the plaintiff can only deny the fact or reply some matter which shows that at the time the defendant was competent to contract, as that her husband was then *civiliter mortuus*, (e¹) and the plaintiff cannot reply that she had a separate maintenance secured to her by deed, (f) or that the husband was an alien living out of the kingdom, (g) and therefore there is seldom any answer to this plea. When *alien enemy*

(b) *Post*, vol. ii. 408; *Pl. Assist.* 76.

(c) *Post*, vol. ii. 408; *Ive v. Chester*, Cro. Jac. 560; *Trueman v. Hurst*, 1 T. R. 40; *Comm. Dig. Pleader*, 2 W. 22.

(d) *Post*, vol. ii. 409; *Borthwick v. Carruthers*, 1 T. R. 648. See the proper form, *Ib.*; *Cohen v. Armstrong*, 1 M. & Sel. 724, 725; *Baylis v. Dineley*, 3 M. & Sel. 481.

(e) *Hunt v. Massey*, 5 B. & Ad. 902.

(e¹) [*Gregory v. Paul*, 15 Mass. 31; *Tracy v. Keith*, 11 Allen, 214, 215; *Dutton v. Rice*, 53 N. H. 496.]

(f) *Marshall v. Rutton*, 8 T. R. 545.

(g) *Stretton v. Busnach*, 1 Bing. N. C. 139.

has been pleaded, the plaintiff may either deny the fact, or if true may reply a license, &c. to reside in this country. (*h*) When a discharge under the *insolvent act*, (*i*) or *lord's act*, (*k*) is pleaded, the replication may either deny the fact, or allege that the discharge was obtained by fraud, &c. If *gaming*, *usury*, or any *other illegality* in the consideration or contract be pleaded, the plaintiff may reply, that the contract was made upon a good and legal consideration, and not upon the supposed unlawful consideration mentioned in the plea. (*m*) To a plea of *tender*, the replication might formerly have either denied the tender generally, (*n*) or stated that a writ was previously issued; (*o*) or a writ with continuances; (*p*) but if the plea stated that the tender was made before the commencement of the suit, instead of exhibiting the bill, then there appeared no necessity to reply the writ, and it would be sufficient to produce it in evidence; (*q*) or the plaintiff might reply a prior (*r*) or subsequent (*s*) demand; or, admitting the tender, might proceed to trial on the plea of *non assumpsit*, when he was prepared to prove that more was due than the sum tendered. (*t*) But as since the uniformity of process act 2 W. 4, c. 39, treats the writ as the commencement of the action, it is not now necessary in any case to reply *specially* the time of *issuing the writ. The replication to a plea of *accord and satisfaction* may either deny the delivery of the chattel in satisfaction, or may deny the acceptance, (*u*) or the plaintiff may deny *both* the delivery *and* acceptance in satisfaction. (*x*) If an *award* be pleaded, the plaintiff may either deny the submission or the award, or may set out the whole award, and, if bad in point of law, may demur. (*y*) If a *former recovery* for the same debt, or a plea of *set-off* on a recognizance of record be pleaded, the replication is *nul tiel record*; (*z*) and to a plea of judgment recovered, the plaintiff may *new assign* that his action is for the breach of different promises; (*a*) and if the defendant plead a judgment recovered in an inferior court, not stating that the contract arose within the jurisdiction of that court, the plaintiff may reply that the cause of action arose out of its jurisdiction. (*b*) To a plea of *release*, he may

(*h*) 43 Geo. 3, c. 155.

(*i*) In general, *ante*, 63.

(*k*) *Ante*, 65.

(*m*) Com. Dig. Pleader, 2 W. 23; Hedges v. Sandon, 2 T. R. 439; 1 Saund. 103 b, note (3); *post*, vol. ii.; 3 Wentw. 104, 108, and *lb.* Index, v.

(*n*) *Post*, vol. ii. 471.

(*o*) *Post*, vol. ii. 472.

(*p*) *Post*, vol. ii. 472. When it need not be stated, Finch v. Wilson, 1 Wils. 167; Beardmore v. Rattenbury, 5 B. & Ald. 452; 1 D. & R. 27, S. C.

(*q*) Beardmore v. Rattenbury, 5 B. & Ald. 452; 1 D. & R. 27, S. C.

(*r*) *Post*, vol. ii.

(*s*) *lb.*; Spybey v. Hide, 1 Campb. 182;

Rivers v. Griffiths, 5 B. & Ald. 630. The subsequent demand must be of the exact sum pleaded to have been tendered, and proof of a demand of a larger sum will not support the issue on such a replication. *Ib.* *Ibid.*

(*t*) *Post*, vol. ii. 472.

(*y*) *Post*, vol. ii. 293. See 3 Wentw. Index, vi. vii. x.

(*z*) Webb v. Weatherby, 1 Bing. N. C. 502; 1 Hodges, 39, S. C. See Brooks & Stewart, 9 Ad. & El. 854.

(*y*) *Post*, vol. ii. 310; 3 Wentw. Index, viii.

(*z*) *Post*, vol. ii. 423.

(*a*) *Post*, vol. ii. 424; [Sugden v. Croy, 2 John. 227.]

(*b*) Briscoe v. Stephens, 2 Bing. 213.

reply *non est factum*, (c) or that it was obtained by *duress*, or *fraud*, (d) and it is unnecessary and injudicious to state the particulars of the fraud; (e) or to a plea of release by a third person, the plaintiff may reply *ne releassa pas*. (f) To a plea of *set-off* on simple contract, the plaintiff may reply *nil debet*, (g) or the statute of limitations, (h) or any matter which a defendant in an action may plead; but if the *set-off* be on a specialty or judgment, or other matter of record, such replication would be insufficient, and the plaintiff should reply *non est factum*, *nul tiel record*, or payment, &c. (i) and the statute of limitations could not be relied upon under the general replication of *nil debet* to a plea of *set-off*; (k) but where the defendant pleaded a *set-off* on a recognizance not of record, and on a simple contract, it was

(c) *Post*, vol. ii. 456.

(d) *Ib.*; 3 *Wentw. Index*, xii.

(e) *Tresham's case*, 9 Co. 110; [*Webb v. Steele*, 13 N. H. 230. In *Hoitt v. Holcomb*, 23 N. H. 535, it was held that a replication to a plea of release, that the release was obtained by fraud and misrepresentation of the defendant, without setting out the particulars of the fraud, was good. In the opinion of the court, by Bell J. the cases on this point are reviewed. But in *Bell v. Lamprey*, 52 N. H. 41, 47, Sargent J., referring to the text and the cases above cited, said: "It was not considered necessary to state the particulars of the fraud because there the fraud is confined to a single fact—the signing of a deed or a release, which is pleaded and specified; yet it is also holden in New York, that where the defendant pleaded a discharge under the state insolvent law, and the plaintiff replied, setting forth all the grounds on which the discharge is made void by the act, in the words of the act, on demurrer the replication was held bad. And it was held, that the plaintiff must specify the particular fraud on which he means to rely to set aside the discharge. *Service v. Heermance*, 2 John. 96." In this case last cited, there were some five replications, each charging perjury or fraud in general terms, with demurrers that no specifications of time, place, persons, and circumstances are given. The court, in the opinion say: "The replication is clearly bad, for it does not state wherein there was perjury or fraud in obtaining the discharge. The plaintiff ought to lay his finger upon the particular fact or fraud on which he means to rely; otherwise the defendant can never know what he is to repel." In *Bell v. Lamprey*, *supra*, the defendant pleaded a discharge in insolvency in another state. The plaintiff replied that the defendant committed perjury in swearing to his schedule, and also, that within a year before filing his petition, and being, and knowing himself to be, insolvent, he paid in part borrowed money and preëxisting debts and liabilities, and that he procured the assent of creditors to his dis-

charge by a pecuniary consideration, and made an assignment and transfer of property, in contemplation of insolvency in fraud of creditors &c. Upon demurrer, it was held that these replications were bad, because they did not specify time, place, persons, and circumstances, when, where, with whom, and under and in connection with which, the acts charged were committed and done. So in *Brereton v. Hull*, 1 Denio, 75, which was a case under the general bankrupt act, it was held that a replication to a plea of discharge, under the bankrupt act, must state what particular act of fraud the defendant has committed, also a description of the property alleged to have been transferred, as to kind and quality, and to whom it was conveyed, and, in case of unlawful preferences, what creditors were preferred, in order that the plaintiff may be fairly apprised of the proof he is to meet on the trial. *Bronson C. J.* in assigning a reason for this rule, says: "If the plaintiff knows that there are any unlawful preferences, in contemplation of bankruptcy, he can specify what in particular they were. If he has no such knowledge, this is then a mere fishing suit, which deserves no encouragement." Other cases to the same effect are *Weld v. Locke*, 18 N. H. 141; *Rand v. Upham*, 22 N. H. 39, and *Lampson v. Eastman*, cited therein; *Willington v. Stearns*, 1 Pick. 500. In *Slack v. McLogan*, 15 Ill. 242, it was held that the facts constituting an alleged fraud must be set forth in the pleading. So in *Abraham v. Gray*, 14 Ark. 301.]

(f) *Richardson v. Pistol* 2 Bulst. 55; *Taylor v. Needham*, 2 Taunt. 278; but see *Connop v. Holmes*, 1 Tyr. & Gr. 87. *Quære*, *non est factum* should be replied if the plea state that the plaintiff released. See *Steph.* 5th ed. 226, 228.

(g) *Ib.*

(h) *Post*, vol. ii. 465; [*Levering v. Bittenhouse*, 4 Whart. 130.]

(i) *Solomons v. Lyon*, 1 East, 369; 3 *Wentw. Index*, xiv.

(k) *Chapple v. Durston*, 1 Cr. & J. 1.

held the plaintiff should merely deny the set-off, and not reply *nulli record.* (l)

As the statute 4 & 5 Ann. (m) does not extend to *replications*, and the statutes which give the plea of set-off do not specify *how* the plaintiff is to reply, the plaintiff cannot reply several distinct answers to the whole or the same part of a plea of set-off (m¹) When the *court of conscience act* has been pleaded, the plaintiff may deny the residence of the defendant within the jurisdiction, or may allege that more than 40s. &c. was due. (n)

* When the *statute of limitations* was pleaded, either that the defendant did not undertake, or that the cause of action did not accrue, within six years "before the exhibiting of the plaintiff's bill," and the plaintiff could prove a promise or acknowledgment within that time, the replication might deny the *plea generally*, and conclude to the country; (p) but if the time of issuing the first writ in the action were material, it must have been replied specially, as in the case of a tender; and if continued process were stated, the return of the first must have been shown; but this did not seem necessary when the plea stated "before the commencement of the suit," instead of "exhibiting the bill," (q) though a special replication was in general advisable, because it might reduce the proof to be adduced by the plaintiff on the trial. (q¹) The replication might also have been that the plaintiff or the defendant was abroad when the cause of action accrued, and that the action was commenced within six years after his first return; (r) and any other circumstance which brought the case within either of the exceptions mentioned in the statute should have been replied. (s) As the uniformity of process

Not two replications to same ground of defence.

Replication to statute of limitations.

(l) Glynn v. Thorpe, 1 B. & Ald. 153.

(m) 4 Anne, c. 16.

(m¹) [See Levering v. Rittenhouse, 4 Whart. 130.]

(n) Post, vol. ii.; 3 Wentw. Index, xviii.

(p) This is stated by Saunders to be an anomalous case, the plaintiff being bound to do more than fully answer the plea. [See Bargamin v. Poitiaux, 4 Leigh, 412.]

(q) Beardmore v. Rattenbury, 5 B. & Ald. 452; 1 D. & R. 27, S. C.

(q¹) [See Satterlee v. Sterling, 8 Cowen, 232; Livingston v. Ostrander, 9 Wend. 306. To several counts on distinct promises, the defendant pleaded one plea of the statute of limitations. A replication, that one of the promises is within an exception in the statute, is good. Perkins v. Burbank, 2 Mass. 81.]

(r) Plummer v. Woodburne, 4 B. & C. 625. [See Harper v. Hampton, 1 Harr. & J. 453; Craig v. Brown, Peters C. C. 443.]

(s) [Jarvis v. Pike, 11 Abb. Pr. (N. S.) 398.] See the instances, 3 Wentw. Index, xx. &c. See, as to replying fraud, Clark v.

Hougham, 2 B. & C. 149. [In an action on a breach of contract in making a turnpike road, the defendant set up the statute of limitations, the plaintiff replied fraud and deceit in the execution of the work, and that the action was commenced within six years after the discovery of the fraud; the court held the replication to be good. First Massachusetts Turnpike Corp. v. Field, 3 Mass. 201. And although not the universal, it seems to be the prevailing rule in the United States, that to a plea of the statute of limitations, in an action on the case for fraud, it is sufficient for the plaintiff to reply generally, that he did not discover the fraud until within six years. Homer v. Fish, 1 Pick. 435, and numerous cases cited; 2 Chitty Contr. (11th Am. ed.) 1235, note (f). In Massachusetts, it is provided, that if any person liable to any of the actions mentioned in the chapter of limitations of personal actions, fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years af-

act, 2 W. 4, c. 39, now declares that the issuing of the writ of summons shall be considered in all cases to be the commencement of the action, the plea of the statute of limitations will always be that the defendant did not promise or that the causes of action did not accrue within six years *next before the commencement of the suit*; and no special replication showing the time of commencing the action can be required.

When the alleged matter of defence is to be denied it has been usual in the replication to traverse the *most material part*; but there are cases where *all the grounds* of defence may conjunctively be traversed without rendering the replication bad for multifariousness; thus to a plea of delivery of a pipe of wine in satisfaction, the replication may traverse as well the delivery as the acceptance, (t) and although it was formerly doubted whether a replication *de injuriâ* in assumpsit was not too comprehensive, (u) recent decisions have now established that it is sufficient. (x) If the plea in effect deny or show that no valid contract or promise was ever made, or claim for the defendant an *interest* in the goods stated in the declaration, then a replication *de injuriâ*, or *that defendant broke his promise of his own wrong*, without the cause stated in the plea, is insufficient, * because, in the first case, the plea in effect was that the defendant *never undertook*, and therefore it was illogical to reply that he broke his promise; (y) but if the plea merely state in effect *an excuse* for the breach, then such a general replication is admissible. (z) The courts have so decided in several cases, on the *general principles of pleading*, and not on the consideration of the convenience of permitting such a replication; (z) but the applicability of that general replication will presently be fully considered.

IN DEBT.

In actions of debt on *simple contract*, the replications have always been and are to be substantially the same as in the action of assumpsit. If to debt on a *specialty*, fraud or duress be pleaded, the plaintiff may reply that it was duly or fairly obtained, (a) or if infancy be pleaded he denies the plea, (b)

IN DEBT.
On simple contract and on specialties.

ter the person entitled to bring the same discovers that he has such cause of action, and not afterwards. Genl. Sta. c. 155, § 12; thus giving to all cases coming within this act the same period of six years limitation after discovery of the fraud, without regard to the previous different periods of limitation. As to what amounts to fraudulent concealment in such cases, see *Nudd v. Hamblin*, 8 Allen, 130; *Cole v. McGlathry*, 9 Greenl. 131; *McKown v. Whitmore*, 31 Maine, 448; *Farnam v. Brooks*, 9 Pick. 244; *Dodge v. Essex Ins. Co.* 12 Gray, 65, 71; *Rouse v. Southard*, 39 Maine, 404; *Way v. Cutting*, 20 N. H. 187. In New York and some other states, the replication of concealed fraud

seems not to be allowed. 2 Chitty Contr. (11th Am. ed.) 1235, note (l), and cases cited.)

(t) *Webb v. Weatherby*, 1 Bing. N. C. 502; 1 Hodges, 39, S. C.

(u) *Whittaker v. Mason*, 2 Bing. N. C. 359; *Crisp v. Griffiths*, 3 Dowl. 754, 755; 1 Gale, 106, 227, S. C.

(x) *Griffin v. Yates*, 2 Bing. N. C. 579; *Isaac v. Farrar*, 1 M. & W. 65; 4 Dowl. 750, S. C.; and see *post*, 635, note (k).

(y) *Solly v. Neish*, 4 Dowl. 248.

(z) *Griffin v. Yates*, 2 Bing. N. C. 579; *Isaac v. Farrar*, 1 M. & W. 65; 4 Dowl. 750, S. C.; and see *post*, 635, note (k).

(a) Com. Dig. Pleader, 2 W. 19, 20.

(b) *Post*, vol. ii. 408.

or to a plea of usury, gaming, &c. traverses the illegality of the contract. (c) Replications to a plea of tender resemble those in assumpsit; (d) and to a plea of set-off to debt on bond, the replication may either deny the subject-matter of the defendant's set-off, or allege that more was due on the bond than the sum mentioned in the plea. (e) The only replication to a plea of *solvit ad* or *post diem* is a denial of the payment; (f) and if to debt on an annuity bond or deed it be pleaded that no memorial was enrolled containing the names of the witnesses, &c. the replication sets out the memorial *verbatim*, and states that it was duly enrolled. (g) If to debt on a bail bond by the assignee of the sheriff, the defendant has pleaded ease and favor, the plaintiff should reply, stating that it was duly executed, and deny the ease and favor; (h) or if the action be in the name of the sheriff, and the bond is not set forth in the plea, the plaintiff should pray that the bond may be enrolled, and then set it out, and state that he was sheriff, &c. and the arrest of the defendant, and that the bond was made to the plaintiff as sheriff, and traverse the ease and favor; (i) and to a plea of release, it is sufficient to deny it in the replication. (k)

At common law, and independently of the statute 8 & 9 W. 3, c. 11, s. 8, it is frequently necessary in a bond for performance of covenants, where the defendant has pleaded performance and the * plaintiff has not assigned the breach in his declaration, (l) to deny the effect of the plea, and show a particular breach. The rule is, that in all cases (except in the case of an award, which stands upon a particular ground), when the defendant pleads matter of excuse, which admits a non-performance, it is sufficient if the plaintiff deny the plea, and he need not assign a breach in his replication; but it is otherwise where the defendant has pleaded performance, or, in other words, where the plea does not put in issue any particular fact or breach; (m) in the latter case, to a plea of general performance of the condition of the bond, the replication must state the breach with particularity, and should conclude with a verification, in order that the defendant may have an opportunity of answering it. (n)

(c) *Post*, vol. ii. 395.

(d) *Ib.* 471.

(e) *Symmons v. Knox*, 3 T. R. 65; *post*, vol. ii. 462, 465.

(f) *Post*, vol. ii. 443. See *Turner v. M'Namara*, 5 Moore, 198; 2 Chit. R. 697, S. C. [See *Nadenbousch v. M'Rae*, Gilmer, 228.]

(g) *Post*, vol. ii. 300.

(h) *Post*, vol. ii. 310; 1 Saund. 159; Com. Dig. Pleader, 2 W. 25.

(i) *Blewet v. Appleby*, Lutw. 680, 685; 2 Saund. 60 a, note (3).

(k) *Fletcher v. Hennington*, 2 Burr. 944.

(l) It is now considered best not to assign the breach in the declaration. See *post*, 613.

(m) *Shelley v. Wright*, Willes, 12, 13.

(n) *Cornwallis v. Savery*, 2 Burr. 774; 1 Saund. 101, 102; Com. Dig. Pleader, F. 14, 15; *post*, vol. ii. 351. Where the defendant pleads performance to part of the condition only, and matter of excuse for non-performance to the residue, the plaintiff, as to the part of the condition as to which performance is pleaded, may assign one or more breaches; but as to the part of which performance is not pleaded, but is excused, there must be a suggestion; or, if the matter of excuse is traversed, then there must be no assignment, but a suggestion of breaches. *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36, S. C. See *ante*, 383, note (e).

And in the case of bonds affected by the 8 & 9 W. 3, c. 11, s. 8, the plaintiff should state in his replication (or suggest, in case of *non est factum*, &c. pleaded), all the breaches of the bond, &c. on which he means to rely. (o) It must necessarily depend on the nature of the case and the plea, as to what will amount to a plea of a general performance, or one which in effect puts in issue a particular fact. In debt on a bond, conditioned for the performance of an award, if the defendant has pleaded no award, the replication must state the whole of the award *verbatim*, and also assign a breach. (p) If to debt on an indemnity bond, the defendant plead *non damnificatus*, the plaintiff must reply specially, setting forth how he was damnified. (q) Upon a bond conditioned that a collector of poor-rates shall render an account of moneys received, after general performance pleaded, it is necessary to reply that he received moneys to be accounted for. (r) But where to debt on bond the defendant craved oyer, and after reciting a mortgage deed, which showed the condition to be for payment of a sum of money on a day specified, according to the tenor of a proviso contained in the indenture, and for the performance of the covenants therein pleaded, that there were no negative or disjunctive covenants in the indenture, and that he paid the money mentioned in the condition on the day therein specified according to the effect thereof, and performed all the covenants and provisos in the indenture on his part to * be performed; and the plaintiff in his replication took issue generally on the non-payment of the money, and concluded to the country; on special demurrer, assigning for causes that it should have concluded with a verification, and that no breach of the condition was assigned according to the 8 & 9 W. 3, c. 11, s. 8, it was held that such replication was good, as the only point in issue was the payment of the money, and as the plaintiff had therein denied the whole substance of the defendant's plea. (s) And a plea (to a declaration on a bond conditioned amongst other things for the payment of £3,000) that all the sums of money which became due on the bond were paid, may be replied to generally by a general denial of the words of the plea, without assigning any breach. (t) The mode of framing the replication will be hereafter considered. (u)

Before the passing (x) of the 8 & 9 W. 3, c. 11, s. 8, the plaintiff in

(o) See 1 Saund. 58, note (1); 2 Saund. 187 a, note (2); De la Rue v. Stewart, 2 New Rep. 362; Cardozo v. Hardy, 2 Moore, 220; Homfray v. Rigby, 5 M. & Sel. 60. [See Reed v. Drake, 7 Wend. 345.]

(p) Shelley v. Wright, Willes, 12; 2 Saund. 62 b, note (5); 1 Saund. 103, note (1); note (4), 317. See the mode, Serra v. Wright, 6 Taunt. 45, 47. [See Gihon v. Levy, 2 Duer, 176.]

(q) Post, vol. ii. 354, note (n).

(r) Serra v. Wright, 6 Taunt. 45; 1 March. 441, S. C., *semble*, overruling Wil-

cocks v. Nicholls, 1 Price, 109; and see Jones v. Williams, Dougl. 214. As to replication, rejoinder, surrejoinder, &c. see Calvert v. Gordon, 7 B. & C. 809.

(s) Darbyshire v. Butler, 5 Moore, 198.

(t) Turner v. M'Namara, 2 Chit. Rep. 697.

(u) See post, vol. ii. 20; Tombs v. Painter, 13 East, 1; Parkes v. Middleton, 1 Lutw. 421; Cornwallis v. Savery, 2 Burr. 772; Barton v. Webb, 8 T. R. 459.

(x) See the reason explained, *ante*, 249.

an action on a bond, with a condition for the performance of anything, could only have assigned one breach, and under that assignment was entitled to the full penalty of the bond ; but now by the above statute it is enacted, " that in an action upon a bond, or any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing, contained, the plaintiff *may assign as many breaches* of the covenants and agreements as he shall think fit, (x¹) and the jury, upon the *trial* of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also *damages* for such of the said *breaches* so to be assigned as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions." Where the defendant does not plead, the statute provides, " that if judgment shall be given for the plaintiff on *demurrer*, or by *confession* or by *nil dicit*, the plaintiff *may suggest* upon the roll as many breaches as he shall think fit ; " and upon such suggestion a writ of inquiry is to be executed before the judge at the assizes, or at *nisi prius*, according to the *venue*, to ascertain the *truth of the breaches*, and to assess the plaintiff's *damage*. (y) This statute is compulsory on the plaintiff to proceed in the method it prescribes ; (z) and under the act the breaches must be assigned as at common law, not merely in the words of the condition, but specially stating the facts. (a) At

Whether to state breach of condition in the declaration or not until replication.

one time it was considered advisable to state the breaches in the declaration, because it was supposed that if the * defendant should plead *non est factum* or any other plea on which the plaintiff might at common law have taken issue in his replication, without assigning a breach, it would be incorrect to assign a breach in a replication to such a plea : but the better opinion now is, *that the breaches should not be stated in the declaration*, (a¹) but reserved for the replication, because the defendant in rejoining can only present one answer to each breach, whereas in pleading to the declaration he may answer each breach by any number of pleas ; and if the defendant plead any plea on which the plaintiff might at common law have taken an issue in his replication, without assigning a breach of the condition of the bond, the plaintiff may

(x¹) [Several breaches may be assigned in the same count. *United States v. Truedell*, 2 Bond, 78 ; *Genl. Sts. Mass. c. 129*, § 2, pt. 10 ; *Form* § 87.]

(y) There are also provisions that the proceedings shall be stayed on payment of the sum really due, with costs, and that the judgment shall be a security for *future* breaches on a further suggestion being entered, &c.

(z) 1 *Saund.* 58 ; 2 *Saund.* 107 a, note (2) ; *Drage v. Brand*, 2 *Wils.* 377 ; *Sayer on Damages*, 67, S. C. ; *Goodwin v. Crowle*, *Cowp.*

337 ; *Tidd's Prac.* 9th ed. 584 ; *Tombs v. Painter*, 13 *East*, 3, note (a). The statute does not bind the crown. *Rex v. Peto*, 1 *Y. & J.* 171.

(a) *Plomer v. Ross*, 1 *Marsh.* 95 ; 5 *Taunt.* 386, S. C.

(a¹) [In debt on bond conditioned for the performance of duties, in *Indiana*, the breaches must, under act of 1847, be assigned in the declaration. *State v. Harrey*, 8 *Blackf.* 527. So under practice act of *Massachusetts*. *Genl. Sts. c. 129*, § 2, pt. 10.]

still take issue, and enter a distinct and separate suggestion in the nature of an assignment of breaches under the statute, though he cannot *incorporate* such issue and such suggestions in one and the same replication. (b) If the defendant plead any plea which makes it necessary for the plaintiff at common law to assign a breach in the replication, as for instance, general performance, the plaintiff must still assign the breach in the replication, with this difference, that he may now assign several breaches under the statute, whereas at common law he could only assign one. (b¹) If only one breach be assigned in the replication, it is not necessary to state that it is assigned "according to the form of the statute," and it is doubtful whether that allegation be necessary in any case. (c) If issue be joined on *non est factum* and plea of fraud, and there be no suggestion of breaches, the judge will try the issues, but refuse immediate execution, and leave the plaintiff to suggest breaches, &c. (d) The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial breaches. (e)

Where there is *no plea* to the declaration, and consequently *no issue* to be tried, judgment, either upon demurrer or by default, is to be signed for the penalty, as at common law, and the plaintiff suggests breaches on the roll, of which a copy should be given to the defendant, with notice of inquiry for the sittings or assizes, and a writ of inquiry is executed, and upon that there is an award of execution. (f)

This statute does not extend to a bond conditioned for the payment of a sum certain at a day certain, or to a *post obit* bond; (g) nor a *common money bond; (h) nor a warrant of attorney payable by instalments, (i) though a bond be also given; (k) nor to a bail bond, (l) nor a petitioning creditor's bond, (m) nor a replevin bond. (n) But *bonds for the payment of money by instalments*, (o) or of annuities, or for the performance of an award, are within the statute. (p) And

(b) See 2 Saund. 187 a, &c.; and note (c) by the editors of the 5th ed.; *Homfray v. Rigby*, 5 M. & Sel. 60; *Darbyshire v. Butler*, 5 Moore, 198; *Plomer v. Ross*, 1 Marsh. 95; 5 Taunt. 386, S. C.; *Ethersey v. Jackson*, 8 T. R. 255; *De la Rue v. Stewart*, 2 New Rep. 862. See, however, *Cardozo v. Hardy*, 2 Moore, 220; *Tidd*, 9th ed. 686. See, however, *Barwise v. Russell*, 3 C. & P. 608, why better in declaration.

(b¹) [Where several breaches are assigned in the declaration, if one be bad, it does not vitiate the others. *Cuyler v. Rochester*, 12 Wend. 169; *Martin v. Williams*, 13 John, 264.]

(c) *Tombs v. Painter*, 13 East, 1; 2 Saund. 187 a, &c. 5th ed.

(d) *D'Aranda v. Houston*, 6 C. & P. 512, 514.

(e) *Stobert v. Goodfellow*, 1 N. & Man. 202.

(f) *Tidd*, 9th ed. 585. See forms &c. *post*, vol. ii.

(g) *Murray v. Earl of Stair*, 2 B. & C. 82, 89; 3 D. & R. 278, S. C.; *Wardell v. Fernor*, 2 Campb. 285; *Cardozo v. Hardy*, 2 Moore, 220.

(h) 4 Ann. c. 16, s. 13; 1 Saund. 58, 5th ed.

(i) *Cox v. Rodbard*, 3 Taunt. 74; *Kinnersley v. Mussen*, 5 Taunt. 264; *Tilby v. Best*, 16 East, 164; *Shaw v. The Marquis of Worcester*, 6 Bing. 385; *Hurst v. Jennings*, 5 B. & C. 656.

(k) *Austerbury v. Morgan*, 2 Taunt. 195.

(l) *Moody v. Pheasant*, 2 B. & P. 446.

(m) *Smith v. Edmonson*, 3 East, 22; *Smith v. Broomhead*, 7 T. R. 300.

(n) *Middleton v. Bryan*, 3 M. & Sel. 155.

(o) *D'Aranda v. Houston*, 6 C. & P. 511.

(p) See *Walcott v. Goulding*, 8 T. R. 126; *Willoughby v. Swinton*, 6 East, 550; *Welch*

although a bond be on the face of it a common money bond, yet if there be a concurrent instrument showing that it is in substance a bond intended to secure the performance of covenants, &c. within the meaning of the statute, it is necessary to suggest or assign breaches in pursuance of the act, although the bond does not refer to the instrument which explains it. (q)

The 3 & 4 W. 4, c. 42, s. 5, gives a special replication of a written acknowledgment or part payment to a *plea of the statute of limitations* to debt on an *indenture*, specialty, or recognizance, under the third section.

To a plea of *nul tiel record* in debt on a record, the replication must state that there is such record, and conclude *prout patet per recordum*, with a prayer that it may be inspected, &c. (r) If to debt on a recognizance of bail, the defendant has pleaded *no ca. sa.* against the principal, the replication must state the *ca. sa.* and conclude with a verification; (s) and where the defendant has pleaded the death of the principal, before the return of a *ca. sa.*, the writ and return must be replied, and it must be averred that the principal was then living. (t) If to debt on a *statute* the defendant plead a prior action depending, or a compromise by rule of court, &c. the plaintiff may traverse the fact, or reply *per fraudem*. (u)

IN COVENANT.

In covenant, as the declaration states the breach, and the plea usually denies it, and concludes to the country, a special replication does not so often occur as in *assumpsit* and some other actions. (x)

*IN ACTIONS AGAINST EXECUTORS, &c.

In actions, whether of *assumpsit*, debt, or covenant, against an executor or administrator, as such, to the plea of *ne unques* executor or administrator, the plaintiff may reassert the fact. (y) To the plea of *plene administravit*, if untrue, the plaintiff should reply, that at the time of the commencement of the suit the defendant had assets; (z) or if assets had come to his hands since the commencement of the suit, and before the plea, (a) or if at the time the defendant first had notice of the action he had assets, but unduly administered

v. Ireland, 6 East, 613; 2 Saund. 187, note (c); Tidd, 9th ed. 584; Middleton v. Bryan, 8 M. & Sel. 156.

(q) Hurst v. Jennings, 5 B. & C. 650; 8 D. & R. 424, S. C.; Quin v. King, 1 M. & W. 42; 1 T. & G. 410, S. C.

(r) Com. Dig. Pleading, 2 W. 13; post, vol. ii. 418; [Share v. Becker, 8 Serg. & R. 239; Bone v. McGinley, 7 How. (Mis.) 671.]

(s) Henderson v. Withy, 2 T. R. 576; post, vol. ii. 454.

(t) Post, vol. ii. See Peterdorff on Bail.

(u) Post, vol. ii. 388.

(x) See the forms, post, vol. ii. 20; 5 Wentw. Index, cii. to cxliv.; [Morris v. Wadsworth, 11 Wend. 100.]

(y) Post, vol. ii. 382.

(z) Ib. 384.

(a) Mara v. Quin, 6 T. R. 10; 3 Wentw. 221.

them afterwards, these facts may be replied specially. (*b*) So, if the plea be *plene administravit*, except a sum not sufficient to satisfy bonds or judgments outstanding, the plaintiff may reply that the defendant had assets *ultra*; (*c*) or that the judgments mentioned in the plea were obtained by fraud and covin, (*d*) or suffered fraudulently for more than was due, (*e*) or that the bond pleaded as an outstanding debt is satisfied, and kept on foot by fraud. (*f*) If the plaintiff cannot deny the plea of *plene administravit* he should pray judgment of assets *quando acciderint*, either generally or specially; as, "which, after satisfying moneys due on the outstanding judgments, bonds, &c. mentioned in the defendant's plea, shall come to the defendant's hands as executor, &c. to be administered;" (*g*) or if *plene administravit præter* a sum acknowledged to be in hand has been pleaded, the plaintiff should pray and take judgment *pro tanto*, and of assets *quando acciderint* as to the residue, in case the plea be true. If the defendant has pleaded the general issue, or any other plea denying the debt or cause of action, with the plea of *plene administravit*, the plaintiff must proceed to trial to establish his debt, and on the prayer of judgment of assets *quando*, &c. upon the plea of *plene administravit*, there is a stay of judgment till the determination of the issue. But where the debt has not been denied, and the defendant has merely pleaded *plene administravit* generally or specially, and the plaintiff prays judgment of assets *quando acciderint* thereon, there should be an entry of that judgment immediately, and an award of an inquiry to ascertain the amount of the plaintiff's demand, unless the defendant has by *cognovit* confessed the same in order to save the expense of an inquiry; (*h*) or unless in reference to the form of action the judgment is final in the first instance, as in debt, &c. On a plea of *plene administravit præter*, the plaintiff is entitled to judgment of assets *in futuro quando* for costs as * well as for the debt, (*k*) and the plaintiff should not take issue on the plea, for if he do, and the plea be found for the defendant, the latter will be entitled to all the costs. (*l*)

In debt against an heir on the bond of his ancestor, to a plea of *rien per descent* the plaintiff may reply either that the defendant had such assets at the time of the commencement of the suit, (*m*) or that he had them between that time and the death of his ancestor, (*n*)

(*b*) *Post*, vol. ii. 384.

(*c*) *Ib.* 384.

(*d*) *Ib.* 388; *ante*, 609.

(*e*) *Pease v. Naylor*, 5 T. R. 82; *post*, vol. ii. 387, 388.

(*f*) *Post*, vol. ii. 387; *Com. Dig. Pleader*, 2 D. 9.

(*g*) *Ib.* 384.

(*h*) *Post*, vol. ii. 384. See *ante*, 517.

(*k*) *Cox v. Peacock*, 2 Scott, 125; 4 Dowl. 134, S. C.

(*l*) *Iggulden v. Terson*, 2 Dowl. 277.

(*m*) *Post*, vol. ii. 400; *Com. Dig. Pleader*, 2 E. 2.

(*n*) *Ib.* 400; *Redshaw v. Hester*, 5 Mod. 122, 123. [And the replication in this case may conclude with a verification. *Labagh v. Cantine*, 13 John. 272.]

or if *rien præter* a reversion be pleaded the plaintiff may take judgment, &c. *cum acciderint*. (o)

IN CASE.

In an action on the case for a libel or verbal slander, the general replication *de injuriâ sui propriâ abque tali causa* (the nature of which will be hereafter fully considered), is sufficient to a plea of justification when untrue; (p) unless the plea allege that the plaintiff committed perjury in a court of record, when this general replication would be improper, because it would refer the matter of record to be tried by the jury. (q) So if in an action on the case for slander of title, if the defendant has pleaded that he spoke them in defence of his own title, the replication *de injuriâ* is incorrect on special demurrer, though good after verdict. (r) But if the plea be true, the plaintiff must reply some matter in confession and avoidance; as that after the commission of the crime, and before the speaking, &c. he was pardoned, &c. (s)

To a plea by a sheriff in an action for *an escape*, that the escape was negligent, and that the party was taken on fresh suit, the plaintiff may reply that the escape was voluntary, or allege that the party was not, after the retaking, kept in safe custody. (t) If accord and satisfaction, or the statute of limitations be pleaded in case or trover, the replications will resemble those in *assumpsit*. (u)

* PLEAS IN BAR IN REPLEVIN.

It has been supposed that in *replevin de injuriâ* never occurs; (x) but this is not so; and to an avowry under a distress for an arrears of a poor rate a general plea in bar *de injuriâ* is sufficient; (y) but by the statute (z) he may in general, with leave of the court, plead several *pleas in bar*. If the defendant has pleaded *cepit in alio loco*, with an avowry or cognizance for a return, the plaintiff cannot traverse any matter in the avowry or cognizance, but must take issue on the traverse of the place or amend his declaration; but

(o) Com. Dig. Pleader, E. 4, 5.
(p) 1 Saund. 244, note (7); Com. Dig. Pleader, 2, L. 4; *post*, vol. ii.; [Allen v. Crofoot, 7 Cowen, 46.]

(q) Moor & Savage's case, Leon. 81; Parker & Burton's case, Leon. 102; Com. Dig. Pleader, F. 20.

(r) The Earl of Northumberland v. Byrt, Cro. Jac. 163, 164; *post*, 635, note (k).

(s) Dan. 163; Cuddington v. Wilkins, Moore, 872. Where in an action for a libel in a newspaper, or other periodical, the defendant pleads a special plea under the 6 & 7 Vict. c. 96, s. 2, it is competent to the plaintiff to reply generally, denying the whole of such plea.

(t) Griffiths v. Eyles, 1 B. & P. 413, 416, 417; 1 Saund. 35, note (1); Bonafons v.

Walker, 2 T. R. 127; White v. Jones, 5 East, 293; Chambers v. Jones, 11 East, 406.

(u) *Ante*, 608, 609, 610.

(z) Finch's Law, 396; Jones v. Kitchen, 1 B. & P. 76; 2 Saund. 284 c, note (3). [See Hopkins v. Hopkins, 10 John. 369. But if pleaded it can only be taken advantage of by demurrer. Hopkins v. Hopkins, 10 John. 369; Lytle v. Lee, 5 John. 112.]

(y) Bardons v. Selby, 1 C. & M. 500, in exchequer chamber, and S. C. in K. B. 3 B. & Ad. 2. But *de injuriâ* is a bad replication to a plea justifying an entry as landlord to distrain. Hooker v. Nye, 4 Tyr. 777.

(z) 4 Anne, c. 16

if the defendant *had* them in the place mentioned in the declaration, though he *took* them elsewhere, the plaintiff may safely take issue; (*a*) and to any cognizance, the plaintiff may traverse that the defendant was bailiff, concluding to the country. (*b*)

To an avowry or cognizance for *rent*, the plaintiff may in one plea in bar deny the demise or tenancy, (*c*) and in another, that any part of the rent was in arrear, (*d*) concluding each to the country; (*e*) or he may plead payment of rent to a ground landlord, or prior incumbrancer, or of land or property tax in respect of the premises, though he cannot avail himself of any other set-off. (*f*) So a party may plead a former distress and satisfaction under it; (*g*) eviction is also a good plea in bar. (*h*) But since the statute 11 Geo. 2, c. 19, when the defendant avails himself of the general avowry, the plaintiff cannot in terms plead *nil habuit in tenementis*; though he may traverse the tenancy, which, if the avowant claims under derivative title and has never received rent, will put such title in issue. (*i*) So where the plaintiff admits the tenancy and that part of the rent was in arrear, he may plead *rien en arriere* as to part, and a tender of the residue. (*k*)

To an avowry or cognizance by a freeholder, or a copyholder, or his tenant, for a *distress damage feasant*, the plaintiff may deny his * title, and conclude to the country; or state his own title specially,

(*a*) 1 Saund. 347, note (1); *post*, vol. ii. 683; Ast. Ent. 475. And as to the pleas in bar connected with the *place*, see 1 Saund. 347, note (1); Com. Dig. Pleader, 3 K. 11-29.

(*b*) *Post*, vol. ii. 688; *Horne v. Lewin*, 1 Ld. Raym. 641; Com. Dig. Pleader, K. 14.

(*c*) *Post*, vol. ii. 688; Com. Dig. Pleader, 3 K. 16, 20 *b*.

(*d*) *Ib.* [In Ohio, in replevin, the plaintiff may put in a double replication. *Cotter v. Doty*, 5 Ohio, 393. See *Middleton v. Quigley*, 7 Halst. 351. A plea of no rent in arrear is an admission of the demise and of the title of the defendant, as laid in the avowry. *Alexander v. Harris*, 4 Cranch, 299; *Hill v. Miller*, 5 Serg. & R. 255. Hence the advantage of also pleading *non demisit*. The general principle is, that anything may be given in evidence under the general issue, which shows that no right of action ever existed; and in some cases facts may be shown which prove that no right of action existed at the commencement of the suit. In debt for rent the defendant may show an eviction by the plaintiff, under the plea of *nil debet*. But in covenant an eviction cannot be proved unless pleaded. *Riens en arriere* is the general issue to an avowry for rent, and under it an eviction may be shown. *Lewis v. Payn*, 4 Wend. 423. See 1 Chitty Contr. (11th Am. ed.) 464, and note (*q*), 512, note (*b*); 2 *Ib.* 1081; *Shumway v. Collins*, 6 Gray, 227; *Nicholson v. Munigle*, 6 Allen, 215; *Fuller v. Swett*, 6 Allen, 219, note; *Morrison v. Chadwick*, 7

C. B. 266; *Dyett v. Pendleton*, 8 Cowen, 727; 8 C. 4 Cowen, 581. The subject of partial eviction is elaborately treated by Gray J. in *Royce v. Guggenheim*, 106 Mass. 201.]

(*e*) *Horne v. Lewin*, 1 Ld. Raym. 641; 1 Saund. 103 *b*.

(*f*) *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524; *Bradbury v. Wright*, Dougl. 624, 625; *Laycock v. Tufnell*, 2 Chit. R. 531; *Dyer v. Bowley*, 2 Bing. 94. And as to pleas of payment of ground rent, see *Andrew v. Hancock*, 1 B. & B. 37; 3 Moore, 287, S. C. See *Stubbs v. Parsons*, 3 B. & Ald. 516. As to property tax, *Denby v. Moore*, 1 B. & Ald. 123.

(*g*) *Hudd v. Ravener*, 5 Moore, 542; *Lingham v. Warren*, 4 Moore, 409; *Lear v. Edmonds*, 1 B. & Ald. 157.

(*h*) See note (*d*), *supra*.

(*i*) *Syllivan v. Stradling*, 2 Wils. 208; *Cooke v. Loxley*, 5 T. R. 4; 2 Saund. 284 *d*; *Carvick v. Blagrove*, 4 Moore, 303; *Alchorne v. Gomme*, 2 Bing. 54; *Fenner v. Duplock*, 2 Bing. 19; *Sapsford v. Fletcher*, 4 T. R. 511. *Non tenuit* is not pleadable to a cognizance for rent in arrear, under a demise of a receiver in chancery. *Dancer v. Hastings*, 4 Bing. 2.

(*k*) *Post*, vol. ii. 683; Clift. Ent. 646; Com. Dig. Pleader, 3 K. 20. [There can be no such thing as a general issue to an avowry; but some special point must be traversed. *Hill v. Miller*, 5 Serg. & R. 357.]

and conclude with a traverse; though the former seems preferable. (*m*) So the plaintiff may in his plea in bar state a demise to himself from the defendant; (*n*) or a right of common in the *locus in quo*, either as a freeholder or copyholder or as his tenant. (*o*) In general, a freeholder claims a right of common by *prescription*; (*p*) and a copyholder grounds the right upon a *custom* within the manor, either for all copyholders within the manor, or for the tenant of the defendant's land in particular. (*q*) Where a copyholder claims common or other profit in the soil of a stranger, which is not parcel of the manor, he must prescribe in the name of the *lord*, viz. that the lord of the manor and his ancestors, and all those whose estate he hath, have immemorially had common, &c. in the *locus in quo* for themselves and their customary tenants. (*r*) So the plaintiff may plead in bar a right of way over the *locus in quo*; (*s*) or in excuse for the cattle having been in the *locus in quo*, he may plead defect of fences, which the defendant ought to have repaired; (*t*) so admitting that the cattle trespassed in the *locus in quo*, the plaintiff may traverse that the distress was made while the cattle were *damage feasant*; (*u*) or may plead a tender before the impounding. (*x*) It should seem that in the case of a distress *damage feasant*, the plaintiff might plead in bar, that the avowant, after making the distress, *used* the cattle, or otherwise became a trespasser *ab initio*. (*y*)

REPLICATIONS IN TRESPASS.

In *trespass to persons*, if the defendant has pleaded *son assault demesne*, and self-defence, or a defence of a father, mother, son, &c. or any other plea merely in excuse of an injury to the person (and not a justification under process of a court of record), the replication or general traverse *de injuriâ* (*y*¹) or *de son tort demesne*, the qualities of which will be explained hereafter, is in general proper, if the plea be wholly untrue. (*z*) And this *general*

REPLICATIONS IN TRESPASS.

(*m*) *Post*, vol. ii. 683; 2 Saund. 206 a, note (22); 1 Saund. 103 b; 1 Co. 63, 64.

(*n*) *Post*, vol. ii. 683.

(*o*) *Ib.*; Com. Dig. Pleader, 3 K. 24.

(*p*) *Post*, vol. ii. 640, 642; Com. Dig. Pleader, 3 K. 24; 1 Saund. 348, note (10).

(*q*) *Ib.*; 1 Saund. 348, notes (8), (11).

(*r*) 1 Saund. 349, note (11); Com. Dig. Pleader, 3 K. 24. See the forms referred to, *post*, vol. ii.

(*s*) Com. Dig. Pleader, 3 K. 24; *post*, vol. ii. 683.

(*t*) *Post*, vol. ii. 651; 2 Saund. 284 c, 285, note (4), 289, note (7); *Dovaston v. Payne*, 2 H. Bl. 527.

(*u*) *Clement v. Milner*, 3 Esp. Rep. 95.

(*x*) *Post*, vol. ii. 645; Com. Dig. Pleader, 3 K. 23; Bul. N. P. 60; *Allen v. Bayly*, Lutw. 1596; *Anscomb v. Shore*, 1 Campb. 285; 1 Taunt. 261, S. C.; *et vide* *Sheriff v. James*,

1 Bing. 341; 8 Moore, 234, S. C.; *Browne v. Powell*, 4 Bing. 230; 2 Moore, 454, S. C.

(*y*) Com. Dig. Pleader, 3 K. 20; Bac. Abr. Trespass, B.; *Dye v. Leatherdale*, 3 Wils. 22; *Lucas v. Nockells*, 1 M. & P. 802; *ante*, 155; [*Hopkins v. Hopkins*, 10 John. 369. The plaintiff may plead to an avowry an abuse of the distress, or any matter showing the defendant's proceedings to have been irregular and illegal. *Osgood v. Green*, 30 N. H. 210.]

(*y*¹) [The general replication *de injuriâ* is good only where the defendant pleads matter of excuse. See *Lytle v. Lee*, 5 John. 112; *Hyatt v. Wood*, 4 John. 150; *Plumb v. M'Crea*, 12 John. 491; *Strong v. Smith*, 3 Caines, 164; *Hannen v. Edes*, 15 Mass. 347; *Coffin v. Bassett*, 2 Pick. 359; *Cowper v. Garbett*, 13 M. & W. 33.]

(*z*) *Post*, vol. ii. 707; Com. Dig. Pleader, F.

replication will suffice, though title be alleged as inducement; as if to a declaration for an assault * and battery, the defendant plead that he was possessed (or, according to some cases, seized in fee) (a) of a close, and had cut his corn, and that the plaintiff came to take it away, and the defendant, in defence thereof, assaulted the plaintiff, *de son tort* is a good replication. (b) But if the plea be true, and the plaintiff did in fact commit what in point of law amounted to the first assault, *but can justify it, he must reply specially*, confessing and avoiding the plea; as if the plaintiff did in fact make the first assault in defence of his father, son, &c. or to turn the defendant out of his house, whereupon the defendant assaulted and beat the plaintiff, *this answer to the plea must be replied specially*. (c) So, if the defendant has pleaded *son assault demesne* in defence of the possession of his close, and the plaintiff claim a right of way over it, he must specially reply such right of way, and that he was upon the land in the exercise of such right. (d) It is said, that if the defendant's battery were outrageous, or more than was necessary for *self-defence*, *that matter should be so replied*. (e) And matter in aggravation, or an excess, must be new assigned. (f) So where to assault and battery the defendant pleaded that the plaintiff was his apprentice, and behaved saucily and refused to obey his lawful commands, and that he moderately corrected him, and the plaintiff replied *de injuriâ*, the full court of exchequer held, that under that replication the plaintiff could not insist that the chastisement was immoderate, because that matter should have been specially replied. (g) So, if there be only one count in the declaration, and the defendant has pleaded *son assault*, and there have been two distinct assaults, one excusable and the other not, the plaintiff

18; Taylor v. Markham, Cro. Jac. 224; Yelv. 157, S. C.; Cooper v. Monke, Willes, 54; Cockerill v. Armstrong, Willes, 101; Jones v. Kitchin, 1 B. & P. 80. [See Sampson v. Henry, 11 Pick. 379; M'Dermot v. Kennedy, 1 Harring. 143; Gates v. Loundsbury, 20 John. 427.]

(a) *Post*, 620; *sed quare*, see Cockerill v. Armstrong, Willes, 100, 101.

(b) Com. Dig. Pleader, F. 21; Com. Dig. Pleader, 18; 2 Saund. 295 b, note (1).

(c) *Post*, vol. ii. 697; King v. Phippard, Carth. 280; Leward v. Basillee, 1 Salk. 407; King v. Tebbart, Skin. 387; Dale v. Wood, 7 Moore, 33; Taylor v. Smith, 7 Taunt. 156; and see Sayre v. Rochford, 2 Bl. Rep. 1165, S. P.; and see in general when or not a replication *de injuriâ* is proper. Price v. Peck, 1 Bing. N. C. 386, 387; Hosker v. Nize, 1 Cr., M. & R. 258; *post*, 634, 635, note (k). When the defendant must prove all the grounds of justification stated in his plea. Rees v. Taylor, 1 Harr. 15.

(d) *Post*, vol. ii. 701.

(e) Nevill v. Cooper, 2 Cr. & M. 320; VOL. I. 48

Reece v. Taylor, 1 Harr. & Wol. 15; Price v. Peck, 1 Bing. N. C. 386, 387; Dale v. Wood, 7 Moore, 33; Monprivatt v. Smith, 2 Campb. 176; Dye v. Leatherdale, 3 Wils. 20; Phillips v. Howgate, 5 B. & Ald. 220; *semble*, King v. Tebbart, Skin. 387; Rowe v. Tuttle, Willes, 17; 1 Selw. N. P. 29, note (9); *sed quare*, if not sufficient to reply *de injuriâ*; Gilb. C. P. 154; Weaver v. Bush, 8 T. R. 81. And Lord Tenterden C. J. at nisi prius, signified that he was of this latter opinion; and see Reece v. Taylor, 1 Harrison R. 15, 16, per Littledale J. But see Oakes v. Wood, 2 M. & W. 797, per Parke B.

(f) Monprivatt v. Smith, 2 Campb. 176, 177; Worrall v. Clare, 2 Campb. 629; Cheaseley v. Barnes, 10 East, 73; Dale v. Wood, 7 Moore, 33. As to new assignments, see *post*. If the plaintiff proceeds for an assault committed at a time when the authority given by law and pleaded by the defendant did not exist, a new assignment is necessary. Per Parke B. Oakes v. Wood, 2 M. & W. 797.

(g) Penn v. Ward, 2 Cr., M. & R. 338.

should not reply, but should new assign another assault; (*h*) but if there be several counts in the declaration, equal to the number of assaults, this would be unnecessary and improper. (*i*) The course which the plaintiff should adopt, if the defendant plead that the two * assaults mentioned in different counts are one and the same, and then show matter justifying in the same plea one assault only, has already been pointed out. (*k*) Where the justification is under a writ, warrant, or other process of a court of record, the plaintiff cannot reply *de injuriâ* generally, putting the whole of the plea in issue; (*l*) but must, according to the facts of each particular case, either specifically deny the issuing of the writ, or the making of the warrant, (*m*) or admit the writ or warrant, and reply *de injuriâ* as to the residue. (*n*) If the parties have been guilty of any illegal conduct, as undue violence, or an imprisonment before the issuing, or after the return of the writ, the plaintiff should reply the facts, or new assign; (*o*) and matter which shows that the defendant, by subsequent misconduct became a trespasser *ab initio*, (*p*) should be specially replied. (*q*)

In trespass to *personal* property, where the defendant has in his plea merely justified in his own right the chasing cattle, or removing personal property from a close, &c. whereof he was possessed, the plaintiff may reply *de injuriâ* generally; (*r*) and it appears to have been considered that this replication would also suffice, where, in a similar plea, it is stated that the defendant was seised in fee; (*s*) and although when the defendant had justified as servant of another; (*t*) or under a distress for rent; (*u*) or the taking and impounding, and not merely the chasing of cattle, &c.; (*x*) it has been considered that this general replication will not suffice, that doctrine was doubted, and it has been recently decided that, although the defendant has justified as servant of a third person, *de injuriâ* may be replied. (*y*) And in cases where this general replication

(*h*) *Post*, vol. ii. 674; 1 Saund. 299, note (6).

(*i*) *Ib.* *Ibid.*

(*k*) *Ante*, 429; Gale v. Dalrymple, R. & M. 118.

(*l*) 6 Co. 67 a; Com. Dig. Pleader, F. 19, 20.

(*m*) 1 Saund. 299 b.

(*n*) *Post*, vol. ii. 709.

(*o*) *Post*, vol. ii. 674; 1 Saund. 299, note (6); Searle v. Darford, Lutw. 1436; King v. Tebbert, Skin. 387; Com. Dig. Pleader, 3 M. 16; Atkinson v. Matteson, 2 T. R. 172; Monprivatt v. Smith, 2 Campb. 176, 177; Oakley v. Davis, 16 East, 85; Dale v. Wood, 7 Moore, 33.

(*p*) As to which, see *ante*, 193; [Sterling v. Warden, 52 N. H. 197, 201; The Six Carpenters' case, 8 Co. 146 b; Butman v. Wright, 16 N. H. 219; Hoar J. in Esty v. Wilmot, 15 Gray, 168, 170.]

(*q*) Shorland v. Govett, 5 B. & C. 485;

supra, note (*o*); [Curtis v. Carson, 2 N. H. 539; Hannen v. Edes, 15 Mass. 347.]

(*r*) Taylor v. Eastwood, 1 East, 212; Figgott v. Kemp, 1 C. & M. 197.

(*s*) Taylor v. Eastwood, 1 East, 212; Taylor v. Markham, Yelv. 157; 1 Brownl. 215; Com. Dig. Pleader, F. 21; 2 Saund. 295 a, note (1); Langford v. Waghorn, 7 Price, 670, S. P.; Cooper v. Monke, Willes, 52; Bell v. Wardell, Willes, 202; *sed vide* Cockerill v. Armstrong, Willes, 103; Jones v. Kitchin, 1 B. & P. 80; Chancey v. Win, 12 Mod. 582; and *post*.

(*t*) Cockerill v. Armstrong, Willes, 99; Jones v. Kitchin, 1 B. & P. 80.

(*u*) Cooper v. Monke, Willes, 52.

(*x*) Cockerill v. Armstrong, Willes, 101, 102; Taylor v. Markham, Cro. Jac. 225.

(*y*) Figgott v. Kemp, 1 Cr. & M. 197; and see in general *Bardons v. Selby*, in exchequer chamber, 1 Cr. & M. 500.

might not be bad on demurrer, it may, nevertheless, be advisable, and in some cases necessary, to reply specially; as if there be two tenants in common, and one bring trespass against the other for taking his cattle, to which the defendant pleads that he took them *damage feasant*; in this case, it seems that the plaintiff ought to reply specially that he was tenant in common with the defendant, and so show that he was not a * trespasser. (z) But if the justification be under a *fiery facias*, or other process, the replication must not be *de injuriâ* generally, but must state the particular answer to the plea, as in the case of trespass to persons. (a) Where the answer to a plea *confesses* and *avoids* it, the replication should be special; thus the plaintiff ought to reply his right of common, or defect of fences, to a plea of a distress *damage feasant*; (b) or he may show that the plaintiff converted such distress to his own use or abused it. (c)

In trespass to *real property*, the plaintiff might, to the plea of *liberum tenementum*, reply, (c¹) according to the facts, in either ^{3dly. To} of four ways, 1st, If the name or abutments of the close had ^{really.} been so minutely stated in the declaration that there could be no question what close was alluded to, (d) and the plaintiff's title was inconsistent with the defendant's, as if the plaintiff insist that the *locus in quo* is his freehold, or the freehold of another person, then the replication should deny the defendant's title, by replying, that it is the plaintiff's or the third person's freehold, and not the defendant's, and should conclude to the country; or the replication may merely deny that the close is the defendant's freehold, which latter mode is proper where the plaintiff is not entitled to the freehold; (e) or, 2dly, if the plaintiff derive title under the defendant, then he must not traverse his plea, but, confessing the defendant's title, must reply the lease or some other title under him, concluding with a verification; (f) or, 3dly, if the plaintiff has a middle case, and neither derives a title under the defendant, nor has a title inconsistent with the defendant's, he may reply, that before the defendant had anything in the premises another person was seised and made a lease for years to a person under whom the plaintiff claims, stating his derivative title, without either expressly confessing or denying the defendant's plea, and concluding with a verification; (g) but, 4thly, if the declaration be gen-

(z) Taylor v. Eastwood, 1 East, 218.

(a) Ante, 620. and notes.

(b) Post, vol. ii. 647. See Lucas v. Nockells, 1 M. & P. 783.

(c) Gargrave v. Smith, 1 Salk. 221; Bagshawe v. Goward, Cro. Jac. 147. See Weedling v. Aldrich, 9 Ad. & El. 861; post, vol. ii. 647.

(c¹) [To a plea of *liberum tenementum* the plaintiff cannot reply *de injuriâ*. Hyatt v. Wood, 4 John. 150.]

(d) It is now necessary, by Reg. Gen. Hil. T. 2 W. 4, reg. 5, in a declaration in trespass, to state the abutments or name, or other description of close, or defendant may demur specially.

(e) Lambert v. Stroother, Willes, 225; Cocker v. Crompton, 1 B. & C. 489; 2 D. & R. 719, S. C.; post, vol. ii. 718.

(f) Lambert v. Stroother, Willes, 225; post, vol. ii. 719.

(g) Lambert v. Stroother, Willes, 225, 226

eral, without naming the *locus in quo* or the abutments, and there be any reason to apprehend that the defendant has any land in the same parish, the plaintiff must always have new assigned, setting out the *locus in quo* with more particularity. (*h*) The doctrine of *new assignments* will be considered in a subsequent part of the work.

* Where in trespass *quare clausum fregit* the defendant in his plea claims *an interest in the land* (as a right to distrain for rent in arrear), a replication of *de injuriâ* is bad on special demurrer. (*i*)

It was formerly considered that, if the defendant justified as *servant or bailiff of a freeholder or termor*, the plaintiff could not traverse the defendant's authority, because he would leave unanswered the other parts of the plea, and thereby admit that another is entitled to the possession; though if both parties claimed under the same person, the command was always considered as traversable. (*k*) But now it is settled that the plaintiff may in all cases take issue upon the fact of the defendant's having been authorized to commit the trespass. (*l*) If the defendant in his plea has relied on a possessory title derived from the *seisin in fee* of a stranger, the plaintiff cannot take issue on the matter stated in the plea by way of express color, (*m*) but may deny the demise, &c. to the defendant, without showing any title in himself; (*n*) or may reply that the defendant, before the trespasses were committed, demised the close to the plaintiff; or if the plaintiff deny the title of the party under whom the color is given, he should show his own title, and traverse that stated by the defendant; (*o*) and if the plaintiff insist that the defendant's tenancy has been determined by a notice to quit, or a surrender, or forfeiture, &c. he should reply that matter specially. (*p*)

To a plea of *license*, the plaintiff may reply generally, that the defendant of his own wrong, and without the supposed license, committed the trespasses, concluding to the country; (*q*) or, as it has been considered, if the plaintiff did license the defendant to commit some acts, then he should reply a revocation, or new assign that he brought his action for different trespasses; (*r*) but it seems that if the

(*h*) 1 Saund. 299 *b*, *c*; Steph. 2d ed. 265; Com. Dig. Pleader, 3 M. 34; Goodright v. Rich, 7 T. R. 335; Helwis v. Lomb, 2 Salk. 453; 6 Mod. 119; Lambert v. Stroother, Willes, 223; Hawke v. Bacon, 2 Taunt. 156; Richards v. Peake, 2 B. & C. 918. [See Austin v. Morse, 8 Wend. 477; Collins v. Andrews, 6 Watts, 516;] *post*, vol. ii. 671, *acc.*; Dyer, 23, *contra*. See *post*.

(*i*) Howker v. Nye, 1 Cr., M. & R. 258; 4 Tyr. 777, S. C.; see *post*, 635, note (*k*).

(*k*) Graham v. Peat, 1 East, 245; Thorn v. Shering, Cro. Car. 586; 6 Co. 24 *a*; Trevilian v. Pyne, Salk. 107; 1 Saund. 348 *c*, note (4).

(*l*) Chambers v. Donaldson, 11 East, 65.

(*m*) As to this, see *ante*, 555.

(*n*) Cary v. Holt, 2 Stra. 1238; Goslyn v.

Williams, Fortesc. 378; Farmer v. Fisher, Poph. 1, 2.

(*o*) Farmer v. Fisher, Poph. 2; Com. Dig. Pleader, F. 13; Bourne v. Taylor, 10 East, 189.

(*p*) Taunton v. Costar, 7 T. R. 431; White v. Stubbs, 1 Lev. 307.

(*q*) Barnes v. Hunt, 11 East, 451; *post*, vol. ii. 657, 658; 1 Saund. 103 *b*; Colchester v. Roberts, 4 M. & W. 769.

(*r*) 1 Saund. 300 *a*; 2 Saund. 5, end of note (3). As to replication of a waiver of a forfeiture, see Warrall v. Clare, 2 Campb. 629. In trespass *quare clausum fregit*, the defendant pleaded a right of way over the *locus in quo* from a highway to the plaintiff's house and back, and the plaintiff replied that the defendant enjoyed the right by the leave

license only extended to some of the trespasses, and that other trespasses were committed at different times, and not covered in evidence by the license, then the general replication *de injuriâ* will suffice. (s)

To a plea of *escape of cattle through defect of fences*, which the * plaintiff ought to have repaired, it is said, that as the plea contains mere matter of excuse, the plaintiff may reply *de injuriâ*, (t) or he may deny in particular the obligation to repair, or the defect of the fences, or the defendant's right to put the cattle in the close adjoining the *locus in quo*, concluding to the country; (u) but he should reply specially that the defendant turned the cattle into the *locus in quo*, or that they were unruly, and conclude with a verification. (x)

To a plea claiming a *right of common*, the plaintiff cannot reply *de injuriâ*, (y) but must either deny the *seisin in fee* or other title to the estate, as appurtenant to which the defendant claims his right, or may deny the right of common as stated in the plea, (z) or that the cattle were the defendant's own commonable cattle *levant and couchant* upon the premises, (a) concluding to the country, and not with a formal traverse. (b) But it is said, that in the latter case, where the defendant has turned on his own commonable cattle, as well as other cattle, the plaintiff should new assign, stating that he brought his action for depasturing the common with other cattle, and ought not to traverse the *levancy and couchancy*. (c) The plaintiff may also reply an approvement; (d) or he may reply that the close in which, &c. had been inclosed from the common more than thirty years and enjoyed adversely. (e) But it seems to be sufficient in these cases

and license of the plaintiff. It was proved that the defendant had a *right of way* over the close to a particular field, and a *license* from the plaintiff to use the way for other purposes; it was held that the replication of a general license was not supported by the facts, and that the plaintiff should have restricted the allegation of the license to the exercise of the road for all other purposes than for going to the particular field. *Colchester v. Roberts*, 4 M. & W. 769. [Where in trespass *quare clausum*, the defendant pleaded a license to his principle, co-extensive with all the allegations of trespass, such license being to enter the plaintiff's close for the purpose of taking and removing personal property, to the possession and control of which his principal was entitled, and that it was necessary that the defendant's assistance should be rendered in the removal of the property, the plaintiff, on demurrer, cannot assign, as a reason for an attempted revocation of the license, that the defendant was personally obnoxious to him. He can only justify a revocation on that ground, by replication or new assignment. *Sterling v. Warden*, 51 N. H. 217.]

(s) *Barnes v. Hunt*, 11 East, 451. See *post*, 634-638; [*Esty v. Wilmot*, 15 Gray,

170; *Hannen v. Edes*, 15 Mass. 347; *Dole v. Erskine*, 35 N. H. 503; *Bennett v. Appleton*, 25 Wend. 371.]

(t) *Cooper v. Monke, Willes*, 54; *Rast. Ent.* 621 a; *Com. Dig. Pleader*, M. 29; *post*, 635.

(u) 1 *Saund.* 103 b; *Com. Dig. Pleader*, 3 M. 29;

(x) *Clerke v. Johnson*, *Lutw.* 1358, 1359; *Com. Dig. Pleader*, 3 M. 29; *Rast. Ent.* 621 a.

(y) 8 Co. 67 a; *Cockerill v. Armstrong, Willes*, 101; *Stott v. Stott*, 16 East, 350; *Langford v. Waghorn*, 7 Price, 670.

(z) See, however, *Evans v. Ogilvie*, 2 Y. & J. 79; *post*, 624.

(a) *Robinson v. Raley*, 1 Burr. 320; *Cockerill v. Armstrong, Willes*, 100, note (c); *Bul. N. P.* 93; 8 Co. 67 b.

(b) 1 *Saund.* 103 b.

(c) 1 *Saund.* 346 d.

(d) *Arlett v. Ellis*, 7 B. & C. 346.

(e) *Richards v. Peake*, 2 B. & C. 918; and see *Hawke v. Bacon*, 2 Taunt. 156. But if only part of the close wherein the alleged trespass was committed has been so inclosed, the plaintiff should reply so, as it would be incorrect to reply the whole close had been inclosed. *Ib. Ibid.*

merely to deny the existence of the common pasture, &c. stated in the plea, without replying specially, &c. (*f*)

If a public or private *right of way* be pleaded, the plaintiff may deny the way, and conclude to the country, and he may also new assign, (*g*) or allege that the defendant used the way to another tenement than that alleged in the plea; (*h*) or to a plea of a private way, the defendant's title may be denied, (*i*) and the plaintiff may, under such replication, give in evidence an order of justices whereby the public or private way has been stopped. (*k*) But where the plaintiff cannot deny the plea, and only insists that the defendant trespassed out of the way, or was guilty of unnecessary damage in removing an obstruction, or actually converted the materials to his own use, in order to save unnecessary expense, the plaintiff should not deny the right * of way, but should merely new assign, *extra viam*, &c. *De injuriâ* generally cannot be replied to a plea justifying under a right of way. (*l*) If the plaintiff merely traverse a non-existing grant of a way, he cannot on the trial give evidence to show that the supposed grantor was not, as alleged in the plea, seised in fee, even for the purpose of rebutting the presumption of the grant. (*m*) And under a general traverse of a custom which is laid in the plea to exist, with a *certain exception*, the plaintiff cannot contend that he is *within the exception*. (*n*)

The replications to pleas justifying a trespass to real property under *process* of courts of *record*, are similar to those in trespass to persons, in which we have seen that the plaintiff cannot, in general, put in issue the whole of the matters in the plea, by replying *de injuriâ*. (*o*)

The replication to pleas in trespass of matters *in discharge* in general resemble those in assumpsit. (*p*) Thus, if a release be pleaded, the replication may be *non est factum*, or that it was obtained by fraud. (*q*) To a plea of accord and satisfaction, the plaintiff may deny the accord, or state that it was for another trespass, with a traverse of the acceptance in satisfaction of the trespass complained of, or he may allege, that the defendant was guilty after the accord; (*r*) or to a plea of a distress for the same trespass, he may reply that the cattle died in the pound; (*s*) or to a plea of tender, that no tender

(*f*) *Arlett v. Ellis*, 7 B. & C. 346.

(*g*) 1 Saund. 103 *b*; *post*, vol. ii. 671, 673.

(*h*) *Stott v. Stott*, 16 East, 350.

(*i*) *Post*, vol. ii. 739.

(*k*) *Davison v. Gill*, 1 East, 64; *Selw. N. P.* 1139.

(*l*) 8 Co. 67; *Langford v. Waghorn*, 7 Price, 670; *Tidd*, 9th ed. 683.

(*m*) *Cowlshaw v. Cheslyn*, 1 Cr. & J. 48.

(*n*) *Evans v. Ogilvie*, 2 Y. & J. 79.

(*o*) *Ante*, 620.

(*p*) As to these, see *ante*, 608.

(*q*) *Com. Dig. Pleader*, 3 M. 12. [In trespass *quare clausum*, the plaintiff took issue on the defendant's plea of license, and it was held that he might prove that the license was obtained by fraud, without replying *fraud* specially, a license so obtained being not voidable merely, but void. *Anthony v. Wilson*, 14 Pick. 303.]

(*r*) *Com. Dig. Pleader*, 3 M. 13. *Sed quære*, if the plaintiff ought not in such case to new assign, see *post*, vol. ii. 671, 673.

(*s*) *Vasper v. Eddows*, 1 Salk. 348.

was made, or that it was insufficient. (*t*) And to a plea of the statute of limitations, the plaintiff may reply any matter of which he could avail himself in the action of assumpsit. (*u*)

II. OF THE FORMS AND PARTS OF REPLICATIONS.

A replication, before the pleading rules, was usually *entitled* in the court and of the *term* of which it was pleaded; and the names of the *plaintiff* and *defendant* were stated in the *margin*, thus, "A. B. against C. D." (*x*) Where any new matter was stated in the replication, which occurred *pending the suit*, and after the last pleading, as the death of one of several plaintiffs or defendants between the plea and replication, this was to be *suggested*, and a *special imparlance* was then stated at the head of the replication. (*y*)

Since the Reg. Gen. Hil. T. 4 W. 4, the same practice as to the title of the court still continues, although no advantage could be taken of the *omission*. With respect to the date the Reg. Gen. Hil. T. * 4 W. 4, reg. 1, is express, that every pleading shall be entitled of the day of the month and year when the same was pleaded, unless otherwise specially ordered by the court or a judge. The *names of the parties* should be accurately stated in the *margin*. Imparlanes we have seen have been abolished, (*a*) but the statement of recent deaths or other events that have occurred since the last pleading may still be suggested. (*a*)

The Reg. Gen. Hil. T. 4 W. 4, reg. 9, orders, "nor shall it be necessary in any *replication* or subsequent pleading intended to be pleaded in maintenance of the *whole action*, to use any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, *replications*, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the *whole action*, provided that nothing herein contained shall extend to cases where an estoppel is pleaded." The Reg. Gen. T. T. 1 Vict. reg. 19, directs the form of replication to a plea of payment of money into court.

The title of the court, date, margin, commencements, and conclusions may be thus:—

In the queen's bench [or "C. P." or "exchequer of pleas."]

On the — day of — A. D. 1843.

Commence-
ment and
conclusion
with *simi-
lilar*.

A. B. } The plaintiff as to the said first plea of the defendant, and whereof
agt. } he hath put himself upon the country, doth the like.
C. D. }

(*t*) Thomp. Ent. 304; *post*, vol. ii. 471, 472; Com. Dig. Pleader, 3 M. 36.

(*u*) *Ante*, 609, and notes.

(*x*) See forms, *post*, vol. ii. 20.

(*y*) *Ib.* Ibid. 20.

(*a*) Reg. Gen. Hil. T. 4 W. 4, reg. 2; and *ante*, 455. The observations with respect to the title of a plea will, in general, here apply, see *ante*, 470, 575.

The conclusion to a special plea may be to the *country*, as thus, "and this the plaintiff prays may be inquired of by the country, &c.;" or with a verification, thus, "and this the plaintiff is ready to verify."

When the plea concludes to the *country*, the replication consists either of the common or special *similiter*. The first is, "and the plaintiff doth the like;" and the latter is thus, "and the plaintiff, as to the said pleas of the defendant by him first and secondly above pleaded, and whereof he hath put himself upon the country, doth the like;" and the plaintiff must join issue or demur, and cannot reply any new matter when a plea concludes to the country. (b) If in the *similiter* there be any mistake in the names, the defendant may demur; but where to an issue tendered by the plaintiff, the defendant has added the *similiter* in the *plaintiff's* name, this defect will be aided after verdict, there being an affirmative and negative before. It was once held that the want of a *similiter* was not aided by or amendable after verdict: and where in the *similiter* the defendant's * name was put instead of the plaintiff's, the chief justice dismissed the jury, conceiving he had no commission to try the issue; but in a subsequent case, where a similar mistake was made, the court, after trial of the issue, refused to arrest the judgment, and at length the *similiter* was allowed to be inserted after verdict, instead of the "&c." upon three grounds; first, that it was an omission of the clerk; secondly, that it was implied in the "&c." added to the last pleading; and, thirdly, that by amending, the court only made that right which the defendant himself understood to be so, by his going down to trial. (f) So where, to a rejoinder concluding with a verification, the plaintiff, instead of taking issue and concluding to the country, added the *similiter*, and took down the record to trial, and the defendant obtained a verdict, the court would not grant a new trial, but amended the record. (g) And where the parties had gone down to trial upon a plea which had not been traversed, after verdict for the plaintiff, he was permitted to amend by adding a traverse; (h)

(b) Com. Dig. Pleader, R. 1; Co. Litt. 126 a; Courteen's case, Hob. 271; Wilson v. Kemp, 2 M. & Sel. 549.

(f) Sayer v. Pocock, Cowp. 407; 2 Saund. 319, note (6); Com. Dig. Pleader, B. 11. 12, &c.; Rawbone v. Hickman, 1 Stra. 551; Wright v. Horton, 1 Stark. 400; Tidd, 9th ed. 924; Reeder v. Bloom, 9 Moore, 741; 2 Bing. 384, S. C.; Swain v. Lewis, 3 Dowl. 700. Where a replication traversed the facts contained in the plea, and concluded to the country, but without an "&c." and no *similiter* was added, it was held that the omission might be considered as a misprision of the clerk, and amendable after verdict, judgment, and writ of error brought. Siboni v. Kirk-

man, 6 Dowl. 98; 3 M. & W. 46, S. C. See, also, Stockdale v. Chapman, 4 Ad. & EL. 419.

(g) Grundy v. Snell, 1 New Rep. 28. As to the *similiter*, see fully Seabrook v. Cave, 3 Dowl. 691; Rawlinson v. Rauntre, 6 C. & P. 551; Clark v. Nicholson, 1 Gale, 21; 3 Dowl. 454; 6 C. & P. 712, 713.

(h) Cooke v. Burke, 5 Taunt. 164; Wordsworth v. Browne, 3 Dowl. 698. [See Shaw v. Redmond, 11 Serg. & R. 32. An issue of fact is not complete without the *similiter*, and a refusal by the plaintiff to add the *similiter* is a discontinuance of the action. Earle v. Hall, 22 Pick. 102.]

and in a *qui tam* action, the court of king's bench, after verdict, directed a *similiter* to be entered, though the objection was taken on the trial. (i)

We have seen that a plea of *nul tiel record* concludes with an averment and prayer of judgment *si actio*, &c. except in the case of a judgment in Ireland, &c. (k) If the plea deny a record in the *same court*, the replication thereto should reassert the existence of the record, and conclude with a prayer that it may be viewed and inspected by the court, and a day is given to the parties; (l) and when the record of *another court* is denied, the replication reasserts it, and a day is given to the plaintiff to bring it in. (m) When the *defendant* has pleaded a record of the *same court*, the replication denying it concludes with a verification, and a day is given to the parties to hear judgment; (n) and where the defendant has pleaded a record of *another court*, the replication of *nul tiel record* may either conclude by giving the defendant a day to bring it in, (o) or with an averment and prayer * of the debt and damages, &c. (p) In the former case the issue is complete upon the replication; (q) but in the latter, there should be a rejoinder reasserting the existence of the record; (r) and therefore the first form, being the most concise, is obviously preferable. Where matter of *fact*, as well as matter of *record*, is properly put in issue, the replication may conclude to the country. (s)

TO A PLEA OF
NUL TIEL
RECORD, OR
STATING A
RECORD.

The replication to a plea containing *new matter*, and therefore of necessity so framed as to afford the defendant an opportunity of answering it, may be considered with reference, 1st, to the *commencement*; 2dly, the *body*; and, 3dly, its *conclusion*. The *commencement* of the replication in such case professes wholly to deny the effect of the defendant's plea; the *body* shows the ground on which that denial is founded; and the *conclusion* is either to the country or to the record, if it merely deny the plea; but if the replication contain *new matter*, it should *conclude* with a *verification*.

TO A SPECIAL
PLEA CON-
CLUDING WITH
A VERIFICA-
TION.

(i) Wright v. Horton, 1 Stark. 400; S. C. in 2 Chitty R. 25, and 6 M. & Sel. 50.

(k) Sandford v. Rogers, 2 Wils. 114; Collins v. Ld. Mathew, 5 East, 473; ante, 583; but see note (u), Ib. [See Baldwin v. Hall, 17 John. 272.]

(l) Post, vol. ii. 421, 424; Clarke v. Scroggs, 2 Lutw. 1514; Herne, 278; Nembery v. Strudwick, Barnes, 336; [Share v. Becker, 8 Serg. & R. 293.]

(m) Post, vol. ii. 424; Moor v. Defendant's Bail, 2 Salk. 566; 3 Bl. Com. 330, 331.

(n) Post, vol. ii. 424. See the practice, Tidd, 9th ed. 742.

(o) See post, vol. ii. 424.

(p) Sandford v. Rogers, 2 Wils. 113; Barnes, 161.

(q) Tipping v. Johnson, 2 B. & P. 302.

(r) Tidd, 9th ed. 743.

(s) Esplin v. Smallet, Sayer, 208; Whitmore v. Rooke, Sayer, 299. See Glynn v. Thorpe, 1 B. & Ald. 153; [Share v. Becker, 8 Serg. & R. 242.]

I. THE COMMENCEMENT.

1st. The *commencement* of the replication, when matter of *estoppel* is to be replied, after stating the title of the court, the day of the month and year, and the names of the parties in the margin, is thus: "And the plaintiff saith, that the defendant ought not to be admitted in his said plea to aver, that, &c." (*stating fully the matter alleged in the plea, which the replication afterwards shows the defendant is estopped from relying on*) "because he saith that, &c." (*stating the matter of estoppel*). (t)

The Reg. Gen. Hil. T. 4 W. 4, reg. 9, seems still to require the same formal commencement as regards *estoppel* as prevailed heretofore.

When the replication *denied* or *confessed and avoided* the plea, it commenced with an allegation, technically termed the *precludi non*, and which was as follows: "And A. B. as to the said plea of C. D. by him secondly above pleaded, saith, that he A. B. by reason of anything by C. D. in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against C. D.; because he says, that, &c." (u) When the body of the replication only contained an answer to a *part* of the plea, the *commencement* * then was to recite or specify the part intended to be answered; for, should the commencement assume to answer the whole plea, but the body contained an answer to part only, the whole replication was insufficient, and so *vice versa*. (y) In this case the form ran thus: "And A. B. as to so much of the said plea of C. D. by him secondly above pleaded, as relates to the said supposed *recognizance in that plea mentioned* (according to the fact), says, that he ought not to be barred from having or maintaining his aforesaid action thereof against him, because he says, that, &c." (*stating the answer to such part of the plea, and with the proper conclusion thereto*). The answer to the *other part* of the plea commenced as follows: "And A. B. as to the residue of the said plea, saith, *precludi non*; &c. because," &c. (z) On the other hand, when the matter to be replied was equally an answer to several pleas, it was proper, in order to avoid expense, to answer all the pleas in *one* replication; (a) and the repli-

(t) See the form, *post*, vol. ii. 20; *Outram v. Morewood*, 3 East, 348; *Shelley v. Wright, Willes*, 10; *Inledon v. Burgess*, Carth. 66 67; 1 Saund. 256, 276, note (1). 325, note (1); *Wilkins v. Wingate*, 6 T. R. 62, *post*, 630.

(u) *Gardner v. Jessop*, 2 Wils. 42. If the plea be in bar of the further maintenance of the suit, the replication should be framed accordingly. *Le Bret v. Papillon*, 4 East, 502, 503.

(y) 1 Saund. 28, note (3), 377, 378; *Com. Dig. Pleader*, F. 25; *Swinburn v. Ogle*,

Lutw. 241; *Gray v. Pindar*, 2 B. & P. 427; *Summary Treatise on Pleading*, 72; *Le Bret v. Papillon*, 4 East, 503, 504. See, further, as to the qualities of a replication, *post*.

(z) 1 Saund. 337, 338. See the forms, *post*, vol. ii. 20; *Swinburn v. Ogle*, *Lutw.* 241; *Com. Dig. Pleader*, F. 4.

(a) See the form, 8 *Wentw.* 5; *English & Pellitory's case*, 1 Leon. 124; *Curtis v. Bateman*, 1 Sid. 39; *Birket v. Manning*, *Yelv.* 65; *Com. Dig. Pleader*, F. 4 and 24; *Summary Treat. on Pleading*, 71, 72; *sed vide* 1 Leon. 139, as to a demurrer.

cation *de injuriis suis propriis, absque tali causa* to two several justifications by different defendants in the same action, was held sufficient; (b) in these cases the commencement should apply to and profess to answer all the pleas. So where to a plea by an executor of judgments outstanding, the plaintiff replies that each judgment is fraudulent, &c. he may conclude his replication with one verification, or with a separate verification to the answer to each of the judgments; the former is perhaps the better course. (c)

The above form of *precludi non* is still admissible and sometimes useful; but the Reg. Gen. Hil. T. 4 W. 4, expressly declares, "nor shall it be *necessary*, in any replication or subsequent pleading intended to be pleaded in maintenance of the *whole action*, to use any allegation of *precludi non* or to the like effect, or any *prayer of judgment*; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectfully in bar of the whole action; provided that nothing herein contained shall extend to cases where an estoppel is pleaded." (d)

II. THE BODY.

It is first to be observed that the Reg. Gen. Hil. T. 4 W. 4, reg. 8, directs that *no venue* shall be stated in the body of the declaration, or * *in any subsequent* pleading; but provides that in cases where *local description* is now required, such local description shall be given.

II. THE
BODY.
No venue to
be stated.

With respect to the *body* of the replication, we have seen that it contains either, 1st, matter of *estoppel*; 2dly, a *traverse* or *denial* of the plea; 3dly, a *confession and avoidance* of it; or, 4thly, in the case of an *evasive* plea, a *new assignment*. We will consider each of these in the above order.

When the matter which operates as an *estoppel* (e) appears on the face of the declaration, the plaintiff may demur to a plea by which the defendant attempts to set up such matter as a de-

1st Estop-
pel. (d¹)

(b) *Ib.*; *English v. Pellitory*, 1 Leon. 124; Cro. Eliz. 139, S. C.; *Curtis v. Bateman*, 1 Sid. 39.

(c) 1 Saund. 338, note (5); *Aston v. Sherman*, 1 Salk. 298; *Parker v. Atfield*, 1 Salk. 312.

(d) See the interpretation of the words "*whole action*" in this rule, *ante*, 580.

(d¹) See express regulations as to matter of estoppel, Reg. Gen. Hil. T. 4 W. 4, reg. 9.

(e) As to estoppel in general, see Co. Litt. 252 a; Com. Dig. Estoppel; Steph. 5th ed. 227, 250; *Duchess of Kingston's case*, 2 Smith's Leading Cases, where all the cases on the subject are collected. An estoppel arises either, 1st, from matter of record; 2dly, by deed; or, 3dly, by matter in pais. Where a

verdict is found against a defendant on a plea of set-off he is estopped from suing the plaintiff for the demand specified in the plea of set-off. *Eastmure v. Laws*, 5 Bing. N. C. 444; 7 Dowl. 431, S. C. A recovery by foreign attachment at the suit of a creditor of the plaintiff's is not a discharge of a debt without execution executed. *Magrath v. Hardy*, 4 Bing. N. C. 783. Where a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is not as between the parties to the instrument, and in an action upon it, competent to the party bound to deny the recital; and a recital in an instrument not under seal may be such as to be conclusive to

fence. (f) Thus, if in covenant on a lease by the lessor, the defendant plead *nil habuit in tenementis*, that is, in effect, that the lessor had *no title* to or interest in the land, the plea will be defective, because the matter of estoppel, viz. the demise by deed and holding thereby, appears in the declaration. (g) But where an action upon a lease is brought by a party who claims derivatively from the lessor, in which case the declaration must show the lessor's title and the derivative title of the plaintiff, it is competent to the defendant to deny that the lessor had the *particular title* alleged in the declaration. (h)

If the matter of estoppel do not appear from the anterior pleading, the replication must expressly show such matter and rely thereon, and there must be an appropriate commencement and conclusion to the replication; for by replying an estoppel without relying upon it, the advantage of the *estoppel* as such may often be lost. (i) As where in debt for rent on a demise by indenture by one who has nothing in * the land (the declaration not showing the deed (k)), the defendant pleads *nil habuit in tenementis*, if the plaintiff reply that he had a sufficient estate to make the demise, he loses the benefit of the estoppel; but if he reply that the lease was made *by indenture*, and conclude *unde petit judicium*, if the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, the defendant shall be estopped. (l) Where the demise is not by deed there can be no *pleading* by way of estoppel, especially as the declaration may by virtue of the statute 11 Geo. 2, c. 19, be in the general form for use and occupation: but it must be remembered that in general, even in such case, the party to whom the premises were let, or his assignee, shall not be permitted to dispute the title of the landlord by whom the former was let into possession, or the title of the assignee of such lessor. (m) So if in a declaration in debt on bond, not showing the condition, it be recited in the condition that a fact exists, and the ob-

the same extent. But a party to an instrument is not estopped in an action by another party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made is receivable to show that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish. *Carpenter v. Buller*, 8 M. & W. 209. See, also, *Beeman v. Duck*, 12 L. J. R. N. S. Exch. 198; *Lanyon v. Davey*, 1b. 200.

(f) 1 Saund. 325 a, note (4); *Palmer v. Ekins*, 2 Stra. 817; *Parker v. Manning*, 7 T. R. 537; *Blake v. Foster*, 8 T. R. 487; *Shelley v. Wright, Willes*, 13; *Taylor v. Needham*, 2 Taunt. 278.

(g) 1 Saund. 325 a, note (4); 2 Taunt. 418, note (1).

(h) 1 Saund. 418, note (1); *ante*, 514. See *Steph.* 5th ed. 192. In covenant by the assignee of a lessor, if the declaration allege

that the lessor was seised in fee, and conveyed by lease and release, the defendant may traverse the seisin in fee. *Seymour v. Franco*, after *Trinity Term*, 1828, 7 Law Journal, 18, K. B.; and *Whitton v. Peacock*, in C. P. 3d June, 1835, *Shearman, attorney*; *ante*, 377; *Carrick v. Blaggrave*, 4 Moore, 303.

(i) 1 Saund. 325 a, note (4); and see *Jervis, Reg. Gen. Hil. T. 4 W. 4, reg. 9.*

(k) See *ante*, 377.

(l) 1 Saund. 325 a, note (4); *Treviban v. Lawrence*, 2 Ld. Raym. 1051; *Kemp v. Goodal*, Salk. 277; *Wilkins v. Wingate*, 6 T. R. 62.

(m) See *Cooke v. Loxley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & Ald. 50; *Doe v. Lady Smythe*, 4 M. & Sel. 347; *Taylor v. Needham*, 2 Taunt. 278; *Rennie v. Robinson*, 1 Bing. 147; *Bulls v. Westwood*, 2 Campb. 11; [1 *Chitty Contr.* (11th Am. ed.) 462, and note (t) and cases cited; *Hawes v. Shaw*, 100 Mass. 187; *Towne v. Butterfield*,

ligor attempt to dispute such fact, the plaintiff may reply, setting out the condition and relying on the estoppel. (n) Where the matter in question has been tried upon a particular issue between the same parties in a former suit, and there has been a finding thereon by the jury, such finding operates as an estoppel by matter of record, provided it be specially pleaded and relied upon as such. (o)

As a species of estoppel it may be proper here to notice, that if in debt on a bond, conditioned for the performance of covenants, the defendant falsely plead that there were no covenants in the indenture on his part, the plaintiff may reply, setting out the indenture containing such covenants and demur. (p) A party who has executed a deed is not *estopped* from denying that fact, and may plead *non est factum*; but he cannot (admitting his deed) deny its *operation* or effect by a plea of *non concessit*, &c. (p¹) as a stranger to the deed is permitted to do. (q)

The Reg. Gen. Hil. T. 4 W. 4, reg. 9, expressly provides "that nothing herein contained shall extend to cases where an estoppel is pleaded;" so that the above regulations in pleading estoppel still continue in force.

Exceptions
in Reg. Gen.
Hil. T. 4 W.
4, reg. 9, as
to estoppel.

* The *second* description of replication is that which neither concludes the defendant by matter of estoppel, nor confesses and avoids the plea, but *traverses or denies the truth thereof either in part or in whole*. (s) It will be proper to consider the nature of these replications under the following heads:—

2dly. Denial
of the plea.

97 Mass. 105; Jolly v. Arbuthnot, 4 De G. & J. 224; Doe v. Heath, 13 Ired. (Law) 489; Fusselman v. Worthington, 14 Ill. 135; Frazer v. Robinson, 42 Missou. 121; Hardy v. Akerly, 57 Barb. 148; Plumer v. Plumer, 30 N. H. 558; 6 Am. Law Rev. 1; Bigelow on Estoppel, 372; Cuthbertson v. Irving, 4 H. & N. 742; S. C. 6 H. & N. 135; Gray J. in Hilbourn v. Fogg, 99 Mass. 12; Gillett v. Mathews, 45 Missou. 307; Dunshoe v. Grundy, 15 Gray, 312; Bergman v. Roberts, 61 Penn. St. 497; Gray J. in Miller v. Lang, 99 Mass. 13.] But the termination of the landlord's title after the letting may be shown, when, 2 Saund. 418, note (1); England v. Slade, 4 T. R. 682; Doe v. Ramsbottom, 3 M. & Sel. 516. See, further, Alchorne v. Gomme, 2 Bing. 54; 9 Moore, 130, S. C.; Doe v. Andrews, 4 Bing. 348, 356; Pope v. Biggs, 9 B. & C. 245; [1 Chitty Contr. (11th Am. ed.) 465, and note (u); Mountnov v. Collier, 1 El. & Bl. 630; Claridge v. M'Kenzie, 4 M. & Gr. 143; Downs v. Cooper, 2 Q. B. 256; Higginbotham v. Barton, 11 Ad. & El. 307, 312; Marriott v. Edwards, 5 B. & Ad. 1065; Fenner v. Duplock, 2 Bing. 10; Gravenor v. Woodhouse, 7 Moore, 289; Hilbourn v. Fogg, 99 Mass. 12; Wolf v. Johnson, 30 Miss. 513; Den v. Ashmore, 2 Zab. 261, 265; Grundin v. Carter,

99 Mass. 16; Taylor Land. & Ten. § 707; Lowden v. Watson, 2 Stark. 230; Earle v. Kingsbury, 3 Cush. 206, 208. And it appears that the tenant may avail himself of the defence, that his landlord's title has expired since the letting without proving that he renounced his landlord's title, or that he gave up possession, or commenced a fresh holding under another person. Tindal C. J. in Claridge v. M'Kenzie, 4 M. & Gr. 143, 152; Mountnov v. Collier, 1 El. & Bl. 630; Lowden v. Watson, 2 Stark. 230; Lamson v. Clarkson, Essex Co. Mass. 1875, not yet reported.]

(n) 1 Saund. 325 a, note (4), and 215, note (2); Wilkins v. Wingate, 6 T. R. 62; Shelley v. Wright, Willes, 9; Bonner v. Wilkinson, 5 B. & Ald. 682; Baker v. Dewey, 1 B. & C. 704.

(o) Outram v. Morewood, 3 East, 346; Hooper v. Hooper, M'Clel. & Y. 509; Vooght v. Winch, 2 B. & Ald. 662. And see the precedents in trespass for meane profits, where to a plea of title the recovery in ejectment was replied, 2 Rich. C. P. 444.

(p) 1 Saund 316-319.

(p¹) [Stow v. Wise, 7 Conn. 214.]

(q) See Steph. 5th ed. 228; Taylor v. Needham, 2 Taunt. 278; 2 Balst. 55.

(s) See, in general, Com. Dig. Pleader,

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|---|--|
| { | 1st. A denial of the <i>whole</i> plea, or <i>de injuriâ</i> , &c. |
| | { 1st. When allowed or not proper, or not advisable. |
| | { 2dly. The form of such replication. |
| | 2dly. A denial of only <i>part</i> of the plea. |
| | { 1st. Of what fact. |
| | { 2dly. The mode of such special denial. |
| | 3dly. A denial, and stating a particular breach, &c. |

There is no real distinction between *traverses* and *denials*; they are the same in substance. (*t*) Any pleading by which the truth of the opponent's allegation is disputed is termed a pleading by way of traverse or denial. Traverses are of two kinds, general or special. The *general* traverses or denials were the general issue, and the replication *de injuriâ suâ propriâ*, and such pleadings as simply deny a *particular fact* pleaded by the adversary; the *special* traverse in its strict legal sense imports the technical and now unusual formal traverse, with an inducement and *absque hoc*, which will be presently explained. (*u*)

It is the first object of pleading to bring the point in dispute between the parties, at as early a stage of the cause as possible, to an *issue* or point which is *not multifarious or complex*; (*v*) and therefore the issue must in general be single. (*x*) But this *single point* may consist of *several facts* if they be dependent and connected; (*y*) and therefore where in trespass the defendant justified under a right of common, and the plaintiff in his replication traversed, "that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises, and commonable cattle; the replication was, on a special demurrer, assigning for cause that it was multifarious, holden to be good. (*z*) So, according to the first resolution in *Cro-

G.; Saund. Index, "Traverse;" Summary Treat. on Pleading, 75-80; Steph. 5th ed. 168-228.

(*t*) Lambert v. Stroother, Willes, 224.

(*u*) 1 Saund. 103, note; Steph. 5th ed. 193.

(*v*) Bell v. Wardell, Willes, 204; Cooper v. Monke, Willes, 54; Taylor v. Eastwood, 1 East, 217; Robinson v. Raley, 1 Burr. 320; Summary Treatise on Pleading, 77.

(*x*) *Ib.* Ibid. [See Rogers v. Burk, 10 John. 400.]

(*y*) Robinson v. Raley, 1 Burr. 320; Cock-erill v. Armstrong, Willes, 100, note (*c*); Bul. N. P. 93; 8 Co. 67 *b*; O'Brien v. Saxon, 2 B. & C. 908; [Strong v. Smith, 3 Caines, 160.]

(*z*) Robinson v. Raley, 1 Burr. 320; Cock-erill v. Armstrong, Willes, 100, note (*c*); Bul. N. P. 93; 8 Co. 67 *b*; and see *Bardons v. Selby*, 1 Cr. & M. 500. Where the defendant having agreed to sell a horse for 1s. if he did not trot 18 miles within the hour, pleaded to an action for the horse on the

agreement, that the horse would have done so, but a servant or agent of the plaintiff interrupted the trotting of the said horse, and hindered and prevented the horse from trotting the said 18 miles within one hour;" a replication that such person "did not, as the servant or agent of the plaintiff, interrupt the said trotting of the said horse, or hinder or prevent the horse from trotting the said 18 miles within one hour," was held good. *Brogden v. Marriott*, 2 Bing. N. C. 473. Where to an action of covenant for rent of turnpike tolls, the defendant pleaded that the trustees entered into and upon part of the tolls and ejected and expelled the defendant from the possession; a replication, denying that the trustees entered or ejected *modo et formâ*, was held good, the allegation of entry being immaterial and impossible; and that the defendant having mixed up the entry and expulsion, as constituting the eviction, the plaintiff had a right to follow him and to accept the issue so tendered. *Palmer*

gate's case, to a justification under proceedings in the admiralty court, hundred court, or county court, or any other court which is *not of record*, *de injuriâ sui propriâ* is good; all being matter of fact and making but one cause of justification. (a) And where in an action for maliciously suing out a commission of bankruptcy against the plaintiff, the defendant pleaded that the plaintiff, being a trader, and being indebted to the defendant in the sum of £100, became bankrupt, whereupon the defendant sued out the commission; and the plaintiff replied *de injuriâ sui propriâ*; on demurrer, assigning for cause that the plaintiff by his replication had attempted to put in issue the distinct facts, the act of bankruptcy, the trading, and the petitioning creditor's debt, it was held that these three facts constituted but one entire proposition, and that the replication was therefore good. (b) Indeed, in some cases the traverse or denial must consist of more than one fact, for it is another rule that in a traverse the plaintiff cannot narrow the title set up by the defendant. (c) And the reason why the general replication *de injuriâ* (which will presently be fully explained) cannot in many instances be adopted, is not because it puts two or three things in issue. (d)

In actions on contracts and in replevin, the replication usually denies the *material* facts, or *one of the facts*, alleged in the plea, with particularity and in express words. (e) But we have seen that *de injuriâ* may be proper in assumpsit, covenant, case, or replevin. (f) If a replication deny the *whole* of a plea, yet proof of so much as in justice entitles plaintiff to recover will suffice. (g) In *trespass*, and in actions on the case for slander, the replication containing a *general denial of the whole plea* sometimes occurs, and is termed a replication *de injuriâ sui propriâ absque tali causâ*, or "*de son tort demesne sans tiel cause*;" (h) or if a *part* of the plea be admitted, then it is termed **de injuriâ*

First, General denial, as by *de injuriâ*, when allowed or not proper or advisable.

v. Gooden (in error), 8 M. & W. 890; 1 Dowl. N. S. 673, S. C.

(a) 8 Co. 67 b; Cockerill v. Armstrong, Willes, 101, note (c).

(b) O'Brien v. Saxon, 2 B. & C. 908; 4 D. & R. 579, S. C.; vide The King v. M'Kay, 4 B. & C. 353.

(c) Morewood v. Wood, 4 T. R. 157; Summary Treat. on Pleading, 78.

(d) Jones v. Kitchin, 1 B. & P. 80; 2 Saund. 295 a, note; Bradley v. Milnes, 1 Bing. N. C. 644. When a replication, traversing the whole of a plea, is bad, see Moore v. Boulcott, 5 Moore & Scott, 122; 3 Dowl. 145, S. C. *De injuriâ* to a plea, justifying an expulsion from a house as servant of lawful occupier, is good; Piggott v. Kemp, 1 Cr. & M. 197; and is good as a plea in bar to an avowry for poor rate. Bardons v. Selby, 1 Cr. & M. 500.

(e) In replevin, the replication *de injuriâ*, it was said, never occurs. Finch Law, 396;

Jones v. Kitchin, 1 B. & P. 76; but see Piggott v. Kemp, 1 Cr. & M. 197; Bardons v. Selby, 1 Cr. & M. 500.

(f) Ante, 609, 616, 617.

(g) See instance in Bradley v. Milnes, 1 Bing. N. C. 664.

(h) Com. Dig. Pleader, F. 18; Crogate's case, 8 Co. 67. Most of the points relating to this replication are collected in Mr. Smith's notes to the leading case, Crogate's case, 8 Co. 67. See, also, Cockerill v. Armstrong, Willes, 99; Doc. Plac. vol. i. 113-115; and Com. Dig. Pleader, F. 18, &c.; Jones v. Kitchin, 1 B. & P. 79, 80; Finch Law, 395, 396; 2 Saund. 295, note (1); 1 Saund. 244 c, note (7). It is to be observed that the plaintiff is not *obliged* to reply *de injuriâ* to a plea, when that form of replication is admissible, but may traverse the material allegations in the plea. Garten v. Robinson, 2 Dowl. N. S. 41. ✓

absque residuo causâ, thereby denying all but the admitted fact or facts. This replication tenders issue upon and compels the defendant to prove every material allegation in his plea, (i) and therefore it is frequently advantageous to the plaintiff to adopt it, when by the rules of pleading it is permitted. (i¹)

In general, when the defendant's plea in *trespass* or *case* consists merely of matter of *excuse*, and *not of matter of right or interest* inconsistent with or affecting the right, the infringement of which is complained of in the declaration, whether it relate to the person, or to personal or real property, the general replication *de injuriâ* is sufficient. (k) And in these cases, when a title is stated

(i) Com. Dig. Pleader, F. 18-24; 8 Co. 67 a; Cockerill v. Armstrong, Willes, 100. See Carnaby v. Welby, 8 Ad. & El. 872.

(i¹) [See Coburn v. Hopkins, 4 Wend. 577; Lytle v. Lee, 5 John. 112; Griswold v. Sedgwick, 1 Wend. 126; Brown v. Bennett, 5 Cowen, 181; Stickie v. Richmond, 1 Hill, 177.]

(k) 8 Co. 67 a; Com. Dig. Pleader, F. 18, &c.; Doc. Pl. 113-115; Jones v. Kitchin, 1 B. & P. 80; Taylor v. Eastwood, 1 East, 212, 214, 218; 2 Saund. 295, note (1); Langford v. Waghorn, 7 Price, 670. Most of the cases in assumpsit in which the question of the admissibility of the replication *de injuriâ* has been raised, have been actions on bills of exchange and promissory notes, where the plea has confessed and avoided the cause of action. In Isaac v. Farlar, 1 M. & W. 65; 4 Dowl. 750, one of the first of these cases, and which was an action by the indorsee against the maker of a promissory note of £150, payable three months after date to the maker's order, and by him indorsed to one H. R. who indorsed it to the plaintiff; the defendant pleaded that he drew and delivered the note to A. under fraudulent circumstances, set forth in the plea, upon the faith and promise of A. that the said note should be renewed when due for two years, and that he should receive from A. the amount of the note on a subsequent day; and averred that A. did not pay the defendant the amount or any part thereof, but had defrauded and imposed upon him, and that the note was indorsed to the plaintiff without consideration, and that he held the same without value or consideration, and that there never was any consideration or value on the said note between any parties thereto. The plea then went on to aver that H. R. and the plaintiff, at the respective times when the note was so indorsed to them respectively, were privy to and had notice of the transaction and of the fraud and imposition detailed in the plea, to which the plaintiff replied *de injuriâ*, and on special demurrer the replication was held good, as the plea amounted only to matter of excuse for the non-performance of the promise. See, also, Watson v. Wilks, 5 Ad. & El. 237. So where to an action by the indorsee against the acceptor of a bill of exchange, the latter

pleaded that he accepted the bill for the accommodation of the drawer, and upon the understanding and promise of the drawer that he would furnish the funds for the payment of the bill, and that the defendant should not be called on to pay it until it should be his will so to do; and that no consideration whatever was given to the defendant for the acceptance or payment of the bill, and that it was indorsed to the plaintiff, after it became due, for his accommodation, and without any consideration; it was held that *de injuriâ* was the proper form of replication to put all the facts in issue, and that *de injuriâ* may be replied in assumpsit, where the plea consists of excuse. Griffin v. Yates, 2 Bing. N. C. 579. In another action by an indorsee against the acceptor of a bill of exchange, where the defendant pleaded that the bill was drawn and accepted for the accommodation of B.; that B. indorsed and delivered it to the plaintiff, in order that he the plaintiff should discount it and pay the value to B. but that the plaintiff did not discount it or pay the value to B. or to the drawer or to the defendant; and the defendant replied *de injuriâ*; the replication was held good, as the plea amounted to matter of excuse for the non-payment of the bill. Basan v. Arnold, 6 M. & W. 559. And where in an action by the indorsee against the acceptor of a bill the defendant pleaded that it was accepted for a gaming debt, and that the plaintiff, before the indorsement to him, had notice thereof; *de injuriâ* was held on special demurrer to be a good replication. Humphreys v. O'Connell, 7 M. & W. 370; Curtis v. Marquis of Headfort, 6 Dowl. 496. To an action of assumpsit by the fourth indorsee of a foreign bill of exchange against the first indorser, alleging for breach non-payment by the drawee, the defendant pleaded that before the bill became due, and after the indorsement to the third indorsee, and before the indorsement to the plaintiff, the bill was refused acceptance, and was protested; that the third indorsee and the plaintiff, at the time of the indorsement to the latter, had notice of the non-acceptance and protest; and that the defendant had not due notice of the non-acceptance or of the protest; on special demurrer it was held that a replication *de injuriâ* was

merely as * *inducement* to the defence, the plaintiff need not answer, or particularly deny it, because it is merely *collateral* to the matter in

good. *Whitehead v. Walker*, 9 M. & W. 506. To an action on two bills of exchange drawn by the plaintiffs on the defendant and accepted by him, the defendant pleaded that certain persons had agreed that they should form a public joint stock company, under the pretext of carrying on the business of mining, and that they should act as a corporate body, and that the shares in the same should be transferable without restriction, notwithstanding that they had not, and should not obtain any act of parliament, or charter of incorporation; that the company being formed they acted as such corporate body, and carried on certain trade and business as such, and that the undertaking and project of the company was an attempt tending to the common grievance, prejudice, and inconvenience of her majesty's subjects; that no act of parliament or charter of incorporation was obtained, and that while the company was so acting *illegally*, certain bills of exchange were given by them, of which the plaintiffs became and were the indorsees and holders; that it was afterwards agreed between the company (whereof the defendant was a member) and the plaintiffs that the said bills should be renewed; that they were renewed, and that the bills in the declaration mentioned, drawn on the company by the plaintiffs, were accepted by the company in lieu of, and in satisfaction for, the said bills, of which the plaintiffs were the indorsees and holders; and that the plaintiffs always had notice and knowledge of the premises. It was held on special demurrer that the plea was a plea containing matter of confession and excuse, and that the replication *de injuriâ* was good. *Scott v. Chappelow*, 2 Dowl. N. S. 78. But where to a declaration on bills of exchange for £520, drawn by M. upon and accepted by the defendant, and indorsed by M. to the plaintiffs, the defendant pleaded, that before the accepting of the bills he was indebted to M. in a larger amount, and that they were accepted on account of £520, part of the debt; that after the acceptance, and before the bills became due, the defendant was also indebted to other persons named, and was embarrassed in his circumstances, and unable to pay his debts in full; and thereupon, by an instrument in writing, made between M. and the said other persons of the one part, and the defendant of the other, and subscribed by M. and the several persons whose debts were set against their names, they agreed to receive from the defendant a composition of 7s. in the pound on their respective debts, payable on a day named (which was after the bills became due). The plea then averred payment of the composition by the defendant to M. and the other subscribing creditors; and also, that afterwards, and before the commencement of the suit, M. paid to the plaintiffs, and they received from him, divers sums of money, amounting to a

sum sufficient to satisfy all consideration whatever for or in respect of the indorsement of the bills in the declaration mentioned, and all money due from M. to the plaintiffs in respect of the bills or otherwise, and all claims and demands of the plaintiffs in respect of the bills or otherwise on M. in full satisfaction and discharge of the bills, and of all claims and demands whatever in respect of them or otherwise; and that the plaintiffs then became, and thenceforth continued, holders of the bills, without consideration, and in fraud of the defendant and his creditors; and the plaintiff replied *de injuriâ*, it it was held on special demurrer that the replication was bad, for that the plea amounted to matter of *discharge* not of *excuse*. *Jones v. Senior*, 4 M. & W. 123. *De injuriâ* cannot be replied to a plea of set-off. *Salter v. Purchell*, in error, 1 Q. B. 209, reversing the judgment of the court below. Tindal C. J. in delivering the judgment in the exchequer chamber in this case said: "The rule in *Crogate's case* (8 Rep. 66 b), by which the plaintiff has been permitted to use this general form of replication, instead of being compelled to take issue on some material fact stated in the defendant's plea, has always been limited, in its terms and in its application, to cases of actions brought for personal injuries, where the facts stated in the plea amount merely to matter of excuse or justification of the act complained of. As where in trespass for assault and battery, there is a plea of *son assault demesne*, or a plea of *moliter manus imposuit*, in defence of possession, or in false imprisonment, where there is a plea that the plaintiff broke the peace, and that he, the defendant, being a constable, and present, took him, in order to carry him to a justice of the peace; or, in an action on the case for a defamation, where the plea justifies by reason of the truth of the words spoken; in all which, and similar instances, the facts stated in the plea show that, at the time the act complained of was done, it was done under circumstances which make it excusable or justifiable in the eye of the law. And it is to such pleas only that the rule in *Crogate's case* applies. But there is a manifest distinction between such pleas and those which rely upon matter of discharge and extinguishment of the right of action; as to which latter class no authority has been cited to show that the general form of traverse is allowable; and, indeed, it is excluded by the very terms of the rule above referred to. Thus, in a plea of payment, or accord and satisfaction, or release, or of any matter which extinguishes the right to sue, both the rules of pleading and the course and practice from the earliest time, require the plaintiff to make a traverse of, or to deny the material stated in the plea, which constitutes the discharge or extinguishment of the right of action. In the

dispute; * but there is a material difference between these cases and the instances in which the plaintiff makes title by his declaration to anything, and the defendant in his plea denies the title, or claims an *interest* in the subject-matter; for then the plaintiff must reply specially. (m) Thus, in an action for an assault, if the defendant plead *son assault demesne*, or the plea be moderate correction of a servant for his neglect of service, the general replication *de injuriâ* is sufficient, if the plea be untrue. (n) And though such excuse for the personal injury may be stated in the plea to depend on the *possession* of land or personal property; as if the defendant plead that the plaintiff entered upon his possession, and that therefore the defendant *molliter manus imposuit* to remove him; (o) or if the plea be that the defendant was *seised*, &c. as rector, and that the tithes were severed, and that the plaintiff endeavored to carry them away, and that the defendant, in defence of his tithes, *molliter manus imposuit*, &c.; yet in these cases the general replication is sufficient, and the plaintiff need not answer the defendant's title; because the plaintiff by his action claims nothing in the soil or corn, but only damages for the battery, which is merely *collateral* to the title, and which is stated merely as inducement. (p) However, it seems to have been considered that where the *excuse* arises, even in part, out of the *seisin in fee* of another, then *de injuriâ* is insufficient. (q) So, in trespass to *per-*

present case, the plea is in substance a plea of set-off. Such a plea operates as a bar to the plaintiff's right of action, not by excusing or justifying the breach of promise complained of in the declaration, but, whilst it admits such breach to have been committed, by setting up, as a matter of compensation, the cross demand of the defendant, by force of the statute of George the Second. And it is unnecessary to observe that an ordinary plea of set-off cannot be met by the general traverse, but only by a special traverse or denial of the existence of the cross demand. And upon another and distinct ground the replication upon this record is inapplicable to the present case. For in those instances in which the plea goes only to a matter of excuse or justification, and where, consequently, the general traverse is allowed, there is engrafted an exception, that, where the plea justifies under any authority or command or license from the plaintiff, the general replication is not good without a special traverse of such command, license, or authority. And the exception to the rule, so far from being arbitrary, appears to be founded in good sense. For, although the plaintiff may be well allowed by his general replication to put in issue, and to compel the defendant to prove, all the facts which constitute his defence, when they lie in his, the defendant's, exclusive knowledge, yet where facts are pleaded which lie equally in the knowledge of the plaintiff and the de-

fendant, such as an authority or license given by the plaintiff, there is no reason for compelling the defendant to prove them, unless the plaintiff thinks proper to deny them by a special traverse. And the same reason will explain a similar exception from the general rule, where the defendant claims in his plea any interest in or out of land, for such interest must have been granted originally, either by the plaintiff himself or those to whom he is privy in estate." When a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad. *Parker v. Riley*, 3 M. & W. 230; 6 Dowl. 375, S. C.

(m) *Taylor v. Markham*, Yelv. 157; Cro. Jac. 225; *Cockerill v. Armstrong*, Willes, 102, 103; Com. Dig. Pleader, F. 20, 21; *Vivian v. Jenkins*, 3 Ad. & El. 741. See, also, *Bowler v. Nicholson*, 12 Ad. & El. 341.

(n) Gilb. C. P. 154; *Cockerill v. Armstrong*, Willes, 102.

(o) *Hall v. Gerrard, Latch*, 128, 221; Com. Dig. Pleader, F. 18; *Chancey v. Win*, 12 Mod. 582.

(p) *Taylor v. Markham*. Yelv. 157; Cro. Jac. 224, 225; Com. Dig. Pleader, F. 18; 2 Saund. 295, note (1); *Figgott v. Kemp*, 1 Cr. & M. 200.

(q) *Ante*, 634; *Jones v. Kitchin*, 1 B. & P. 80; and see *Cockerill v. Armstrong*, Willes, 102, 103; *Chancey v. Win*, 12 Mod. 582; *The Archbishop of Canterbury v. Kemp*,

sonal property, if the defendant merely justify the chasing cattle or removing goods from land of which he was *possessed*, the general replication will suffice. (r) And in trespass to *real* * property, if the defendant in his plea do not claim any interest therein, or easement over the same, the replication *de injuriâ* is sufficient; as if in trespass for pulling down a building, the defendant, without claiming any interest therein, plead that he removed it as being a nuisance on his land, this general replication will suffice. (s) So, if in trespass to land with cattle, the defendant plead that the plaintiff's fences were out of repair, whereby the defendant's cattle escaped into the plaintiff's close, this plea, consisting merely of matter of *excuse* and claiming no *interest* in the land, may, it is said, be answered by the general replication. (t) And though it is stated as a general rule, that where the defence rests upon an authority of law the replication must be special, (u) yet this, as a general position, is inaccurate. (x) For if the defendant justify, that he, as a constable, without a warrant, took the plaintiff for a breach of the peace; or as a vagrant or lunatic; (y) or under a public act of parliament; or under a right for all persons given by the common law; (z) or if in trespass for false imprisonment, the defendant justify by process out of the admiralty, hundred, or county court, or other court not of record, the general replication is sufficient; all being matter of fact, and making but one cause. (a) The instance of an entry to view waste proceeds on a special reason; (b) for suppose the lessor was seised in fee, such seisin would be involved in the issue. (b)

If in any case the defendant justified under the *warrant* of a justice of the peace, (c) or as servant of another, or by his command, the replication must have been special, and admit or protest the warrant or commandment, and reply *de injuriâ absque residuo causâ*, or take issue simply on the warrant or commandment. (d) However, it has been held that *de injuriâ* is a good replication to a plea justifying *as servant* of an occupier in turning out the plaintiff from a house, (e) and *de injuriâ* is a

When *de injuriâ* is not proper, but a qualified replication or denial is required.

Cro. Eliz. 539, 540; The King v. Hopper, Cro. Jac. 598; Langford v. Waghorn, 7 Price, 670.

(r) *Ante*, 620.

(s) Summary Treat. on Pleading, 81, 82; *ante*, 621-624.

(t) *Ante*, 622, 623; Bardons v. Selby, 1 Cr. & M. 500.

(u) 3 Co. 67 b.

(z) Chancey v. Win, 12 Mod. 582; Bowler v. Nicholson, 12 Ad. & El. 341; 4 P. & D. 16, 8. C.

(y) Com. Dig. Pleader, F. 18; Chancey v. Win, 12 Mod. 582.

(x) Chancey v. Win, 12 Mod. 580, 581; Jones v. Kitchin, 1 B. & P. 77; Summary Treat. on Pleading, 81, *acc.*; Tidd, 9th ed. 684; and 8 Co. 67 b, *contra*.

(a) Com. Dig. Pleader, F. 19; Chancey v. Win, 12 Mod. 582; 8 Co. 67 a; Doc. Plac. 114.

(b) Chancey v. Win, 12 Mod. 582.

(c) *Ib.*

(d) *Ib.*; 8 Co. 67 a, b; Gray v. Hart, Lutw. 1459; Doc. Plac. 113, 114; Jones v. Kitchin, 1 B. & P. 76; Com. Dig. Pleader, F.; Cockerill v. Armstrong, Willes, 100, 101; 2 Saund. 295 b, note (1); 2 Bro. Ab. *De son tort Demesne*, pl. 13, 15. According to later cases the authorities must be derived from the plaintiff himself. Pigott v. Kemp, 1 Cr. & M. 197; Bowler v. Nicholson, 12 Ad. & El. 355.

(e) Pigott v. Kemp, 1 Cr. & M. 197; *ante*, 620, note (y).

good plea in bar to an avowry for a poor-rate. (*f*) So, "when by the defendant's plea any *authority or power* is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it specially, and shall not reply *de injuriâ* generally;" (*g*) as if he *justified by virtue of the leave, or license, or command of the plaintiff. (*h*) So, when the defendant in his plea claims in his own right, or as lessee or servant of another, any right to, or interest in, the person, (*i*) personal property, (*k*) or real property, (*l*) for a supposed injury to which the plaintiff has declared; or any right of way, (*m*) common, (*n*) or other easement, &c.; (*o*) or rent issuing out of the land claimed in the declaration; (*p*) or right to enter for a distress for rent; (*q*) or if the plea contain matter of record not stated merely as inducement, (*r*) and of which a jury cannot be competent judges, as if the sheriff or his officers justify under process of a court of record; (*s*) or if the defendant justify under the warrant of a justice of the peace; (*t*) or under a particular custom of a manor; (*u*) or in some cases by authority of law, as to view waste; (*x*) in these cases the general replication *de injuriâ* is improper. (*y*) In such instances the plaintiff must either deny the title, easement, warrant, &c. in particular; (*z*) or admitting those matters, (*a*) must reply, that the defendant, of his own wrong, and without *the residue* of the cause alleged by the defendant, committed the trespasses; in which case it will not be incumbent on the defendant to prove either of those matters so admitted. (*b*) Where mat-

(*f*) *Bardons v. Selby*, 1 Cr. & M. 500; *Selby v. Bardons*, 3 B. & Ad. 2.

(*g*) 8 Co. 67, 68; *Jones v. Kitchin*, 1 B. & P. 80; Com. Dig. Pleader, F. 22; 2 Saund. 293, note (1); Steph. 5th ed. 192; *Cockerill v. Armstrong*, Willes, 99.

(*h*) Com. Dig. Pleader, F. 22; Summary Treat. on Pleading, 83; Bro. Abr. *de son tort*, pl. 30; *Cotsworth v. Bettison*, 1 Lord Raym. 104, 105. However, to the common plea of license to a declaration in trespass, it is usual to reply that defendant, of his own wrong, and without the supposed license, committed, &c. see *Barnes v. Hunt*, 11 East, 451.

(*i*) *Cockerill v. Armstrong*, Willes, 102.

(*k*) *Taylor v. Markham*, Yelv. 157; Cro. Jac. 225, S. C.; *The Archbishop of Canterbury v. Kemp*, Cro. Eliz. 539. *Quære*, whether it must not be an interest in land. See *Selby v. Bardons*, 3 B. & Ad. 1; *Bowler v. Nicholson*, 12 Ad. & El. 341.

(*l*) 8 Co. 67 *a*; *Jones v. Kitchin*, 1 B. & P. 79, 80; *Cooper v. Monke*, Willes, 52; *Cockerill v. Armstrong*, Willes, 99, 101, 102; Doc. Plac. 114; Com. Dig. Pleader, F. 21, &c.

(*m*) *Ib.*; *Jones v. Kitchin*, 1 B. & P. 79.

(*n*) *Ib.*

(*o*) *Ib.*

(*p*) 8 Co. 67 *a*; *Jones v. Kitchin*, 1 B. & P. 76; *Cooper v. Monke*, Willes, 52; Com.

Dig. Pleader, F. 21; *Hooker v. Nye*, 1 Cr. M. & R. 258; 4 Tyr. 777, S. C.

(*q*) *Hooker v. Nye*, 1 Cr. M. & R. 258; 4 Tyr. 777, S. C.; *Bowler v. Nicholson*, 12 Ad. & El. 341. *Aliter*, as to a distress for poor-rate. *Bardons v. Selby*, 1 Cr. & M. 500; *Selby v. Bardons*, 3 B. & Ad. 2.

(*r*) *Cockerill v. Armstrong*, Willes, 103, note (*a*); Com. Dig. Pleader, F. 19, 20; *Moor & Sir John Savage's case*, 2 Leon. 81. [See *Allen v. Crofoot*, 7 Cowen, 46; *Griswold v. Sedgwick*, 1 Wend. 130; *Coburn v. Hopkins*, 4 Wend. 578.]

(*s*) 8 Co. 67 *a*; Doc. Plac. 114; Com. Dig. Pleader, F. 20; Hardr. 6; *Chancey v. Win*, 12 Mod. 580-582.

(*t*) *Chancey v. Win*, 12 Mod. 582, 583; Doc. Plac. 113.

(*u*) Com. Dig. Pleader, F. 20; *Banks v. Parker*, Hob. 76; *Wells v. Cotterell*, 3 Lev. 49; 8 Co. 67 *a*; *Bell v. Wardell*, Willes, 202.

(*z*) Co. 67 *b*; Com. Dig. Pleader, F. 23; *Chancey v. Win*, 12 Mod. 582.

(*y*) See all the above cases, and 8 Co. 67; *Jones v. Kitchin*, 1 B. & P. 79, 80; Doc. Plac. 114; Com. Dig. Pleader, F. 20, &c.; *Lucas v. Nockells*, 4 Bing. 729; 1 M. & P. 723; 2 Y. & J. 304, 379, S. C.

(*z*) *Gray v. Hart*, Lutw. 1459.

(*a*) *Post*, 639, 640.

(*b*) *Cowlishaw v. Cheslyn*, 1 C. & J. 48.

ter of record is denied, the replication should be merely *nul tiel record*. (c)

Thus, where in trespass for taking the plaintiff's servant, the defendant pleaded that the father of the person taken held of the defendant by knight's service and died seised, and that the person taken being under age the defendant seized him as his ward, the general replication *de injuriâ* was held insufficient, the plea claiming an *interest in the person claimed by the plaintiff in his declaration. (b) So, if in trespass for taking goods, trees, &c. the defendant plead that he took them as tithe, or as a distress for rent, or as *damage feasant*, showing title thereto, the general replication will be improper. (c) But by the statute of sewers, and in the instance for distresses for poor's-rates, exceptions are introduced; and where in a justification of *taking* cattle damage feasant, the defendant sets out a title and does not rely merely on possession, the replication should be special. (d) Other instances have already been sufficiently enumerated. It also seems, that though the plea claim no *interest* in the property mentioned in the plaintiff's declaration, but merely contain matter of *excuse*, yet where such matter of excuse arises in part out of the *seisin in fee* of another, it is not advisable to reply *de injuriâ*; because that replication is only allowed where in the plea an excuse is offered to *personal* injuries, and not even then if it relate to any *interest* in land which would make part of the issue; (e) there being a distinction in this respect between a plea relying merely on *possession* as inducement, and where an interest is pleaded by way of title. (f)

There are also many cases in which, though the replication *de injuriâ* might not be objectionable upon demurrer, still it will not be proper to adopt it, and it may be necessary in effect to confess and avoid the plea. Thus, if in trespass for an assault the defendant plead *son assault demesne*, and the plaintiff did in fact commit the first assault, but can justify it as having occurred in defence of his house, &c. it would be improper to use the traverse *de injuria*, &c. and the plaintiff should reply his possession of the house, and defend-

(c) *Adney v. Vernon*, 3 Lev. 243, 244; *Gray v. Hart*, Lutw. 1459. [See *Green v. Ovington*, 16 John. 55.]

(b) *Cockerill v. Armstrong*, Willes, 102; *Taylor v. Markham*, Yelv. 158; Com. Dig. Pleader, F. 21.

(c) *Ante*, 621, 622, 623, 637; *Taylor v. Markham*, Cro. Jac. 225; Yelv. 157, S. C.; *Archbishop of Canterbury v. Kemp*, Cro. Eliz. 539; Com. Dig. Pleader, F. 21; *Jones v. Kitchin*, 1 B. & P. 76; *Cooper v. Monke*, Willes, 52; *Cockerill v. Armstrong*, Willes, 99.

(d) *Ante*, 622, 636; *White v. Stubbs*, 1 Lev. 307; Com. Dig. Pleader.

(e) *Jones v. Kitchin*, 1 B. & P. 80; *Cockerill v. Armstrong*, Willes, 102, 103; *The King v. Hopper*, Cro. Jac. 598; *Horne v. Lewin*, 1 Ld. Raym. 640; *Chancey v. Win.* 12 Mod. 582; *Archbishop of Canterbury v. Kemp*, Cro. Eliz. 539, 540; *Taylor v. Markham*, Yelv. 157; observed upon in *Cockerill v. Armstrong*, Willes, 101; 2 Saund. 295, note (1); *Langhorn v. Waghorn*, 7 Price, 670.

(f) *Skevill v. Avery*, Cro. Car. 139; *Serie v. Darford*, 1 Ld. Raym. 120; *Langford v. Webber*, Carth. 10.

ant's entry and refusal to quit, &c. (g) And in an action for false imprisonment, where the defendant justifies the commitment as a magistrate for a bailable offence, in consequence of an information upon oath, the plaintiff, under the general replication *de injuriâ sui propriâ*, &c. cannot give in evidence a tender and refusal of bail, but ought to reply that matter specially. (h) But where in trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *feri facias*, to which the plaintiff replied *de injuriâ sui propriâ absque residuo causâ*,* and new assigned that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea; it was held, that it was competent to the judge to leave it to the jury to say whether the goods were *bond fide* taken under the writ, or whether the execution was resorted to as a color for taking them to evade payment of freight, to which they would have been liable had the defendants accepted them under the bill of lading, and not to effect a levy by virtue of the writ. (i) In many cases, where it may not be absolutely necessary to reply specially, it may be advisable so to do, in order to narrow the plaintiff's evidence, and to compel the defendant to admit a part of his title. (k)

Where *de injuriâ* is improperly replied, the defendant may demur specially, but the defect will be aided after verdict, and cannot be taken advantage of by general demurrer. (l)

In point of form, the general replication *de injuriâ* or *de son tort* *demesne* would be defective, unless the words *absque tali causâ* be added, though the omission will be aided by verdict. (m) The usual language of this replication in trespass is, that the defendant, at the said times when, &c. *of his own wrong*, and *without the cause* by him in his said plea alleged, committed the said trespasses in the introductory part of that plea [or "in the declaration"] mentioned *in manner and form* as the plaintiff hath above thereof complained against him, and this he the plaintiff prays may be inquired of by the country, &c. (n) which is uniformly the

Form of general denial, *de injuriâ*, &c.

(g) *Ante*, 619.

(h) *Sayre v. Earl of Rochford*, 2 Bl. Rep. 1165.

(i) *Lucas v. Nockells*, 4 Bing. 729; S. C. affirmed in error, 1 M. & P. 783; 2 Y. & J. 304. See *Wans v. Ogilvie*, 2 Y. & J. 79.

(k) *Bell v. Wardell*, Willes, 204; *Cooper v. Monke*, Willes, 54; *Taylor v. Eastwood*, 1 East, 217.

(l) Com. Dig. Pleader, F. 24; *Fursdon v. Weeks*, 3 Lev. 65; *Banks v. Parker*, Hob. 76; *Collins v. Walker*, Sir T. Raym. 50; *Parker v. Riley*, 3 M. & W. 230; 6 Dowl. 375, S. C.; *Steph. on Plead.* 5th ed. 193.

If the defendant improperly sets up two matters of defence in his plea, he cannot object to the replication *de injuriâ*, on the ground that it puts in issue more than one matter of defence. *Reynolds v. Blackburn*, 7 Ad. & El. 161.

(m) Com. Dig. Pleader, F. 24; *The King v. Hopper*, Cro. Jac. 599; *Gilb. C. P.* 133; *Burton v. Chapman*, 1 Sid. 341; *Rodoway v. Lowder*, Lutw. 1384.

(n) See the form of the replication *de injuriâ* in assumpsit, *ante*, 609; *Whittaker v. Mason*, 2 Bing. N. C. 359; *Crisp v. Griffiths*, 3 Dowl. 754; *Isaac v. Farrar*, 1 M. & W. 65; 4 Dowl. 750, S. C.; and *post*, vol. ii.

conclusion of such a replication. (*n*¹) The word *cause*, which means without the matter of excuse alleged, though in the singular number, puts in issue all the facts in the plea, which constitute but one cause; (*o*) and if such a replication be adopted, as we have seen it may be, in answer to two or more pleas by different defendants, the *tali causâ* will suffice, *reddendo singula singulis*; (*p*) and the words *modo et formâ* only put in issue material allegations in the plea. (*q*)

When the plaintiff is not at liberty to reply *de injuriâ* to the whole * plea, but must deny some *particular* fact or facts, it is *first* to be considered *what fact* he may deny; and *secondly*, the *form* of such denial. (*r*)

Secondly,
denial of
only part of
the plea.

1st. A party may traverse or deny any *material* and issuable allegation in his opponent's pleading; and this although the matter be stated with more preciseness or particularity than is necessary; (*r*¹) as if in an avowry, if it be stated that the defendant was seised in fee, though it would have been sufficient to allege that the close was his freehold, &c. the seisin in fee may be traversed. (*s*) And a material fact may be denied though laid under a *videlicet*. (*t*)

1st. What
fact or part
in particular
may be traversed.

So, whatever is necessarily understood, intended, or *implied* from the plea, is traversable as much as if it were *expressly alleged*. (*u*) Thus, the allegation that "A. is seised of a close," imports that he was *sole* seised, and therefore it may be shown that B. was seised of a third part, with a traverse that A. *alone* was seised. (*x*) But matter not before stated in the adverse pleading, or necessarily implied, is not traversable though it affect the merits. (*y*) In replevin and trespass to *personal* chattels, if the defendant justify as bailiff or by the command of another, his authority might always be traversed; and the same rule now holds in trespass to *real property*. (*z*) When a party

(*n*¹) [Spencer v. Bemis, 46 Vt. 29, 32.]

(*o*) 8 Co. 67; Barnes v. Hunt, 11 East, 451, 455.

(*p*) English v. Pellitory, 1 Leon. 124; Cro. Eliz. 139, S. C.; Curtis v. Bateman, 1 Sid. 39.

(*q*) Gilb. C. P. 51; Co. Litt. 282 b; Vin. Abr. *Modo et Formâ*; 4 Taunt. 320; 6 Bing. 107.

(*r*) As to traverses in general, Com. Dig. Pleading, G.

(*r*¹) [Bradner v. Demick, 20 John. 406.]

(*s*) 2 Saund. 206, 207, notes (21), (22), (24); 1 Saund. 22, note (2); Com. Dig. Pleading, Q. See Carvick v. Blagrove, 1 B. & B. 531; 4 Moore, 303, S. C. As to the danger of unnecessary particularity, see *ante*, 251.

(*t*) 1 Saund. 170, note (2); [Hastings v. Lovering, 2 Pick. 223; Gleason v. M'Vikar, 7 Cowen, 42, explaining the *dictum* in Paine

v. Fox, 16 Mass. 133; United States v. Burnham, 1 Mason, 57.] As to the *videlicet*, see *ante*, 325. "Where matter of contract is pleaded in answer to an action, and the terms of the contract are material to the defence, those terms, though stated under a *videlicet*, must still be proved;" per Tindal C. J. Robson v. Fallon, 3 Bing. N. C. 396.

(*u*) 2 Saund. 10, note (14); Meriton v. Briggs, 1 Ld. Raym. 39.

(*x*) *Ib.*; Gilbert v. Parker, Salk. 629.

(*y*) 1 Saund. 312, note (4); Instances, Steph. 5th ed. 223, 226; but the demurrer to such traverse should be special. *Ib.*

(*z*) Chambers v. Donaldson, 11 East, 65; 1 Saund. 347 c, note (4); Graham v. Peat, 1 East, 245, note (c); Thorne v. Shering, Cro. Car. 586; Cockerill v. Armstrong, Willes, 100, note (b); *ante*, 622. As to the replication *de injuriâ* in such a case, see Piggott v. Kemp, 1 C. & M. 197.

appears on the face of the pleadings to be estopped from denying a fact, if he were to traverse it, his pleading would be demurrable. (a) The plaintiff must be extremely careful in traversing one of several facts, that he denies that which is most open to objection, for he admits those which are not expressly denied. (a¹) In trespass to land, the defendant pleaded that A. was seised in fee, and being so seised granted a right of way by non-existing grant; and the replication traversed *the grant*, and it was held that on these pleadings it was not competent to the plaintiff to prove that A. was not seised in fee for the purpose of rebutting the presumption of the grant. (b)

If, however, an allegation in the opposite pleading be altogether *immaterial*, it cannot be traversed; (b¹) otherwise the object of pleading, viz. the bringing the parties to an issue upon a matter or point decisive * of the merits, would be defeated. (c) And upon this ground, mere matter of aggravation, not going to the cause of action, or mere inducement or explanatory matter not in itself essential to or the substance of the case, should not be traversed. (d)

It is also a most material rule upon this subject, that a traverse should be taken on matter of fact, not mere matter or conclusion of *law*; for to raise an issue upon a legal inference or question would be to submit to the jury that which it is the province of the court to decide; (e) thus, where in trespass for fishing in the plaintiff's fishery, the defendant justified that it was an arm of the sea, wherein every one might fish; a replication, traversing that in the said arm of the sea every subject had the privilege of fishing, was held to be defective, as putting in issue a mere *legal* conclusion. (f) This erroneous traverse more frequently occurs in cases where the plea alleges certain facts in justification, and then concludes or infers from them "by virtue whereof" (*virtute cujus*), the party "became seised," or "became liable." In such case the preceding facts, or some or one of them, if any, should be alone traversed; and no traverse should be taken on the mere legal result drawn from them, and alleged, perhaps unnecessarily, in the plea. (g) But where the allegation, whether in the shape

(a) *Palmer v. Ekins*, 2 Stra. 817; *Blake v. Foster*, 8 T. R. 487; *ante*, 629.

(a¹) [*Toland v. Sprague*, 12 Peters, 335.]

(b) 1 C. & J. 48.

(b¹) [*Austin v. Walker*, 26 N. H. 456.]

(c) See 2 Saund. 307 a; Com. Dig. Pleader, K. 8, G. 10; Bac. Abr. Pleas, H. 5; Instances, Steph. 5th ed. 275.

(d) *Ib.*; Steph. 5th ed. 277.

(e) Plowd. 231 a; 11 Rep. 10 b; 1 Saund. 23, note (5); *Richardson v. The Mayor of Oxford*, 2 H. Bl. 182. See, as to the rule that a plea must be capable of trial, *ante*, 566. In an action on a covenant, assigning a breach in not indemnifying against a debt, a traverse that the alleged debt in the decla-

ration mentioned was not within the true intent and meaning of the covenant, was held bad, as being a traverse of matter of law. *Summers v. Ball*, 8 M. & W. 596.

(f) *Richardson v. The Mayor of Oxford*, 2 H. Bl. 122; 5 T. R. 367; 2 Saund. 159 c; 161, note (11).

(g) 1 Saund. 23, note (5). The concluding allegation in a plea of the bankruptcy of the plaintiff, "that by reason of the premises, the assignees became entitled to the debt and cause of action," is not traversable. *Dangerfield v. Thomas*, 9 Ad. & El. 292. Where the defendant introduces an immaterial averment in his plea, the plaintiff cannot, in his replication, so traverse the

of the *virtute cujus prætextu* or *per quod*, be compounded of law and fact, and they be connected together, a traverse may be properly taken thereon. (h) This subject was clearly explained and settled in a case, (i) already referred to, as showing what may be put in issue by *de injurid*, &c. to a plea justifying under a *feri facias*; the chief justice observed, (k) "it has been argued before us, that motives are not examinable, and that the allegation in pleas of *virtute cujus* is not traversable. If a man do that which he is justified in doing, and no more, the law in many cases will not permit his motives * to be inquired into, as if he have a right to prosecute for a crime, or to arrest for a debt, there can be no inquiry as to the motives with which these acts were done; but if he do more than as a prosecutor or creditor he have a right to do, he will not be justified, and it becomes proper to inquire whether the prosecution or arrest were not mere pretence. Such an inquiry is material for the purpose of getting at the real nature of the transaction, and enabling a jury to award proper damages. The *virtute cujus* is sometimes a mere inference of law as to what is the meaning of a writ, or the extent of authority given by it. In such cases a question of law is raised, and there can be no traverse, for that withdraws the consideration of law from the judges and presents it to the jury. But the *virtute cujus* sometimes raises a mixed question of law and fact, and when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled on which the law depends. In *Beal v. Simpson*, (l) Mr. Justice Powell says, "that when a matter of law is only comprised in a *virtute cujus*, then it is not traversable; but matter of fact in the *virtute cujus* is traversable." Lord Chief Justice Treby differed from Mr. Justice Powell on this point, and said, "By *virtue of the writ*, means by authority of the writ by an operation of law on the writ, without any ingredient or mixture of matter of fact." The other judges agreed with Mr. Justice Powell and said "that when the *virtute cujus* is mixed with fact, it may be traversed." (l) It appears from Williams's Saunders, (m) that *virtute cujus* may be traversed, and he refers, in support of this opinion, to Hobart, (n) and 9 Hen. 6. (o) The learned editor, Mr. Serjeant Williams, says "that when the words *virtute prætextu per quod*, &c. introduce a consequence from the preceding

matters of the plea as to include such immaterial averment in the issue. *Thurman v. Wild*, 11 Ad. & El. 453.

(h) 1 Saund. 23, note (5); Steph. 5th ed. 220, 223, and instances there; *Savill v. Jackson*, 11 Price, 343. As to traversing the due issuing of process, &c. *Dudlow v. Watchorn*, 16 East, 41; *The King v. The Inhabitants of Ecclesfield*, 1 B. & Ald. 348. An averment that a party was "duly elected;" *The King v. Hughes*, 4 B. & C. 368; or that an

assembly was "duly constituted," *The King v. Hill*, 4 B. & C. 426, is good.

(i) *Lucas v. Nockells*, 4 Bing. 729. Affirmed in error, 1 M. & P. 783; 2 Y. & J. 304. Again affirmed in *Dom. Proc.* 3 M. & Scott, 672; *Bardons v. Selby*, 1 Cr. & M. 500.

(k) *Lucas v. Nockells*, 1 M. & P. 803.

(l) 1 Ld. Raym. 410.

(m) 1 Saund. 23, note (5).

(n) Page 52.

(o) Fol. 14, 20.

matter, they are not traversable, but that matter of law connected with fact, or rather matter of right resulting from facts, is traversable." In *The Grocers' Company v. The Archbishop of Canterbury*, Lord Chief Justice De Grey, in giving the judgment of the court, says, (p) "law connected with fact is clearly traversable."

Traverse should be of affirmative allegations, and not put in issue a negative allegation. The traverse should also be on some *affirmative* matter, and not put in issue a negative allegation; thus, if a plea state a request to deliver an abstract, and a refusal, a replication that the plaintiff did *not neglect* and refuse to deliver such abstract, would be insufficient. (q)

Traverse must not be too large. The traverse *must not be too large*. (r) Thus, to an avowry of £20 * arrears of rent, the plea in bar must be, that "no part of it is in arrear," and if it were merely, that "the said sum of £20" is not in arrear, without saying "or any part thereof," it would be demurrable. (s) So, if a defendant show that on a certain day and at a certain place, the plaintiff demised to him the close in question, a traverse that "on the day," or "at the place stated," the plaintiff did not demise, &c. is bad, as involving in the issue the time or place, neither of which is material. (t) And where in trespass for entering the plaintiff's house, the defendant pleads that the plaintiff's daughter licensed him to enter, a replication that defendant "did not enter *per licentiam suam*," is bad, as a *negative pregnant*. (u) It is enough to deny the substance and effect of the averment, without pursuing the words of the party. (x) But where to a declaration against a rector for not carrying away tithe, the defendant pleaded that the close was

(p) 3 Wils. 234.

(q) *Martin v. Smith*, 6 East, 566, 557. [A replication which asserts what is denied in the plea, in the very language of the plea, is bad. *State v. Logan*, 33 Md. 1.]

(r) 1 Saund. 268, note (1); 269, note (2); Com. Dig. Pleader, G. 15; Steph. 5th ed. 278. A traverse may be too large by including quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are not of the substance of the matter. Ib. Where, to an action against the acceptor of a bill of exchange, the defendant pleaded that being indebted to J. M. he accepted the bill and delivered it to the drawer for a special purpose, namely, that it might be discounted by him, and the proceeds paid to J. M. in satisfaction of the debt, and averred that the drawer held the bill for such special purpose, and for the sole use and benefit of the defendant; a traverse that the drawer did not hold the bill for the said special purpose, and for the sole use and benefit of the defendant, was held not too large, as it did not compel the defendant to prove more than he would otherwise be

bound to prove in support of his plea. *Eden v. Turtle*, 12 L. J. R. N. S. Exch. 11.

(s) *Cobb v. Bryan*, 3 B. & P. 348; Com. Dig. Pleader, G. 12, 15; 2 Saund. 207, note (24); 319, note (6); 1 Saund. 268; the reason, 269, note (2).

(t) 2 Saund. 319, note (6); 1 Saund. 268 a, note; Steph. 5th ed. 280. See *Wilkins v. Boucher*, 1 Dowl. N. S. 478.

(u) *Myn v. Cole*, Cro. Jac. 87; 2 Saund. 319, note (6). A negative pregnant is such a form of negative expression as implies or imports an affirmative. See Steph. 5th ed. 419. In the instances put in the text, the denial that there was a demise on a particular day, and that the defendant entered by virtue of the license, is pregnant with an admission that there was some demise, and that there was some license. See, further, *Aubrey v. James*, 1 Vent. 70. This doctrine is not so much attended to now as formerly. Per *Tindal C. J.* in *Bell v. Tuckett*, 1 Dowl. N. S. 458.

(x) *Gilbert v. Parker*, Salk. 629; 1 Saund. 269, note.

surrounded with ditches, and that the ditches, ways, and passages were so filled with water that the defendant could not carry off his tithes ; a replication that the ditches, ways, and passages were not so, was held sufficient on demurrer, though in the conjunctive ; because the plea is one entire matter of excuse, and the defendant relies on the whole, and not on each particular part being impassable. (y) So, a replication to a plea claiming a right of common, traversing " that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises, and commonable cattle," was held sufficient ; because, though issue must be taken upon a single point, it is not necessary that such single point should consist only of a single fact, and the point of defence was the cattle in question being entitled to common. (z) So, to a plea prescribing for tolls, and also showing a prescriptive right to distrain for the same, the replication may deny both the prescriptions.

* In general a traverse, or denial, or allegation, should be so framed as to be *divisible*, and entitle the party pleading to recover *pro tanto*, if he prove part of the allegation. (a) And in one case, where the defendant pleaded a right of common over the plaintiff's close, which the plaintiff had wrongfully inclosed, and the plaintiff replied that " the close in which, &c." had been inclosed twenty years, and the jury found that part only of the close had been so inclosed, and that the trespass was committed on that part, that the defendant was entitled to a verdict, on the ground that the plaintiff should have replied that that *part* of the close, and not that the close had been so inclosed. (b) But in a subsequent action of trespass, where the plaintiff declared for entering two closes, and the plea was, that *the said closes*, in which, &c. were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times when, &c. to use his right of common thereon ; and because the closes, in which, &c. were wrongfully separated from the residue of the waste, he broke down the gate ; and the *replication* was, that the *said closes*, in which, &c. at the said time when, &c. were not wrongfully separated from the residue of the waste, but, continually, for twenty years and more, and before the first time when, &c. had been and were separated, and divided, and inclosed from the residue of the waste, and occupied and enjoyed in severalty ; and the *rejoinder* traversed the averment, and issue was joined thereon : it was held that the allegation in

What entire allegation is or not divisible, so as to enable a party to recover *pro tanto* on proof of part.

(y) *South v. Jones*, 1 Stra. 245.

(z) *Robinson v. Raley*, 1 Burr. 317 ; 1 Saund. 346 c.

(a) *Richards v. Peake*, 2 B. & C. 918 ; *Arlett v. Ellis*, 7 B. & C. 346. As to when a traverse is divisible, see the judgment of Parke B. in *Cousens v. Paddon*, 4 Dowl. 494, 495. A plea of set-off is not divisible, unless,

taken together with other pleas, it answers the whole of the plaintiff's demand. *Tuck v. Tuck*, 7 M. & W. 373.

(b) *Hawke v. Bacon*, 2 Taunt 159 ; *Richards v. Peake*, 2 B. & C. 918 ; *Arlett v. Ellis*, 7 B. & C. 346. But overruled, see *Tapley v. Wainwright*, 5 B. & Ad. 395.

the replication was divisible, and the plaintiff entitled to recover on proof that *any part* of the closes had been inclosed for twenty years. (c) This latter decision establishes that the word *close* in which, &c. is to be taken as divisible into several parts. There are other instances also in which an entire allegation in pleading is to be read as divisible. Thus a replication to a plea of infancy, that the goods mentioned in the declaration were necessaries suitable to the defendant's degree, is a divisible allegation, and may be proved only in part, so as to enable the plaintiff to recover *pro tanto*, if he prove that a part of the goods were necessaries. (d) But care must be observed not to introduce into the allegation any words that may impose the burden of proving the ** whole*, as, for instance, in the above cases, "that *all* the goods were necessaries," or that *the whole and every part* of the said close had been inclosed for twenty years, &c. for such words may prevent the entire allegation from being treated as divisible. (e) Where the defendant pleaded to indebitatus assumpsit for work and labor and materials, that there was an agreement that the work should be done to the satisfaction of the defendant *or* his surveyor, and that the building had not been completed to the satisfaction of the defendant *or* his surveyor, and the replication unnecessarily was in the conjunctive, yet it was holden after verdict to be supported in evidence by proof that the *defendant* was satisfied. (f)

A traverse may be *too extensive*, and therefore defective, by being taken in the *conjunctive* instead of the *disjunctive*, where proof of the allegation in the conjunctive is not essential. Thus, in an action on a policy on ship and tackle, the defendant should not deny that the ship *and* tackle were lost, but that *neither* was lost. (g)

On the other hand the traverse must not be *too narrow*, so as to prejudice the defence. (h) Thus, if in an action of trespass in a common called A., the defendant pleads that A. the *locus in quo*, and B. are commons which lie open to each other, and then prescribes for a right in *both* the commons, the plaintiff must traverse the entire prescription, and not the prescriptive right in A. only; for the prescription is entire, and it may be important to the defendant to

(c) Tapley v. Wainwright, 5 B. & Ad. 395. On a plea of *liberum tenementum* to an action for a trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to *that part* of the close on which the trespass was committed, and is not bound to prove a title to the *whole* close. Smith v. Royston, 8 M. & W. 381; 1 Dowl. N. S. 124, S. C.

(d) Per Denman C. J. in Tapley v. Wainwright, 3 B. & Ad. 399.

(e) *Ib.* Ibid; and see 2 Saund. 206, note (21), as to the improper introduction of the word "only."

(f) Bradley v. Milnes, 1 Bing. N. C. 644. (g) 2 Saund. 205; Steph. 5th ed. 281. As to traversing a particular estate, though unnecessarily stated so precisely, *ante*, 251, 252.

(h) Com. Dig. Pleader, G. 16; Steph. 5th ed. 285.

be let in to prove acts in exercise of the right in B. (i) But in general a party is not bound to traverse more than one fact material to the matter in dispute. (k) And in trespass, if the defendant justify under a prescriptive right to a duty, and the like right to distrain for it, a replication traversing the duty without denying the right to distrain, is sufficient. (l) And where the claim is divisible, and damages *pro tanto* are recoverable, the allegation should not attempt to confine the party to evidence of a *tort* continuing for a specific and named period. (m)

Replications denying a *particular* fact or facts are, in point of *form*, of *three* descriptions; *first*, the plaintiff admits some fact or facts, and denies the other, concluding to the country; or, *secondly*, he at once denies the particular fact intended to be put in issue, and concludes * to the country; or, *thirdly*, formally traverses a particular fact, and concludes to the country.

2dly. The modes of special denial.

1st. When the pleading of either party contains several matters, and the opposite party is not at liberty to put the whole in issue, he may admit one or more facts, and deny the other. Thus, in a action of trespass, where the defendant in his plea has justified an arrest and wounding under a writ and warrant, the plaintiff may admit the writ and warrant and reply *de injuriâ suâ propriâ absque residuo causâ*, (q) or may admit one fact and traverse another. (r) It was formerly usual in pleading to *protest* certain facts and traverse others, but Reg. Gen. Hil. T. 4 W. 4, reg. 12, directs "that no *protestation* shall hereafter be made in any pleading, but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made." The only possible use of a *protestation* was, that in case the party making it succeeded in the point to be tried, he thereby saved to himself the liberty of disputing in *any other* suit the truth of the allegation which was protested against. (s) It was wholly unavailable in the particular suit in which it was adopted, for the allegation protested against was in effect admitted *in that suit*, so that no evidence need have been adduced in support of it; for it was a rule that every pleading was taken to confess such traversable matter of *fact* alleged on the other side as it did not traverse: (t) and it was of no service in any other

1st. With an admission; formerly a protestation.

(i) *Morewood v. Wood*, 4 T. R. 157; 1 Saund. 269, note (1); *Alsager v. Curry*, 11 M. & W. 14; Steph. 5th ed. 284, 285; *sed quare*.

(k) 1 Saund. 268, note (1).

(l) *Griffith v. Williams*, 1 Wils. 338.

(m) 1 Saund. 267.

(q) *Robinson v. Haley*, 1 Burr. 320.

(r) *Fenner v. Fisher*, Poph. 1.

(s) 2 Saund. 103 a, note (1); Com. Dig. Pleader, N.; Doc. Plac. 295; Co. Litt. 124 b; Plowd. 276; Steph. 2d ed. 256; [*State v. Beasom*, 40 N. H. 372; *Briggs v. Dorr*, 19 John. 96.]

(t) Com. Dig. Pleader, G. 2; Steph. 2d ed. 255, 259; *ante*, 642, 643.

action, if the issue were found against the party making it, unless it were of matter which could not be pleaded, or on which issue could not have been joined, and then the party protesting could not be concluded, though the issue were found against him. (*u*) It was said that matter which was the ground of the suit, or upon which issue might have been taken, could not have been protested, (*u*¹) as that in detinue by the executor of A. the defendant could not protest that A. did not make the plaintiff his executor, for it was the ground of the suit, and utterly destroyed the plaintiff's action. (*x*) It was also a rule, that a protestation which was *repugnant* to, or inconsistent with, the plea which it accompanied, was inartificial and improper. (*y*) In these cases the replication either admitted the part of the plea which was not disputed, by saying, * "true it is, that, &c.;" or at once denied the matter intended to be tried; though the latter mode, as being the most concise, was preferable, for whatever was not traversed was in effect admitted. However, a repugnant, or inconsistent, or idle, or superfluous protestation, did not vitiate the plea, though it were shown for cause of demurrer, for the intent of a protestation was, that the party might not be concluded in *another* action, and in the *existing* suit it was surplusage, and might be rejected as such. (*d*) Hence a protestation was, even before the pleading rules, in general an unnecessary form, (*e*) and the replication might at once have denied the fact intended to be put in issue, as in the next description of replications. (*f*) Though it was not unusual, when it was doubtful whether a plea was sufficient in *law* to protest the *legal* sufficiency of it in the beginning of the replication, yet this was unnecessary, for without such protestation the plaintiff was afterwards at liberty to object to the plea by motion in arrest of judgment, writ of error, &c. The pleading over to certain of the facts admits, in general, the truth of the rest of the allegations, without recognizing the *legal* sufficiency of either of such allegations. But, as will be more fully explained hereafter, there are some *faults* in pleading which may be cured by *pleading over*, without demurring.

2dly. The next description of replication, *at once denying the particular fact intended to be put in issue, and concluding to the country*, without any preamble, and without a formal traverse, most frequently occurs in practice, and on account of

2dly. A direct and simple denial of one fact.

(*u*) 2 Saund. 103 *a*, note (1); Com. Dig. Pleader, N.; Bro. Abr. Protestation; Finch's Law, 359; Plowd. 276; Co. Litt. 124 *b*.

(*u*¹) [See Snider v. Croy, 2 John. 227.]

(*x*) Com. Dig. Pleader, N.; 2 Saund. 103, note (1); Plowd. 276; Doc. Plac. 296; Yelding v. Fay, Sir F. Moore, 355, 356; The Case of Langforth Bridge, Cro. Car. 365; Godfrey v. Saunders, 3 Wils. 109, 116; *sed quare*, see the cases in 2 Saund. 106, note (1), in which

there are instances of protestation of matter, upon which issue might have been taken.

(*y*) 2 Saund. 103, note (1); Bro. Abr. Protestation, 1, 5; Plowd. 276; Steph. 2d ed. 258.

(*d*) Com. Dig. Plead. N.; 2 Saund. 103 *b*; note (1).

(*e*) Crispe v. Belwood, 3 Lev. 425.

(*f*) See the form, Manby v. Long, 3 Lev. 105.

its conciseness should, when admissible, be adopted. (*f*¹) In *assumpsit* and other actions on contracts, when the plaintiff denies and does not confess and avoid the plea, this replication is frequent; as that the defendant was not an infant, (*g*) or that no tender was made, &c. (*h*) So to a plea of accord and satisfaction, the plaintiff may reply either that the defendant did not deliver the pipe of wine in satisfaction, or that the plaintiff did not accept the same in satisfaction, or may, it seems, traverse both the delivery and acceptance in satisfaction. (*i*) So in actions in form *ex delicto*, in general, where the plaintiff denies any allegation in the plea, the better and shorter method is directly to deny the fact, without a formal traverse, and conclude *to the country*. (*k*) Thus, if the defendant has pleaded defect of fences, or a prescriptive right of common or of way, or a license, instead of a formal traverse, the proper way is to deny the defect of fences, or the obligation to repair, or the prescriptive right of common or way, or the license, and conclude * to the country. (*l*) The replying with a formal traverse was a practice tending to unnecessary repetition and useless expense, and it may be hoped that the observations of the learned editor of Saunders's Reports (*m*) will have the effect of altering the practice; which was reprobated even in the time of William 3, (*n*) and in the reign of George 2 was considered by the court as an antiquated mode of pleading, tending to unnecessary prolixity, and was said to have been altered of late. (*o*) In this description of replication care must be taken not to attempt to put in issue any immaterial matter. (*p*) The form of traverse has been already noticed. (*q*)

3dly. A *formal* or *special traverse* of the matter alleged in the plea (*r*) is rarely necessary; for we have just seen that when the plaintiff is at liberty, without introducing any new matter, to deny that alleged in the plea, he may and indeed should concisely deny it, and conclude to the country; but when it is necessary in the replication, or other pleading, to show a title in the plaintiff, or to introduce *new matter* inconsistent with that stated by the other party, (*s*) or where there are two affirmatives which do not impliedly negative each other, or a confession and avoidance by argument only, a *special traverse* may be necessary. (*t*) Thus, where

(*f*¹) [Andrus v. Waring, 20 John. 153, 165; Bradner v. Demick, 20 John. 404.]

(*g*) *Post*, vol. ii. 20, 408.

(*h*) *Ib.* 471.

(*i*) Webb v. Weatherby, 1 Bing. N. C. 502.

(*k*) 1 Saund. 103 b. [See Snider v. Croy, 2 John. 428.]

(*l*) 1 Saund. 103 b; Robinson v. Raley, 1 Burr. 320. See the forms, *post*, vol. ii. 20.

(*m*) 1 Saund. 103 b.

(*n*) Horne v. Lewin, 1 Ld. Raym. 641.

(*o*) Robinson v. Raley, 1 Burr. 320.

(*p*) *Ante*, 640.

(*q*) *Ante*, 640-642.

(*r*) See, in general, Steph. 5th ed. 193 *et seq.* where this now almost disused species of traverse is very ably explained; and see Reg. Gen. Hil. T. 4 W. 4, reg. 13, *post*, 653.

(*s*) When necessary to show a title in a replication, Com. Dig. Pleader, F. 13, G. 3.

(*t*) Kenchin v. Knight, 1 Wils. 253; 1

the defendant alleged *seisin* in A., from whom he claimed, the plaintiff could not in his replication allege *seisin* in B., from whom he claimed without either traversing, or confessing and avoiding the *seisin* alleged by the defendant. (*u*) So where in replevin the defendant avowed as for a distress damage feasant, and the plaintiff pleaded in bar a right of common in *six* acres of land, alleging that the *locus in quo* was parcel thereof, and the defendant replied that the plaintiff *formerly had* common in forty acres, whereof the said six acres were and are parcel, and all lying open together, and that the plaintiff before the distress purchased two acres, parcel of the said forty acres, whereby the right of common became extinguished; as this replication did not confess and avoid the plea in bar, it was held bad for not traversing the right of common in six acres only. (*x*) So, if a custom be pleaded, another * custom or prescription repugnant to it cannot be replied without a traverse, but a custom or matter consistent with it, or which only qualifies, may. (*y*) In trespass to land, if the defendant justify under a custom in a manor that each copyholder shall have common of pasture, the plaintiff may, under a traverse of the custom, show another custom defeating the operation of that stated in the plea, as it regards the *locus in quo*, viz. a custom to inclose, &c. without replying such custom specially. (*z*) In real actions, and in *quare impedit*, the plaintiff (then called the demandant) must frequently state a title in his replication inconsistent with that of the defendant, in which case a traverse is necessary. (*a*) But in personal actions it is not in general necessary to state a title in the replication, when the defendant by his plea admits the plaintiff to be in *possession*, which is sufficient against a wrong-doer. (*b*) As if in trespass *quare clausum fregit*, the defendant plead that E. F. was seised in fee of the *locus in quo*, and enfeoffed G. H. who thereby became seised, and being so seised, enfeoffed the defendant, by which he became seised, until the plaintiff, claiming by color of a prior deed of feoffment made by E. F. by which nothing passed, entered, &c.; here the plaintiff may well traverse the feoffment supposed to have

Saund. 22, note (2); [Bindon v. Robinson, 1 John. 516.] A special traverse after the allegation of matter professing to be inducement, but which amounts in truth to a confession and avoidance, is idle, and the plea bad. Pearson v. Rogers, 1 P. & D. 302; 9 Ad. & El. 303, S. C. See the case of Fraser v. Welsh, 8 M. & W. 628, where the court considered a special traverse proper.

(*u*) Hering v. Blacklow, Cro. Eliz. 30; Buckland v. Otley, Cro. Jac. 682; Helier v. Whytier, Cro. Eliz. 651; 6 Co. 25 b; Dyer, 312 b; Com. Dig. Pleader, G. 2, 3.

(*x*) Kimpton & Bellamy's case, 1 Leon. 43, 44; Com. Dig. Pleader, G. 2.

(*y*) Kenchin v. Knight, 1 Wils. 253; Bac. Abr. Pleas and Pleading, H.; Weeks v.

Sparke, 1 M. & Sel. 680; Parkin v. Radcliffe, 1 B. & P. 285; 2 Leon. 209; Brook v. Willett, 2 H. Bl. 234. [In trespass *quare clausum* the defendant pleaded that the *locus in quo* was part of a public highway, and that the plaintiff had wrongfully incumbered it with a gate; the plaintiff replied a prescription in those whose estate he had, to maintain a gate on the highway; it was held that he need not traverse the highway, or the wrongful incumbering it with a gate. Spear v. Bicknell, 5 Mass. 125.]

(*z*) Arlett v. Ellis, 7 B. & C. 346; 9 B. & C. 671, S. C.

(*a*) Fenner v. Fisher, Cro. Eliz. 288; Com. Dig. Pleader, F. 13; Ib. 3, 1, 10.

(*b*) Ib. Ibid.; 8 B. & C. 534.

been made by E. F. to G. H. without making title; because the defendant admits the plaintiff to be in possession by virtue of what amounts to an estate at will, but if the plaintiff were to traverse the title of E. F. then he must state his own title and conclude with a traverse. (c)

When a *formal* or *special* traverse was adopted, and no new matter was stated in the replication, it alleged, "that the defendant of his own wrong committed the trespasses complained of in manner and form as the plaintiff had complained against the defendant, *without this, that, &c.*" denying the right of common or way, &c. as stated in the plea. Where *new matter* is stated as *inducement* to the traverse, such new matter must appear to be sufficient in substance to defeat the opposite party's allegation, and if a defective title be shown the inducement will be bad; though in stating it, so much certainty does not appear to be requisite as in other parts of pleading, because it is seldom traversable, (c¹) the other party being in general compellable in his rejoinder or other pleading to adhere to his own allegation, which has been traversed. (d) The usual words of the *beginning* of a traverse are, "without this, that, &c." (*absque hoc*); * but any words amounting to a denial of the allegation of the other party are sufficient, as "*et non, &c.*" (h) The traverse must neither be *too large* nor *too narrow*; (i) and though it is in general in the negative of the words of the plea, yet time and place, or other matter, when immaterial, must not be included; (k) but the words *in manner and form* as the defendant hath in his said plea above alleged, may be added, for they only put in issue matter of substance. (l) The Reg. Gen. Hil. T. 4 W. 4, reg. 13, orders, "that all special traverses, or traverses with an inducement of affirmative matter, should conclude to the *country*, (l¹) but that the opposite party shall not be precluded from pleading over to the inducement when the traverse is immaterial."

Form of special traverse.

No traverse to be after a traverse.

It is a general rule that there cannot be a traverse after a traverse where the first was material, and of matter necessarily alleged. (m) As if the plaintiff has declared on a seisin in fee in B. who granted, &c. and the defendant shows a seisin *pur*

(c) See the case in Poph. 1, 2. See, also, *Holmes v. Newlands*, 3 P. & D. 128, and pleadings therein.

(c¹) [See *Fowler v. Clark*, 3 Day, 231; *Van Ness v. Hamilton*, 19 John. 371.]

(d) Com. Dig. Pleader, G. 20; when not, see *Ib.* G. 17, 18; 1 Saund. 22, note (2).

(h) Com. Dig. Pleader, G. 1.

(i) As to this, see *Chambers v. Jones*, 11 East, 407, 410, 411; *Meriton v. Briggs*, 1 Ld. Raym. 39; *ante*, 644-647. It must not contain two traverses of the same matter.

Carwardine v. Watkins, 7 Dowl. 484; *Hembro v. Bailey*, 1 C. & M. 204.

(k) *Ib.*; Bac. Abr. Pleas, H. 5.

(l) *Nevil v. Cook*, 2 Leon. 5; *Harris v. Ferrand*, Hardr. 39; Com. Dig. Pleader, G. 1; *vide* *Weatherell v. Howard*, 3 Bing. 135; 10 Moore, 502, S. C.

(l¹) [But it is otherwise in New Jersey. *McWilliams v. King*, 3 Vroom, 21.]

(m) Com. Dig. Pleader, G. 17; *Rex v. Bishop of Worcester*, Vaugh. 62; *Thrale v. Bishop of London*, 1 H. Bl. 376-412. And

autre vie, and traverses the seisin in fee, the plaintiff cannot waive such traverse and traverse that he was seised *pur autre vie*, for this would be a departure from and desertion of his prior allegation, and the parties are not to go on *ad infinitum*. (n) In some cases, however, a traverse may be taken after a former *apt* and *pertinent* one. As where in a transitory action there is a special local justification, with a traverse of the place laid in the declaration, the plaintiff may either join in the defendant's traverse, or traverse the special justification, for in this case the place laid in the declaration being immaterial the plaintiff is not bound by it; (o) and the same rule prevails where time or any other immaterial matter alleged in the declaration is traversed in the plea. (p) And if a traverse be of matter immaterial, (q) or of an inference of law, (r) or not to the substance and point of the action, the other party may either demur specially or may pass it by and tender another traverse. (s)

The queen is allowed to take a traverse after a traverse, where her * title appears by *office* or other matter of *record*; though if it do not so appear, such second traverse cannot be taken. (t)

A *defect* in a traverse can only be taken advantage of by special demurrer; and therefore it was decided that where the inducement to a traverse confesses and avoids the other party's title, the traverse, though idle and bad on special demurrer, is aided by a general demurrer; (u) and an immaterial traverse, (x) or the want of a traverse when necessary, is aided upon a general demurrer, and by verdict or pleading over. (y)

With respect to a replication *denying the effect of the plea, and showing a particular breach* without confessing and avoiding the plea, it most frequently occurs in debt on a bond conditioned to perform covenants, &c. (z) We have already seen (a) when this replication is necessary both at common law and under the 8 & 9 W. 3, c. 11, s. 8, and therefore no further observations thereon will be here necessary.

see the reasons, *The Mayor &c. of Oxford v. Richardson*, 4 T. R. 439; though the decision was reversed in 5 T. R. 367; 2 H. Bl. 182.

(n) *Ib. Ibid.*

(o) 1 Saund. 22, note (2); Com. Dig. Pleader, G. 18; Bac. Abr. Pleas, H. 4; *Searle v. Darford*, Lutw. 1438; *Thrale v. Bishop of London*, 1 H. Bl. 403; *Mayor of Oxford v. Richardson*, 4 T. R. 439, 440; reversed, see 5 T. R. 367; 3 H. Bl. 182.

(p) *Ib. Ibid.*

(q) *Ante*, 641, 642.

(r) *Ante*, 642.

(s) *Richardson v. Mayor of Oxford*, in error, 2 H. Bl. 186; 1 Saund. 22, note (2);

Com. Dig. Pleader, G. 19; Bac. Abr. Pleas, H. 4; *Thrale v. Bishop of London*, 1 H. Bl. 402, 403.

(t) Vaugh. 62; Com. Dig. Pleader, G. 17, 19.

(u) 1 Saund. 207, note (5); 22, note (2); Com. Dig. Pleader, G. 22.

(x) 1 Saund. 14, note (2); 4 Anne, c. 16, s. 1. An immaterial issue is not cared by verdict. 2 Saund. 319 a; Tidd, 9th ed. 921; *aliter*, as to an informal issue, *Ib.*

(y) Com. Dig. Pleader, G. 22; 1 Saund. 14, note (2).

(z) Com. Dig. Pleader, F. 14, 15.

(a) *Ante*, 612.

The *third* description of replication *admits*, either in words or in effect, the fact alleged in the plea, and *avoids* the effect of it by stating *new matter*; and this replication frequently occurs in practice. The general rule is, that a replication ^{Confession and avoidance of the plea.} *must confess and avoid or traverse the matter stated in the plea*; (b) and in this respect a replication resembles a plea. (c) Where the plaintiff declares on a fact which at first view is a trespass, and the defendant in his plea acknowledges that fact, but states such new circumstances, as, if true, amount to a justification, if the plaintiff can suggest additional new matter, which shows that the defendant's plea (though true) will not justify the trespass committed, he ought to reply that new matter in a special replication, that the defendant may demur or take issue upon it. Thus, to a plea in trespass justifying under a warrant upon an information for treasonable practices, for which offence the plaintiff had been admitted to bail by the chief justice of the king's bench, the plaintiff, instead of traversing the plea, should confess and avoid it by replying a tender and refusal of bail. (d) So, where to trespass *quare * clausum fregit*, the defendant pleaded a custom applicable to all farms within the parish, which were not exempted by special agreement or otherwise, and the plaintiff traversed the custom generally; it was held that it was not competent for the plaintiff to prove that his particular farm was exempted by special agreement or otherwise; (e) the proper mode of availing himself of such a defence would have been to have confessed the custom, and avoided it by showing that the exception applied to his farm. (f) If infancy be pleaded, the plaintiff may reply that the goods were necessities, or that the defendant, after he came of age ratified and confirmed the promise. (g) And in replevin to an avowry by a freeholder for a distress damage feasant, the plaintiff may plead in bar a demise to him from the defendant; (h) or in trespass, where the defendant has pleaded *son assault demesne*, the plaintiff, admitting that he made the first assault, may reply, showing that it was justifiable. (i) So to a plea of *liberum tenementum*, the plaintiff may, as in replevin, reply a demise from the defendant, (k) or from some person seised of the estate before the defendant had or claimed to have any interest in the *locus in quo*; (l) or if the defendant has justified under a demise, he may show a notice to quit, or to a justification under a distress *damage feasant* may reply a subsequent conversion. (m) We have

(b) Com. Dig. Pleader, G. 2; Covert's case, Cro. Eliz. 754; The King v. Hughes, 4 B. & C. 379, per Holroyd J.; [United States v. Buford, 3 Peters, 31.]

(c) See ante, 551.

(d) Ante, 621, 640; Sayre v. Earl of Rochford, 2 Bl. Rep. 1165; and see King v. Phippard, Carth. 280.

(e) Evans v. Ogilvie, 2 Y. & J. 79.

(f) Ib.

(g) Post, vol. ii. 408, 409.

(h) Ib. 683.

(i) Ib.; Worral v. Clare, 2 Campb. 629.

(k) Post, vol. ii. 719; Lambert v. Stroother, Willes, 225; Taylor v. Eastwood, 1 East, 212.

(l) Ib.; Dyer, 171 b.

(m) 3 Wils. 20. And see ante, 640, 643,

already seen that in some cases a plea may be *generally* and apparently true, and yet the plaintiff may safely traverse it, and need not bring forward in his replication matter which disproves the plea as applied to the subject in dispute. Thus, in trespass to land, if the defendant justify under a custom for all copy-holders to enjoy common of pasture over the *locus in quo*, as part of the waste, the plaintiff, under a traverse of the custom, may prove another custom for the lord to inclose part of the waste, and that the *locus in quo* was inclosed and became freed from the common of pasture by virtue of such custom. (n)

In replications of this description it is necessary that the material parts of the defendant's title be *admitted* either in terms or in effect. (o) It is indeed a principle applicable to other pleadings as well as a replication, that by not traversing the statement of the adversary, it being material and traversable, its truth is to be taken to be admitted. (p) It behooves the plaintiff therefore to be cautious *in deciding whether he should deny the allegation in the plea, or, admitting its apparent truth, should obviate or defeat its effect by an assertion of new matter. It is not unusual to admit the material facts alleged in the defendant's plea in *express* terms, by stating, "that although true it is that the said demise was made to the defendant as in his said plea is alleged, yet for replication in this behalf the plaintiff in fact saith, that, &c.:" but where the plaintiff in the subsequent part of his replication claims immediately from the defendant, or states generally, "that before the defendant had anything in the *locus in quo*, &c." this form appears unnecessary; (q) though it may be advisable to adopt it, when the plaintiff claims title from a party alleged to have been seised in fee prior to the party under whom the defendant claimed. (r) When the replication completely confesses and avoids the defendant's plea, it should not conclude with a traverse; (s) though as it introduces new matter, it must conclude with a verification, in order that the defendant may have an opportunity of answering it. (t) A replication of this nature must confess as well as avoid the effect of the defendant's plea, and

as to replying, &c. to a justification under a *fiери facias*.

(n) *Ante*, 625, 650.

(o) *Dyer*, 171 b; *Sir W. Jones*, 352. In trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a close, and that he took the cattle there damage feasant, the plaintiff may specially reply title in another, as whose servant he entered, and the giving unnecessary color will not vitiate. *Taylor v. Eastwood*, 1 East, 212.

(p) *Ante*, 549, 554, 643; *Steph.* 5th ed. 248. *Quære*, see *Smith v. Martin*, 1 Dowl.

N. S. 418; *Bingham v. Stanley*, 1 G. & D. 237; *Edmonds v. Groves*, 2 M. & W. 642.

(q) *Dyer*, 171 b; *Key v. Cooke*, *Sir W. Jones*, 352; *Taylor v. Eastwood*, 1 East, 212, 213.

(r) *Ib.*

(s) 1 Saund. 22, note (2); 2 Saund. 28, note (2); *Com. Dig. Pleader*, 2 G. 3. So, where a plaintiff sets up matter consistent with but qualifying the matter alleged on the other side, he should not also traverse. *Keechin v. Knight*, 1 Wils. 253.

(t) 1 Saund. 103, *in notis*.

if the plaintiff rely on some excess, as an imprisonment under color of process after a voluntary escape, this matter should be new assigned, and not replied. (u) For a *replication* must state matter which entitles the plaintiff to his action for the *same* trespasses as those which are mentioned in and attempted to be justified by the plea; of which description are replications of new matter, showing that the defendant is a trespasser *ab initio*; (x) but when the plaintiff relies on trespasses *different* from those pleaded to, he must *new assign*. (y)

The fourth description of replication, if it can be so termed, is a *new assignment*. (z) A new assignment is not, however, properly speaking, a replication, since it does not profess to *reply* to anything contained in the defendant's plea, but if such a term can be tolerated, gives the go-by and throws aside as useless the previous pleading, or rather *restates*, in a *more minute and circumstantial manner*, the cause of action, or some part thereof, alleged in the declaration, in consequence of the defendant having, through mistake or design, * omitted to answer it in his plea. (a) It is therefore in the nature of a new declaration, or rather it is a more precise and particular *repetition* of the declaration in those cases where the law permitted a *general* form of declaring equally *applicable* to two or more states of facts, but leaving it doubtful in the description *which* was intended. The necessity for or use of a new assignment arises from the very general mode of statement sometimes permitted in the declaration, and the latitude allowed in the proof of many of the allegations therein. It is obvious therefore that a new assignment may be admissible in an action of *assumpsit* as well as in other actions; as if to a declaration in *indebitatus assumpsit for goods sold*, the defendant plead a plea applicable to one sale and delivery, but not to that in relation to which the plaintiff's present action was brought, he may *new assign* accordingly that he brought his action for the price of *other* goods sold and delivered. (b) It is clear that in other cases a new assignment may occur in *assumpsit*, as if to an action for goods

(u) *Scott v. Dixon*, 2 Wils. 3, 4; *Atkinson v. Matteson*, 2 T. R. 172. See *ante*, 620, 621; and *post*, 663, 667, as to this.

(x) 1 Saund. 300 a; *Dye v. Leatherdale*, 3 Wils. 20; *Taylor v. Cole*, 3 T. R. 297, 298; S. C. in error, 1 H. Bl. 560, 561. See as to replying excess, &c. *ante*, 619, *post*, 664.

(y) *Scott v. Dixon*, 2 Wils. 4.

(z) See, in general, Com. Dig. Pleader, 3 M. 34; Bac. Abr. Trespass, I. 42; Vin. Abr. Trespass, U. a. 4; and Novel Assignment; 1 Saund. 299, note (6); Steph. 5th ed. 253; Tidd, 9th ed. 690.

(a) 3 Bl. Com. 311; Steph. 5th ed. 259; 1 Saund. 299, note (6); *Norman v. Wescombe*,

2 M. & W. 360. It appears that a new assignment is not necessarily to be understood as admitting the truth of the facts alleged in the plea, and that it may in some cases be treated as nothing more than an assertion that the trespass or grievance which the plea attempts to justify is not the trespass or grievance in respect of which the plaintiff is seeking to recover. *Brancker v. Molyneux*, 1 M. & Gr. 710.

(b) *Sedden v. Tutop*, 6 T. R. 607. See, also, *Heydon v. Thompson*, 1 Ad. & El. 210. See *post*, 666, note (A), as to when a new assignment is proper in debt or *assumpsit*.

sold the defendant plead a *judgment recovered*, the plaintiff may now assign that his present action is for *other and different goods sold* than in the action in which the judgment was recovered. (c) And there is an instance of a new assignment and subsequent pleadings in an action on a bill of exchange. (d)

On reference to the preceding parts of this treatise relative to the form of the declaration, it will be seen that the cause of action is sometimes described in very general terms. In actions upon *contracts* the declaration, when special, in most cases, contains a tolerably particular description of the true cause of action; and in actions for *torts*, where the form of declaration is *in case*, the description of the injury is also in general sufficiently certain; accordingly it will be seen that a new assignment rarely occurs in those forms of actions. (e) So where the action was in *trespass*, a general mode of declaring in *trespass quare clausum fregit* was permitted; and under the ordinary form of declaration, the plaintiff was in general entitled to recover upon proof of *any trespass* of a similar nature to that stated in any close or land in the same parish that had been committed by the defendant * before the commencement of the action. Where several trespasses had been committed, some of which the defendant might conceive to be justifiable, it had become highly important for the interests of defendants, and also expedient for the ends of justice, that the true cause of action, in respect of which the plaintiff meant to proceed, should be better ascertained by the record; for otherwise the defendant might be misled by the generality of the declaration; and be met at the trial by the proof of a different injury from that which he came prepared to dispute; and on other accounts it was often very desirable for the defendant to confine and limit in some degree the general description in the declaration. In order to effect that object he was allowed to frame his plea in such a manner as would often render it necessary that the plaintiff should *restate*, with greater precision and particularity, (e¹) the real cause of action intended by his declaration; and such restatement was termed a *new assignment*. This *repetition* of the real cause of action occasioned evasive and expensive pleading, and on that account the Reg. Gen. Hil. T. 4 W. 4, reg. 5, directed that in declarations in *trespass quare clausum fregit*, the name of the close or its abutments, or other particular description, should be added, by which means the necessity for and utility of a plea of *liberum tenementum* has in a measure been avoided.

(c) *Seddon v. Tutop*, 6 T. R. 607; *Kitchen v. Campbell*, 3 Wils. 304; *Lord Bagot v. Williams*, 3 B. & C. 235; 5 D. & R. 87, 8. C.; and see forms, *post*, vol. ii. 671, 673, Index, New Assignment.

(d) *Heydon v. Thompson*, 1 Ad. & El. 210.

(e) See *post*, 666.

(e¹) [*Troup v. Smith*, 20 John. 43.]

It is a general rule, that where the defendant has committed *several* trespasses either to the person, or the personal or real property of another, some of which were justifiable and others not, and the action is brought for those trespasses which were not justifiable, but the defendant by his plea answers only those which were so, then the plaintiff should *new assign*. (f)

When a new assignment is necessary in general.

Thus, in an action of trespass for an *assault*, if there have been two assaults, one justifiable, on the ground of it having been committed in self-defence, and the other not, and the declaration contain only one count for an assault, and the defendant plead *son assault demesne*, the plaintiff should new assign the illegal assault. (h) In a case of this description we have seen that the defendant cannot, with any degree of certainty, collect from the declaration which of the two assaults the plaintiff means to proceed for, and as the plaintiff would be allowed to prove either under the declaration, it becomes a matter of necessity that the defendant should put his justification upon the record, or otherwise the plaintiff might recover at the trial on proof * of the very assault which was legally justifiable. The defendant is therefore, by the rules of pleading, allowed to suppose that the action was brought for the latter assault, and he consequently pleads *son assault demesne*. Now, in such a case, the plaintiff cannot safely traverse this plea, for if he were to do so, and the justification were to be proved, the defendant would be entitled to a verdict. The reason of this is, that the general terms of the declaration are confined by the effect of the plea and the replication. The plea admits the fact of an assault having been committed, and then gives a more minute and circumstantial account of it, by showing how it originated, and what circumstances rendered it, as the defendant conceives, justifiable. By not traversing the plea the plaintiff is held to admit that the defendant is right as to the particular assault complained of; for if he were allowed to traverse the plea, and afterwards to prove an assault totally unconnected from all circumstances approaching to justification, it would be an act of gross deception towards the defendant. The issue is therefore confined to such an assault as is described in the plea, if any such has actually taken place, viz. an assault committed under some circumstances of provocation, which the defendant asserts amount to a legal excuse, but which assertion the plaintiff denies. In order to avoid this result, and to enable the plaintiff to give evidence of that assault which was wholly destitute of excuse, it is necessary that he should not traverse the defendant's plea, but correct the error or affected error into which the defendant has fallen, by a new assignment, viz. by stating that he brought his action

In case of trespass to the person. (g)

(f) 1 Saund. 299 a, note (6); Groenvelt v. Burwell, 1 Ld. Raym. 465; Scott v. Dixon, 2 Wils. 3, 4.

cess, ante, 619; Penn v. Ward, 2 Cr., M. & R. 338; Oakes v. Wood, 2 M. & W. 797.

(g) The plaintiff must in general reply ex-

(h) Ib. Ibid. ; 2 Saund. 5 e, 5th ed.

not for the assault alluded to, and answered by the plea, but for *another* and a *different* assault committed on a *different occasion*. The same observations will be applicable to cases where the defendant justifies an assault or other trespass under process, &c. and the plaintiff relies on an assault or trespass committed *before* the issuing of the writ, or after the return of it, or after the plaintiff in the second action was discharged by the plaintiff in the first action, or after a voluntary escape on process in execution. (i)

If *son assault demesne* has been pleaded, and the evidence will establish that the defendant's battery of the plaintiff was *excessive*, and more than was necessary for self-defence, it seems that the plaintiff may under *de injuriâ*, and without a special replication or new assignment, give in evidence the excess. (j) But it has been decided that a plaintiff cannot reply *de injuriâ*, and *also new assign* that the defendant committed the trespasses with more violence than * was necessary, such pleading being demurrable for duplicity, though if not demurred to, plaintiff may proceed on either on the trial. (k)

In like manner in trespass for injuries to *personal* property, where there have been two or more injuries to the same property, or two takings of similar property, a new assignment will become necessary in cases analogous to those we have noticed with respect to assaults. (l) Thus, where in an action of trespass for taking away the plaintiff's oaks, the defendant pleaded that the oaks were standing in a certain close, situate in the manor of A. the freehold of B., who felled them, and justified taking them away by the command of B., it was held that the plaintiff might new assign that the oaks were growing in his own close within the manor of W., and were other oaks than those mentioned in the plea. (m) And in transitory actions of this nature, not only the *place*, but the *time* may be made material by the plea, and the plaintiff must then, when it becomes necessary, new assign the trespass at another time. (n) But if to trespass for removing goods, and casting, flinging, or throwing goods out of a barn, the plea only justify the removal, and *except* the casting, flinging, and throwing the goods out of the barn, no new assignment is necessary, and plaintiff may recover for any damage done by the excepted act if proved under the general issue. (o)

And in trespass for an injury to *real* property where the defendant

(i) 1 Saund. 299, note (6); and see *Monprivatt v. Smith*, 2 Campb. 175; *Lambert v. Hodgson*, 1 Bing. 317.

(j) *Ante*, 620, note (e); *Reece v. Taylor*, 1 Harr. & Wol. Rep. 15; but see *Oakes v. Wood*, 2 M. & W. 797, per Parke B.; [*Hannen v. Edes*, 15 Mass. 347.]

(k) *Thomas v. Marsh*, 5 C. & P. 596.

(l) *Ante*, 656.

(m) 1 Saund. 300 a.

(n) 1 Saund. 300; *Anonymous*, 2 Ld. Raym. 1015.

(o) *Neville v. Cooper*, 2 Cr. & M. 329; and see *Bush v. Parker*, 1 Bing. N. C. 72.

justifies under a right of way, &c. if the defendant has used the way in a different manner from what he was entitled to do by virtue of the prescription or grant, the plaintiff must new assign. (p) So, if in an action for trespass to the plaintiff's land, committed with cattle, the defendant prescribe for commonable cattle *levant* and *couchant*, and allege that the cattle mentioned in the declaration were such cattle, and in truth the defendant has put on such cattle, and also other cattle not *levant* and *couchant*, the plaintiff should new assign, stating that he brought his action for depasturing the common with *other* cattle, and should not traverse the *levancy* and *couchancy*; for upon such a traverse it would appear to be sufficient to show anything which excuses the trespass, and the number mentioned in the declaration would not be material. (q) And it has been *held that if an action for breaking and entering the plaintiff's house, land, &c. the defendant plead a license which the plaintiff had revoked before any of the trespasses for which the action was brought were committed, or which was confined to some particular act, and the defendant exceeded, the plaintiff must state the revocation or excess in a new assignment. (r)

Trespass to
real prop-
erty.

In all the preceding instances in which a new assignment may become necessary, it will be observed the very circumstance of the new assignment supposes that two or more trespasses, or acts apparently amounting to trespasses, have taken place. The plaintiff declares in the new assignment that he brought his action, not for the trespass admitted and justified by the plea, but for *another* and different *trespass* committed upon *another* and different *occasion*, and which the defendant has not answered by his plea. (s) And in general the effect of the new assignment is, to admit that one of the assaults, or apparent trespasses, has been justified; and it operates as an entire waiver or abandonment of that particular trespass. (t) But it may often occur in trespass to real property that a new assignment will become necessary on a different ground. We have seen that in declaring in trespass for an injury committed by breaking and entering the plaintiff's close, it *was* unnecessary to give

After plea of
liberum tenementum.

(p) *Senhouse v. Christian*, 1 T. R. 560, 562. See *Colchester v. Roberts*, 4 M. & W. 769; [*Spencer v. Bemis*, 46 Vt. 29, 32; *Perry v. Carr*, 42 Vt. 50; *Warner v. Houghton*, 42 Vt. 94.]

(q) *Ellis v. Rowles*, Willes, 638; 2 Saund. 346 e; *Bowen v. Jenkin*, 6 Ad. & El. 911. But to a plea of right of way under 2 & 3 W. 4, c. 71, for horses, carts, &c. at free will and pleasure, the plaintiff may, under the issue traversing such right, show that the right was for particular purposes only, and need not new assign. *Cowling v. Higginson*, 4 M. & W. 245.

(r) See *Ditcham v. Bond*, 3 Campb. 524; 1 Saund. 300 c, d, 5th ed. But this, it appears, only applies to those cases in which the declaration is confined to a single act of trespass, or in which the defendant confines the general terms of the declaration, by specifying the particular acts to which the license extended in his plea. See *post*, 660; *Barnes v. Hunt*, 11 East, 451.

(s) See the usual form, *post*, vol. ii. 673.

(t) See *Oakley v. Davis*, 16 East, 82, 86, 1 Saund. 299 a, note (6); *Atkinson v. Matteson*, 2 T. R. 176, 177; *per cur.* *Cheasley v. Barnes*, 10 East, 80; *post*, 662.

either the name or abuttals or any specific description of the close, and that it was sufficient to state the parish or place in which it is situate. (u) Under that general description it was obvious the plaintiff would be entitled to give evidence of any act of trespass committed by the defendant in any close of the plaintiff within the particular parish or place mentioned in the declaration; and the consequence of this was, that the defendant was under some difficulty in knowing in what part of the particular parish or place the alleged trespass was committed; and unless he could obtain a specific description of the particular close, he would not know what he was to come prepared to dispute at the trial. To remedy that inconvenience, we have seen that the defendant was permitted to plead the plea of *liberum tenementum*, or as it was called the *common bar*. (x) This plea the plaintiff can seldom safely traverse if the declaration did not describe the close by name or abuttals, for if he did do so, and the defendant could prove that at the time of the supposed trespasses he had any land within the * particular parish or place laid in the declaration, the issue must be found for him; (y) and it was perhaps reasonable that it should be so, for the object of the plea of freehold in such a case being to compel the plaintiff to give a more particular description of the particular close alluded to in his declaration, in the event of his declining to give the required information, he was held to admit that the defendant was right as to the particular place, and the only issue raised by the replication was, whether the defendant could prove that he had any close answering the description contained in his plea. If plaintiff therefore were not able to traverse the plea of *liberum tenementum* with safety, he was driven to a new assignment, in which he stated the place with proper exactness. (z) This is usually done by setting forth the name and abuttals of the close, and in case the defendant has given any particular description to the close mentioned in his plea, the description of the plaintiff's close in the new assignment must be such that a plain difference may be perceived between the place so newly assigned and that mentioned in the plea. (a) It may be observed with respect to new assignments after the plea of *liberum*

(u) See *ante*, 409. It seems to have been sufficient to name the county only. *Ib.* [See *Palmer v. Tuttle*, 39 N. H. 488; *Noyes v. Colby*, 30 N. H. 143.]

(x) See *ante*, 538; *Stevens v. Whistler*, 11 East, 51; [*Palmer v. Tuttle*, 39 N. H. 488, 489. The nature and effect of this plea are very fully explained, and the cases showing its use and operation are carefully reviewed by *Durfee J.* and by *Potter J.* dissenting, in the case of *Providence v. Adams*, 10 R. I. 185. See *Smith v. Royston*, 8 M. & W. 381; *Whitaker v. Jackson*, 2 H. & C. 926.]

(y) *Hawke v. Bacon*, 2 Taunt. 156; per *Lawrence J.* *Goodright v. Rich*, 7 T. R. 335;

1 Saund. 299 b, c; *Com. Dig. Pleader*, 3 M. 34; *Cocker v. Crompton*, 1 B. & C. 489; 2 D. & R. 719, S. C.; [*Ellet v. Pullen*, 7 Halst. 357.]

(z) *Coke v. Evans*, 2 Salk. 453; 6 Mod. 117; *Lambert v. Stroother*, Willes, 223; *Martin v. Kesterton*, 2 Bl. Rep. 1089; 1 Saund. 299 b; note.

(a) *Dyer*, 264; *Rickman v. Cox*, Cro. Jac. 594; *Freeston v. Crouch*, Cro. Eliz. 492; *Bro. Tresp.* 203; 1 Saund. 299 c, 300 c, 5th ed. See the form, *post*, vol. ii. 673; [*Hallock v. Robinson*, 2 Caines, 233; *Ellice v. Boyer*, 8 Wend. 503.]

tenementum, that whenever the defendant possesses any close which he describes in his plea, and alleges it to be his soil and freehold, the effect of a new assignment is entirely to exclude the consideration of any trespass committed within such close. The plaintiff in his new assignment avers that the place newly assigned is *another and different place* from that mentioned in the plea, and he thereby waives and abandons any claim in respect of trespasses committed in the latter place. And the same principle supports the position, that where the defendant in his plea specifies a particular trespass, and justifies it, and the plaintiff new assigns in respect of a different trespass, the former trespass is considered to be entirely abandoned. (b) And as in the latter case the new assignment supposes two different *trespasses*, so in the former it supposes two different *places*; for, as we shall see more particularly hereafter, whenever the plaintiff and defendant are agreed as to the particular trespass or place, and there appears sufficient upon the record to ascertain and identify it, a new assignment is unnecessary and improper. (c)

The cases of new assignment we have hitherto considered are those in which the trespass complained of, or the place in which it * was committed, have been *wholly* mistaken or evaded by the defendant in his plea. And in these cases the plaintiff merely new assigns, without taking any other notice of the plea than stating that it was wholly foreign to the true ground of complaint, and that it does not at all meet the declaration. But the same cause, viz. the generality of the declaration, which, as we have seen, often gives rise to a plea entirely foreign to the real cause of action, may sometimes have the effect of producing a plea whereby *some* of the trespasses which the plaintiff complains of are answered, but others are left entirely unnoticed. Thus, where the plaintiff complains in his declaration that the defendant on a certain day, "and on divers other days and times between that day and the commencement of the action," committed trespasses in the plaintiff's close, the plaintiff will be at liberty under this allegation to prove any number of acts of trespass committed by the defendant within the space of time mentioned, in any part of the close. Now it may happen that the defendant claims a right of way, or common, &c. in the plaintiff's close, and as he has no means of telling from the declaration whether the plaintiff's cause of complaint is confined to acts committed in the exercise of such right of way or common, &c. or whether any other acts of trespass are complained of, he is allowed to assume the former, and may consequently justify under such alleged right In

In what cases it is necessary to reply to part, and also to new assign.

(b) *Pratt v. Groome*, 15 East, 235; *Oakley v. Davis*, 16 East, 82, 86; 1 Saund. 299 c, 5th ed. (c) *Post*, 661, 662; 1 Saund. 300 b, note, 5th ed.

this case, if the plaintiff dispute the existence and validity of the right of way or common, he will of course traverse the defendant's plea. But the effect of such traverse, without any new assignment, will be to confine the issue to the question of the right of way, &c. as pleaded by the defendant; and if this should be found in the defendant's favor, he will be entitled to a verdict. (*d*) If therefore the defendant has committed any acts of trespass, which supposing him to be entitled to the alleged right of way, &c. would not be justified by it, it will be necessary for the plaintiff not merely to traverse the plea, but also to new assign in respect of such other trespasses, and aver in his new assignment that the action was brought *as well* for the trespass or trespasses mentioned in the plea, as for the trespasses newly assigned. (*e*) Thus, where the plaintiff complained in the declaration that the defendant had committed trespasses in his closes, and the defendant pleaded that one of the closes was called Blackacre and the other Whiteacre, and pleaded that they were his freehold, the plaintiff traversed that Blackacre was the defendant's freehold, and new assigned in respect of trespasses in twenty acres other than Whiteacre; upon this it was objected, that by new assigning, the plaintiff had waived the former pleadings as to all, and therefore ought to have omitted the traverse; but the court disallowed the *objection, and held that as the defendant had pleaded in respect of some of the places in which the plaintiff intended to lay the trespass, the plaintiff was at liberty to answer as to that part, and that the defendant was not entitled to waive his plea thereto and plead to all *de novo*. (*f*) So where an action is brought for fishing in a certain river, being the plaintiff's fishery, and the trespass intended by the declaration is for fishing to the extent of two miles and upwards; if the defendant plead that he is seised in fee of ten acres adjoining the river, and prescribes for a free fishery in the river along the side of the ten acres, the plaintiff ought not *merely* to traverse the prescription, and go to issue upon it, because at the trial he would not be permitted to give evidence of any act of fishing by the defendant either above or below the ten acres, for the question would be confined to the prescription only; but the plaintiff should *also new assign*, and state that the trespass complained of was not only for fishing in the river adjoining the ten acres, but also above and below the same, and then the defendant will be under the necessity of giving some answer to the whole trespass. (*g*) In this case it has been observed, that without a new assignment the plaintiff would run a great risk of

(*d*) 1 Saund. 300 b, c, 5th ed.; and see *Monprivatt v. Smith*, 2 Campb. 175, 176.

(*e*) 1 Saund. b, c; *Arlett v. Ellis*, 7 B. & C. 346; 9 D. & R. 897, S. C.; *Cross v. Johnson*, 9 B. & C. 613; 4 M. & R. 290, S. C.

(*f*) *Prettyman v. Lawrence*, Cro. Eliz. 812; and see *Arlett v. Ellis*, 7 B. & C. 346; 9 D. & R. 897, S. C.

(*g*) 1 Saund. 300 c, 5th ed.

being tricked; for if the prescription were found for the defendant, he would succeed in the action, though guilty of almost the whole trespass for which the action was brought. (g) Upon the same principles, in the case before adverted to of a right of way, &c. pleaded by the defendant, where the plaintiff disputes the alleged right, and also affirms that the defendant has committed trespasses in *other* parts of his land, he should traverse the right of way, and new assign for trespasses *extra viam*. (h)

It will be observed to be perfectly clear that the mode of pleading by traverse *and* new assignment is inapplicable where only a *single act* of trespass is complained of in the declaration; (h¹) but where the declaration is capable of covering *several trespasses*, and the defendant pleads some matter of justification which only applies to *part*, it seems to be open to the plaintiff both to traverse the justification and to new assign in respect of the trespasses unanswered, in all cases of trespass, whether to the person or to personal or real property; And although where only a single act of trespass is complained of, this mode of pleading would in general be objectionable, (i) yet where the trespass is of a *continuing* nature, as in the case of imprisonment, or remaining in possession of a house or goods under color of process, the plaintiff may, it should seem, dispute the writ, &c. and also new *assign in respect of a continuation of imprisonment, possession, &c. unauthorized by the process, even supposing it to be valid. (k)

When a new assignment is unnecessary and improper.

In the course of the preceding pages it has been more than once incidentally observed, and from the whole tenor of what has been said on the subject of new assignment it will be collected, that it can never

(h) Ibid.; Cross v. Johnson, 9 B. & C. 613; Vickers v. Gallimore, 5 Bing. 196; Trickey v. Yeandall, 2 Bing. 26; [Creswell v. Chapman, 42 N. H. 53.]

(h¹) [New assignment means specially designating a cause of action within the scope of the declaration, and other than the one covered by the plea. But when the declaration embodies only a single act of trespass, and the plaintiff, by his replication, treats that as a cause of action for which he brought his suit, the declaration is thereby exhausted. There is no subject-matter on which a new assignment can operate; and so it was held in Spencer v. Bemis, 46 Vt. 29, that in trespass *quare clausum*, when the declaration only counts upon a single act of trespass, which is justified by plea, the plaintiff cannot in his replication traverse the matter of such justification, and also new assign the same or different acts of trespass. The defendant in this case justified under an alleged right of way. Barrett J. said: "In the present case, either the plaintiff should not

have traversed, or not new assigned. It was at his option which to do. If the trespass justified in the plea is the one sued for, then a traverse would be proper. If the trespass sued for was *extra viam*, then he might new assign. In such case he would be pursuing for a single act of trespass, which, under the declaration, may have been *intra*, or *extra viam*." "The new assignment, when properly resorted to, presents subject-matter for a new and distinct answer by the defendant, and for a distinct issue to be formed by the course of pleading proper to the matter new assigned."

(i) Thomas v. Marsh, 5 C. & P. 596.

(k) Lambert v. Hodgson, 1 Bing. 317; Monprivatt v. Smith, 2 Campb. 175; Eyewell v. Stow, 3 Taunt. 425. As to replying *de injuriâ*, and new assigning, in answer to a plea justifying under a *feri facias*, see Lucas v. Nockells, 4 Bing. 729; S. C. in error in 1 M. & P. 783; and 2 Y. & J. 304; Oakes v. Wood, 2 M. & W. 791.

be necessary for the plaintiff to new assign where there has been only a *single* act of trespass, except, as we have lately seen, where that act has been of a *continuing* nature (in which case it may perhaps more properly be said to consist of several acts of trespass), or except where the plea of *liberum tenementum* has rendered a particular description of the *locus in quo* necessary. And in general, where a new assignment is unnecessary, it will be improper and sometimes fatal to the plaintiff's right to recover. It has been shown, that in general the object of a new assignment is to correct an error or affected error in the defendant's plea, and that (where there is no traverse of the plea) it operates as an entire waiver and abandonment of the particular trespass justified by the plea. (*l*) And upon this ground, in a case where the plaintiff brought trespass for false imprisonment, and the defendant justified under process, which was in fact irregular, but the plaintiff (instead of traversing the plea as he ought to have done, and relying on the irregularity), new assigned that the trespass complained of was upon *another* and a different *occasion*, it was held that he was bound to prove a new and substantive trespass wholly unconnected with the process, and that as there was only one arrest and imprisonment proved, which would have been authorized by the process had it been regular, it was answered by the plea, and the defendant was therefore entitled to a verdict. (*m*) Upon the same principle, where the defendant described the place in which the trespass was alleged to have been committed in his plea, and justified under a right of common there, and the plaintiff new assigned, setting out the abutments of the *locus in quo*, and alleged in the usual form that the closes newly assigned were other and different closes than the place mentioned in the plea, and it appeared at the trial that they were the same, it was held the defendants were entitled to a verdict on the new assignment. And the court observed, that the plea of not guilty to the new assignment put the whole of it in issue, a part of which was that the closes were different from that mentioned in the plea. (*n*)

* Such being the effect of a new assignment, where only a single act of trespass has been committed, it is equally plain that where only one such act is charged in the declaration and is justified by the defendant, the plaintiff cannot traverse the defendant's plea and also new assign. In a case where the plaintiff complained of a single act of trespass in each count of the declaration, and the defendant justified each of the trespasses thus charged in his pleas, and the plaintiff traversed the matter alleged in justification, and also new assigned in respect of other acts of trespass; the court held, on demurrer, that this

(*l*) *Ante*, 658.

(*m*) *Oakley v. Davis*, 16 East, 82. Where the trespass charged is a single act, but is committed in a more violent manner than the subject of justification authorized, this

should, it seems, be put on the record in a replication, and not as a new assignment of a distinct trespass. 7 Moore, 33; *ante*, 619; *post*, 665.

(*n*) *Pratt v. Groome*, 15 East, 335.

mode of pleading was objectionable on the ground of *duplicité*, and that it was an attempt by a new assignment to amplify the cause of action stated in the declaration; and they observed that the object of a new assignment was to lay out of the question all that the defendant had pleaded, by saying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration. (o) So, in another case, where the plaintiff alleged a single act of trespass in his declaration, and the defendant pleaded a justification thereto, to which the plaintiff replied *de injuriâ*, and also new assigned that the defendant committed trespasses at other times, the court held it to be clear that where a single act only of trespass was laid, and not *diversis vicibus et diebus*, and that act was covered by the plea, there could be no new assignment. (p)

Again, as the object of a new assignment is to correct an error in the plea, and to aver that the defendant has omitted to answer the whole or a part of the true ground of complaint, it can never be necessary to new assign where the defendant in his plea justifies or attempts to justify all the trespasses in respect of which the plaintiff proceeds. Thus, where the declaration charged that the defendant assaulted and imprisoned the plaintiff, and during such imprisonment assaulted and struck him, and the defendant justified an arrest and imprisonment under process, and also justified the beating, in consequence of subsequent outrages and violent conduct on the part of the plaintiff, it was held, that although the defendant proved the first part of his justification, viz. the arrest under process, yet as he failed to show a *sufficient cause* for the battery, the plaintiff was entitled to a verdict without having new assigned. (q)

Upon the same principle, apparently, it has been held, in the case of a license pleaded, that where the declaration alleges the commission of trespasses on *divers days and times*, and the defendant pleads a license generally, viz. on the several days and times when, &c. without confining the generality of the declaration by specifying any particular trespass or trespasses, he is bound to show a license co-extensive with the *trespasses* proved; and that therefore the plaintiff *having shown a trespass prior to the license was entitled to a verdict on the general replication *de injuriâ*, without any new assignment. (r)

Another case in which a new assignment is unnecessary, is where in trespass to real property the plaintiff describes the close by its name in the declaration (as since Reg. Gen. Hil. T. 4 W. 4, reg. 5, he must do, subject to a special demurrer if omitted), and the defendant pleads *liberum tenementum*,

New assignment not necessary when name or abutments, or description of close

(o) *Cheasley v. Barnes*, 10 East, 73, 81, note. See, also, *Thomas v. Marsh*, 5 C. & P. 596.

(q) *Phillips v. Howgate*, 5 B. & Ald. 220.

(r) *Barnes v. Hunt*, 11 East, 451; *ante*, 658, and note (r).

(p) *Taylor v. Smith*, 7 Taunt. 156.

is stated in
declaration
as is now re-
quired by
Reg. Gen.
Hil. T. 4 W.
4, reg. 5.

without giving any more specific description of the *locus in quo* than the plaintiff had done. We have seen that in all cases where the plaintiff had given no particular designation of the *locus in quo*, the general plea of *liberum tenementum* compelled him to new assign, or otherwise the only question at the trial was, whether the defendant could support his plea by showing that he possessed any land within the parish or place named in the declaration. (s) But it has been considered, that wherever the plaintiff ascertains the place in his declaration, the plea of *liberum tenementum* cannot be supported. (t) And at all events it is clear that it can be of no avail to the defendant in a case of this description, where he merely follows the name given by the plaintiff in his declaration. Thus, where the declaration stated a trespass in the plaintiff's close called the *Foldyard*, in the parish of A., and the defendant pleaded that the said close in the declaration mentioned was his freehold, which the plaintiff traversed, and upon the trial it appeared that both the plaintiff and the defendant had a close called the *Foldyard*; it was held by the court that the plaintiff having proved a trespass committed in his close, was entitled to recover, and there was clearly no necessity for a new assignment; that in order to compel him to new assign, as a name was given to the close in the declaration, the defendant should have given some further description in his plea; and that as the issue stood, the question was, whether the close described in the declaration as the plaintiff's was the defendant's freehold or not. (u) And in another case, where the plaintiff after the plea of *liberum tenementum* had newly assigned that the *locus in quo* "abutted on certain closes called A., B., and C., or some or one of them," to which the defendant again pleaded *liberum tenementum*; and it appeared in evidence that the plaintiff had a close abutting on A., and the defendant a close abutting on B. and C., it was held that the plaintiff was entitled to a verdict on the new assignment. (x)

It is of no avail to new assign an *excess* in committing a legal act, if in *law* the *excess* were strictly justifiable, though not necessary in *fact* to the full exercise of the defendant's right or claim in the particular case. Thus, a commoner may pull down *all* the fences which are wrongfully erected *upon* the common, although the destruction of * part would have afforded him the full benefit and enjoyment of his right; and therefore if in trespass against him the plaintiff new assign the excess, the defendant will be entitled to a verdict thereon. (y) So, the *cutting* or destruction of a gate or other *public* nuisance to a highway, though an excess, not absolutely essential for the enjoyment

(s) *Ante*, 658.

(t) Per Willes C. J. *Lambert v. Stroother*, Willes R. 222.

(u) *Cocker v. Crompton*, 1 B. & C. 489, 490; 2 D. & R. 719, S. C.

(x) *Lethbridge v. Winter*, 2 Bing. 49.

(y) *Ariett v. Ellis*, 7 B. & C. 346; 9 D. & R. 897, S. C.; and see 5 C. & P. 596, 597; 1 Chit. Gen. Prac. 654.

of the public right, may, it has been supposed, be justified, and if so, it would be of no use to reply or new assign any such excess. (z)

Lastly, A new assignment will frequently be rendered unnecessary by the use of several counts in the declaration when admissible. Thus where two assaults, &c. have been committed, and the declaration contains as many counts as are equal to the number of assaults, and the defendant pleads a general issue to the whole, and a justification to one of the counts, the plaintiff had better put the justification in issue, and in case the defendant proves it, give evidence of the other assault upon the other counts, than make a new assignment; for if the plaintiff fail in proof of the allegation in the new assignment he cannot afterwards have recourse to the second count, because by the new assignment he acknowledges that one of the trespasses is justified, and has therefore abandoned one count, and relied on the trespass mentioned in the new assignment; he cannot therefore avail himself of one and the same act of trespass, both on the new assignment and on the second count; but if he could prove two trespasses besides that which he has waived, he might then have recourse to the second count. (a)

When new assignment unnecessary in case of two or more counts.

There are some replications which rather partake of the nature of new assignments than are properly and strictly so. As where the defendant has abused an authority or license which the law gives him, by which he became a trespasser *ab initio*. (b) In an action brought for a trespass thus committed, where the defendant pleads the license or authority the plaintiff may reply the abuse. (c) Such a replication it will be observed differs from a new assignment, because it does not operate in any manner as a waiver of abandonment of the trespass attempted to be justified, but states matter in confession and avoidance of the justification.

Replications in nature of new assignments.

The instances we have given upon the law of new assignment have * been confined to the action of trespass, because, as we have formerly observed, it rarely becomes necessary to new assign in any other form of action. The following instances will, however, show that a new assignment may occur in most

Of new assignments in other actions besides trespass

(z) James v. Hayward, Cro. Car. 184; Lodie v. Arnold, 2 Salk. 458; 1 Chit. Gen. Prac. 654.

(a) Atkinson v. Matteson, 2 T. R. 172; per Buller J. 2 T. R. 177; 6 Mod. 120; 1 Saund. 299, note (b); ante, 619.

(b) See ante, 193, 620.

(c) See ante, 193, 620, 622; Thomas v. Marsh, 5 C. & P. 596, 597; Calvert v. Gordon, 7 B. & C. 809; 1 M. & R. 497, S. C.; 8 Rep. 146; Dye v. Leatherdale, 3 Wils. 20;

Taylor v. Cole, 3 T. R. 292; S. C. in error, 1 H. Bl. 555; Moore v. Taylor, 5 Taunt. 69, 72; 1 Saund. 300 d, 5th ed.; Lucas v. Nockells, 4 Bing. 729; 1 M. & P. 783, S. C. In trover, where the defendant justified taking a deer damage feasant, it was held (Littledale J. *dubitante*) that the plaintiff must reply subsequent abuse. Weeding v. Aldrich, 9 Ad. & El. 861. [See ante, 622, note (t); Sterling v. Warden, 51 N. H. 217.]

forms of action. Thus, if in an action in *case* for the publication of a libel, without mentioning the particular person to whom it was published, the defendant has pleaded that he published it lawfully as to members of a committee of the House of Commons, and the plaintiff proceeds for a publication to other persons, not members of the committee, he should reply, or rather new assign such illegal publication. (d) So, in an action for an escape, if the defendant plead a negligent escape and voluntary return, the plaintiff should new assign a subsequent escape; (e) and if in *case* for disturbance of a right of common for cutting turves, the defendant plead that he cut the turves as servant of the lord of the manor, the plaintiff may new assign that the defendant cut other turves for sale, and not for the use of the lord. (f)

In the action of *replevin*, as the plaintiff is bound to show the place in certain where the taking was, it is said there can be no new assignment. (g) In the action of *assumpsit* for goods sold, &c. where the defendant pleads a judgment recovered, and the plaintiff has in point of fact obtained a judgment in a former action for goods sold, &c. but for different goods and causes of action, the plaintiff ought not to reply *nul tiel record*, for in such case he would be defeated by the production of the record; but he should reply that the causes of action mentioned in the declaration were not the same identical causes of action for which the former judgment was recovered. (h) This replication is in some degree analogous in its object and effect to a new assignment, but it will be observed that it is not strictly a new assignment, inasmuch as it consists of a traverse of a material allegation in the defendant's plea.

In point of *form* there are two modes of *introducing* the matter new assigned. If the plaintiff traverse the plea as well as new assign after framing the replication to the plea as in ordinary cases, the form runs thus, (i) "And the said plaintiff further saith, that he issued his * writ against the defendant and declared thereupon, *not only* for the said several trespasses in the said second plea

(d) 1 Saund. 133; *Monprivatt v. Smith*, 2 Campb. 175. In an action in *case* against carriers for loss of goods, where the defendant pleads that the plaintiff had notice that the defendant would not be responsible unless the goods were insured, and that they were not insured; if the defendant was guilty of such negligence as would make him responsible notwithstanding such notice, the plaintiff should new assign the negligence. *Wyld v. Pickford*, 8 M. & W. 459.

(e) *Griffiths v. Eyles*, 1 B. & P. 413; *Chambers v. Jones*, 11 East, 408.

(f) *Greenhow v. Halsey*, Willes, 619, 620.

(g) *Freem*, 238.

(h) *Seddon v. Tutop*, 6 T. R. 607; *Lord*

Bagot v. Williams, 3 B. & C. 235; *Calvert v. Gordon*, 7 B. & C. 809; 1 M. & R. 497, 8 C.; [*Snider v. Croy*, 2 John. 227.] See the form, *Ib.* and *post*, vol. ii. 424; 3 *Wentw.* 151; *semble*, that the plaintiff might new assign that the action is brought for different promises. When unnecessary to new assign to plea of payment in *assumpsit* or *debt*, *James v. Lingham*, 5 Bing. N. C. 553; *Freeman v. Crofts*, 4 M. & W. 4; *Monkman v. Shepherdson*, 11 Ad. & El. 411; in *trover*, *Branker v. Molyneux*, 1 M. & Gr. 710.

(i) See forms, *post*, vol. ii. 763; and see a form in *trespass*, *Thomas v. Marsh*, 5 C. & P. 596.

mentioned, and therein attempted to be justified, *but also* for that the defendant, on, &c." (stating the matter new assigned); (*k*) but if the plaintiff *merely* new assign, then the form is thus: "And as to the said plea of the defendant by him secondly above pleaded, the plaintiff saith, that he issued his writ against the defendant, and declared thereupon, *not for* the said supposed trespasses in the introductory part of the said second plea mentioned, *but for* that the defendant, on, &c." (stating the matter new assigned). (*l*) A new assignment, being in the nature of a new declaration, should be equally certain as to *time*, *place*, and other *circumstances*, (*m*) and it must not be negatively, that the trespasses mentioned in the plea were not the same as those for which the plaintiff complained, but some other trespasses must be shown. (*n*) If the new assignment be in *another close or place*, the plaintiff should give the place a name, or otherwise describe it with some certainty, (*o*) and which, on not guilty thereto, must be proved as stated; (*p*) and if it be in the *same close*, it is said the particular spot should be set forth in such a manner, that a plain difference may be perceived between the place newly assigned and that mentioned in the plea; (*q*) but where a right of way is pleaded, it is usual to new assign *extra viam*, without showing in what particular part of the *locus in quo*. (*r*)

When the defendant justifies under a right of common, or way, &c. at particular times of the year, or in particular parts of the close, &c. the plaintiff may new assign that the trespasses were committed "*at other times, and on other occasions, and for other and different purposes than those mentioned in the plea*;" or that the defendant, "in a *greater degree*, and with *more force* and violence than was *necessary* for removing the supposed obstructions to the said supposed way, &c. cut down the gates, &c." (*s*) The matter new assigned must be consistent with the declaration, and not varying from or more extensive than the trespasses therein enumerated, (*t*) or those which the defendant has answered in his plea; for a new assignment is merely to avoid the effect of the plea, which can only operate upon the trespasses thereby admitted. (*u*) It should also only be of *material* matter, and

(*k*) House v. The Commissioners of the Thames, 3 B. & B. 119; 6 Moore, 330, S. C.; 1 Saund. 300.

(*l*) See the forms, *post*, vol. ii. 671; 2 Co. 6 a, 18 b; 1 Saund. 300 a.

(*m*) Com. Dig. Pleader, 3 M. 34; Vin. Abr. Trespass, U. a. 4, pl. 13; Bac. Abr. Trespass, I. 4, 2; Dyer, 264 a.

(*n*) 3 Leon. 92; *post*, vol. ii. 671, note.

(*o*) Dyer, 264 a, 23 b, pl. 147; 1 Saund. 299 c; Vin. Abr. Novel Assignment, A.; Bro. Abr. Trespass, 203. See the forms, *post*, vol. ii. 671; 2 Co. 6 a, 18 b; 2 Andr. 103; Benl. & Dal. 177; Lethbridge v. Winter, 2 Bing. 49; Cocker v. Crompton, 1 B. & C. 489; 2 D. & R. 719, S. C.

(*p*) Com. Dig. Pleader, 3 M. 34; Vin. Abr. Trespass, U. a. 4, pl. 12, &c.; Bul. N. P. 82; Smith v. Milles, 1 T. R. 479.

(*q*) See note (*m*), *supra*; Vin. Abr. Trespass, U. a. 4, pl. 3.

(*r*) *Post*, vol. ii. 673; *sed vide* Vin. Abr. Trespass, U. a. 4, pl. 3.

(*s*) See forms, *post*, vol. ii. 673. As to replying this, see *ante*, 619, 662, note (*m*).

(*t*) Vin. Abr. Trespass, U. a. 4, pl. 19; Winch. 65; 4 Leon. 15, 16; Cheasley v. Barnes, 10 East, 79, 81; Taylor v. Smith, 7 Taunt. 156.

(*u*) Cheasley v. Barnes, 10 East, 80.

* therefore, if the plea set up a right of way, or common, &c. at *all times* of the year, the new assignment should not be, that the defendant, "at other times, &c." time in that case being immaterial; and in an action of trespass against several, if some of the defendants suffer judgment by default, and the others plead a justification, the new assignment should be as to all the defendants, and not merely to those who have pleaded, for that would be a departure. (x)

The *conclusion* of a new assignment must be with a verification, in order that the defendant may have an opportunity of answering it. (y) After stating the matter newly assigned, the form usually is thus: "And which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said second plea mentioned, and therein attempted to be justified; wherefore, inasmuch as the defendant hath not answered the said trespasses above newly assigned, the plaintiff prays judgment, and his damages by him sustained, on occasion of the committing thereof, to be adjudged to him, &c." (z) And though with respect to the latter part of this conclusion, it has been said that it would be more correct if it were to stop at the words, "*et hoc paratus est verificare*," without praying judgment against the defendant for not answering the trespasses newly assigned, when it was impossible he should answer it before it was alleged; (a) yet it may be observed that matter newly assigned is always considered as having been already stated in the declaration; and consequently the defendant might have answered it, if he had thought fit to plead to the injury really intended to be complained of.

A new assignment being, as already observed, in the nature of a new declaration, and dismissing the previous pleading from consideration, so far as respects the matter newly assigned, the defendant should plead to it precisely as to a declaration, (b) either by denying the matter newly assigned, by the plea of not guilty, &c. (c) or by answering it by a special plea of matter of justification, (d) and he may plead several pleas. (e) As the plaintiff avers that the trespasses newly assigned are other and different to those mentioned in the plea, he waives or abandons the trespasses which the defendant has justified, and it is not necessary to plead over again to the new assignment any matter of justification necessarily covered by the plea; as if common of pasture at all times of

(x) 2 Leon. 199; Com. Dig. Pleader, F. 11; *post*, 674, 675.

(y) Bac. Abr. Trespass, 1, 2, 4; *Hustler v. Raines*, Lutw. 1401; 1 Saund. 103.

(z) See the form, 2 Co. 6 a, 18 b; Rast. Ent. 608; *post*, vol. ii. 671; and 9 Wentw. Index, cxxiv.

(a) Freem. 238.

(b) Gouldsb. 101; *Odiham v. Smith*, Sir F. Moore, 540; Cro. Eliz. 590, S. C.

(c) See the form, *post*, vol. ii. 671; Bra. Abr. Trespass, pl. 359.

(d) Bro. Abr. Trespass, pl. 168, 203, 359.

(e) Bac. Abr. Trespass, l. 4, 2.

the year be pleaded, and * the plaintiff new assigns that the defendant entered at other times, the right of common of pasture cannot be set up in the plea to the new assignment. (*f*) So, the defendant cannot plead to the new assignment, that the place (*g*) or trespass, &c. mentioned therein, is the same as that mentioned in the plea; and, if in truth they are the same, the defendant should plead not guilty, and take advantage of it in evidence, as the plaintiff would be estopped from proving any trespass in the same place, &c. (*h*) For the same reason the defendant cannot justify at a different place, and traverse the place mentioned in the new assignment; (*i*) and when the plaintiff traverses the plea as well as new assigns, the defendant cannot, as to the matter answered in the plea, plead new matter, but must stand by his plea. (*k*) If the new assignment be bad, the defendant should demur, and it may be frequently necessary so to do, if the defendant wish to avail himself of his plea of *liberum tenementum*. (*l*)

In an action of trespass *quare clausum fregit*, where the plaintiff new assigns, it often becomes prudent to suffer judgment by default to the new assignment, (*m*) or perhaps since the stat. 3 & 4 W. 4, c. 42, sect. 21, permitting a defendant by leave of a judge, in some actions, to pay money into court, to do so and plead such payment. Before the 3 & 4 Vict. c. 24, it was held on the construction of the statute 22 & 23 Car. 2, c. 9, s. 136, that a certificate to entitle the plaintiff to full costs, where the damages were under 40*s.*, was unnecessary, whether it appeared from the whole record that the freehold did or did not come in question. (*n*) And it was held in consequence, that when there was a special plea and a new assignment, and the plaintiff recovered upon the new assignment, he was in general entitled to full costs, whether the special plea were not traversed, or whether it were traversed and found for the defendant. (*o*) This often rendered it dangerous to *plead* to the new assignment, and particularly so when the defendant had a good

Suffering judgment by default to new assignment. Effect as to costs, &c.

(*f*) Gouldsb. 191; Odiham v. Smith, Sir F. Moore, 540; Cro. Eliz. 590, S. C.; and see the cases in note (*h*), *infra*.

(*g*) Gouch v. Freestone, Sir F. Moore, 460; Jenk. 6th Cent. 265.

(*h*) *Supra*, note (*f*); Vin. Abr. Trespass, U. a. 4, pl. 10; Bac. Abr. Trespass, I. 4, 2; 1 Saund. 299 c, 115; Freeston v. Stanford, Cro. Eliz. 355; Freeston v. Crouch, Cro. Eliz. 493; 14 Hen. 8, 4, pl. 3; Bro. Abr. Trespass, 168; 27 Hen. 8, 7, pl. 21; Bro. Abr. Trespass, 3.

(*i*) Bro. Abr. Trespass, pl. 168; Vin. Abr. Trespass, U. a. 4, pl. 9, 10, 15.

(*k*) Prettyman v. Lawrence, Cro. Eliz. 812; Bac. Abr. Trespass, I. 4, 2.

(*l*) Lethbridge v. Winter, 2 Bing. 49; Dyer, 23 b, pl. 147.

(*m*) See 1 Saund. 300, note. And see the note of the editors of the fifth edition, in which the cases on this subject are all collected, and the result very perspicuously stated. And see Tidd, 9th ed. 966, 973.

(*n*) Bedridge v. Palmer, 2 H. Bl. 2; Comer v. Baker, 2 H. Bl. 341; Peddell v. Kiddle, 7 T. R. 659.

(*o*) Asser v. Finch, 2 Lev. 234; Beale v. Moor, 2 Stra. 1168; Martin v. Vallance, 1 East, 350; Taylor v. Nicholls, 3 B. & Ald 443; and Cockerill v. Allanson, Hullock on Costs, 76; Chitty's Arch. Prac. 7th ed. 1144.

case upon his special pleas, since, notwithstanding he might succeed on his pleas, and thus fully answer the whole matter substantially in dispute, the plaintiff was * entitled to the *general costs* of the action, if he could prove any trifling act of excess on the part of the defendant. In cases of this description, it was therefore often expedient to suffer judgment by default to the new assignment, and thus at the trial to confine the matters in dispute to those which were answered by the pleas; for although this mode of proceeding enabled the plaintiff to obtain costs as upon a judgment *by default*, if he thought proper, yet if he proceeded to trial on the special plea and failed, the defendant was entitled to the general costs; for the plaintiff might have entered a *nolle prosequi* as to that plea, and assessed his damages on the new assignment before the sheriff, and consequently need not have proceeded to trial. (*p*) By the second section of the 3 & 4 Vict. c. 24, the plaintiff in an action of trespass, or on the case, is not without a certificate from the judge entitled to costs, unless he obtain a verdict for 40s.; but it will still be frequently advisable to suffer judgment by default to the new assignment, and in such a case the defendant must take care that a plea of not guilty be not left entire upon the record, for as the matters newly assigned are considered as virtually contained in the declaration, it has been held that the effect of a general plea of not guilty to the whole declaration is to prevent the plaintiff from availing himself of the judgment by default to a new assignment, by assessing the damages before the sheriff, and to compel him to go to trial notwithstanding such judgment. (*q*) The defendant, therefore, where he has *originally* pleaded the general issue, and is afterwards desirous of suffering judgment by default to a new assignment, should, when he suffers such judgment, enter a *retraxit* of the plea of the general issue, as far as the same relates to the trespasses newly assigned. It is justly observed that there is nothing incongruous in this, since the decisions upon this point have proceeded entirely upon the ground that the trespasses newly assigned are virtually included in the declaration. (*r*) And it has accordingly been decided, that where the defendant adopted this course, and afterwards obtained a verdict upon one issue going to the whole cause of action (exclusive, of course, of the trespasses newly assigned), he was entitled to the costs of the trial. (*s*)

(*p*) *Thornton v. Williamson*, 13 East, 191.

(*q*) *House v. The Commissioners of the Thames*, 3 B. & B. 117; *Vickers v. Gallimore*, 5 Bing. 196; 2 M. & P. 359, S. C.; 1 Y. & J. 354; *Longden v. Bourn*, 1 B. & C. 278.

(*r*) 1 Saund, 300 b, note (*f*), 5th ed. See the judgment of Parke B. on this subject in *Probert v. Phillips*, 2 M. & W. 41.

(*s*) *Cross v. Johnson*, 9 B. & C. 613; and

see per Best C. J. *Vickers v. Gallimore*, 5 Bing. 199. The form of such *retraxit*, as given in 1 Saund. 5th ed. is as follows: "And the said defendant, relinquishing his said plea by him first above pleaded to the said declaration, so far as the said plea relates to the said trespasses above newly assigned, says nothing in bar or preclusion of the said trespasses above newly assigned, wherefore, &c."

To the plea or pleas to the new assignment, the plaintiff should *reply* precisely as to pleas to a declaration, and if the plea be such as * would require a new assignment, if pleaded to a declaration, the plaintiff should again new assign to such plea. (t)

Replication to plea to a new assignment.

III. THE CONCLUSION.

The *conclusion* of replications, in *particular* instances, has already been pointed out. (u) We have seen that *every* replication must, in point of *form*, conclude either to the *country* or with *a verification*. (x) We have also shown when or not a *prayer of judgment* is or not essential or advisable. (y) It may here suffice to observe, that when a replication *denies* the whole of the defendant's plea, containing matter of fact, it should conclude *to the country*, thus: "and this he the plaintiff prays may be inquired of by the country, &c." (z) And it is an established rule applicable to every part of pleading subsequent to the declaration, that when there is an affirmative on one side, and a negative on the other, or *vice versa*, the conclusion should be to the country, (z¹) although the affirmative and negative be not in express words, but only tantamount thereto. (a) It may also be laid down as a safe rule, that where a defendant cannot take any new or other issue in his rejoinder than the matter he had before pleaded without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, the plaintiff should conclude to the country; (b) and it is not material in this case, whether the replication contain a formal traverse, for where a traverse comprises the *whole* matter of the plea, the replication may still conclude to the country. (c) It suffices that there is a good traverse of the substance of the plea. (d) In debt on bond for not accounting, the defendant pleaded that he did account. Replication, that defendant received £2,000, for which he did not account. Rejoinder, that he received it from particular persons, and that he accounted for the same. It was held that a surrejoinder, that the moneys mentioned in the replication, and those mentioned in the rejoinder,

III. CONCLUSION.

(t) 1 Saund. 299 c. See the forms referred to in 9 Wentw. Ind.; 2 Co. 6, and *post*, vol. ii. 671.

(u) *Ante*, 625-627; and see as to the conclusion in general, Com. Dig. Pleader, F. 5, E. 32; Co. Litt. 303 a. All affirmative pleadings which do not conclude to the country, must conclude with a verification. Steph. 5th ed. 481. Origin of the rule. Steph. 5th ed. 480.

(x) *Ante*, 625-627.

(y) *Ante*, 628.

(z) 1 Saund. 103; Robinson v. Raley, 1 Burr. 316; Traupaud v. Mercer, 2 Burr. 1022; Boyce v. Whitaker, Dougl. 94; Smith v. Dovers, Dougl. 428; Hedges v. Sandon, 2

T. R. 442, 443. [And not "of this he puts himself on the country." Hartwell v. Hemmenway, 7 Pick. 117.]

(z¹) [See Labagh v. Cantine, 13 John. 274; Bindon v. Robinson, 1 John. 516.]

(a) 1 Saund. 103; De la Rue v. Stewart, 2 New Rep. 363.

(b) 1 Saund. 103 b; and see the reason, 2 Saund. 189, 190.

(c) Haywood v. Davies, 1 Salk. 4; 1 Saund. 103 a, b. [See Manhattan Company v. Miller, 2 Caines, 60; Snider v. Croy, 2 John. 428; Patcher v. Sprague, 2 John. 462; Bindon v. Robinson, 1 John. 516.]

(d) Hedges v. Sandon, 2 T. R. 443.

were different moneys, might conclude to the country. (e) This conclusion, we have seen, is now proper in all special traverses. (f)

* It is a general rule that when *new matter* is alleged in the replication, it should conclude with an averment or verification, (f¹) in order to give the defendant an opportunity of answering it and an appropriate prayer of judgment for debt and damages, or damages only, according to the form of action, and the subject-matter of dispute, (i) and not merely *unde petit judicium si actione precludi debet*. (j) But when the defendant would not be at liberty to traverse or answer the new matter without a departure, the replication may, notwithstanding the introduction of new matter, conclude to the country; as if to debt on an award the defendant plead no award, and the plaintiff reply an award, and set forth a breach, it is said that he may conclude to the country, (k) though a conclusion with a verification is most usual. (l) And in an action of debt on a recognizance of bail in the same court, where the defendant pleads that no *ca. sa.* issued against the principal, a replication setting out the *ca. sa.* and concluding with a verification by the record, and a prayer that the record may be inspected by the court, is good, though no formal issue be joined. (m) If the new matter introduced in the replication be of a *negative* nature, *no conclusion* seems to be necessary, though it is usually adopted by using the common *verification*, "and this the plaintiff is ready to verify, &c." (n)

Where matter of *estoppel* is replied, the plaintiff should expressly rely on it, or he will lose the benefit of it, (o) and it is usual to conclude the replication in that case with a verification and prayer of judgment, if the defendant ought to be admitted or received against his own acknowledgment, &c. to plead his plea. (p)

(e) Calvert v. Gordon, 7 B. & C. 809.

(f) Ante, 650.

(f¹) Hampshire Manuf. Co. v. Billings, 17 Pick. 87.]

(i) Vide Vivian v. Jenkins, 5 Nev. & Man. 14.

(j) De la Rue v. Stewart, 2 New Rep. 363, 364; 1 Saund. 103, note (1); 327, note (1); 2 Saund. 63 g; Curry v. Stephenson, Carth. 337; Cowper v. Towers, 1 Lutw. 101; Filwood v. Popplewell, 2 Wils. 66; Chandler v. Roberts, Dougl. 60; Henderson v. Withy, 2 T. R. 576; Curry v. Stephenson, 4 Mod. 376; [Frohook v. Pattee, 38 Maine, 103.]

(k) 1 Saund. 327, note (1), cites 3 Lev. 165.

(l) See ante, 583, note (u).

(m) Jackson v. Wickes, 2 Marsh. 354, acc.; Henderson v. Withy, 2 T. R. 576, *semble contra.* See ante, 583, note (u).

(n) See Co. Litt. 303 a; Millner v. Crowdall, 1 Show. 335; Stephen, 5th ed. 481, 482; Harvey v. Stokes, Wiles, 6. A plea of the statute of limitations without a verification, is good on special demurrer. Bodendam v.

Hill, 7 M. & W. 274; 8 Dowl. 862, S. C. In an action by a purchaser against vendors, for breach of the conditions of sale, the latter pleaded that they within twenty days after the sale delivered an abstract, but that the plaintiff did not, within ten days afterwards, take any objection to the title in writing, according to the conditions. The plaintiff replied that although the defendants did, within twenty days, deliver an abstract, yet that they did not, by the said abstract, disclose "a good and sufficient title," and that the plaintiff did, within ten days after the delivery of the abstract, take objections to the title in writing, concluding to the country; and it was held that the replication did not introduce new matter, but amounted to a traverse of the latter allegation in the plea, and therefore properly concluded to the country. Smith v. Tanner, 1 M. & G. 802.

(o) 1 Saund. 325, note (4); 1 Co. 52 a; ante, 629, 630. [See Howard v. Mitchell, 14 Mass. 241.]

(p) Post, vol. ii. 381; Shelley v. Wright, Wiles, 11, 13.

But in this, and indeed all other replications, it is sufficient, after the proper verification, to pray judgment generally, without pointing out the appropriate judgment; (*q*) and where the word "*certify*" was by mistake inserted * instead of "*verify*," the court appeared to consider the replication sufficient. (*r*) And unless assigned specially as a cause of demurrer, a defect in the conclusion of a replication is aided. (*s*)

Where matter of *record* is relied upon, the plaintiff should conclude his replication with a verification by the record. (*t*)

The Reg. Gen. Hil. T. 2 W. 4, reg. 107, orders "that it shall not be necessary that any pleadings which conclude to the country be signed by counsel." (*u*)

Signature of
counsel.

III. THE QUALITIES OF A REPLICATION.

The *qualities* of a replication, in a great measure, resemble those of a plea, (*x*) and are, *First*, that it must answer so much of the plea as it professes to answer, and that if bad in part it is bad for the whole; *Secondly*, that it must be conformable to, and not depart from the count; *Thirdly*, that it must present matter of *estoppel*; or must *traverse*, or *confess and avoid* the plea; *Fourthly*, that, like a plea, it should be certain, direct, and positive, and not argumentative, and also that it be triable; and, *Fifthly*, that it must be single.

1st. We have already pointed out the course which the plaintiff should adopt where the defendant has omitted to plead to a part of the plaintiff's demand, or where one of the defendants has not pleaded at all; and that the plaintiff's omission to adopt the proper course of proceeding thereon will sometimes occasion a *discontinuance*. (*y*) Where there are several defendants in an action *ex contractu*, the plaintiff cannot enter a *nolle prosequi* as to one of them, except upon a plea by him, which operates merely in his personal or individual discharge without affecting the validity of the debt, as bankruptcy or insolvency; but in an action *ex delicto*, a *nolle prosequi* as to one defendant does not in any instance discharge the others. (*z*) A replication should also answer so much of the plea as

I. MUST ANSWER THE
PLEA.

(*q*) *Shelley v. Wright*, Willes, 13; 1 Saund. 97 a; *Le Bret v. Papillon*, 4 East, 502, 509; *Vivian v. Jenkins*, 5 Nev. & Man. 14. As to prayer of judgment in a plea in abatement or bar, *ante*, 476, 477.

(*r*) *Harvey v. Stokes*, Willes, 6, 7.

(*s*) 16 & 17 Car. 2, c. 8; 4 & 5 Ann. c. 16, s. 1; 1 Saund. 99, note (2).

(*t*) See *post*, vol. ii. 20.

(*u*) See *Jervis's Rules*; Tidd, 672, 673, 693. Where a defendant pleaded the general issue to the whole declaration, and a special plea, concluding with a verification, and de-

livered them without counsel's signature, it was held that the plaintiff might treat the whole pleading as a nullity, and sign judgment as for want of a plea. *Shield v. Quick*, 8 M. & W. 289. As to the sufficiency of a copy of the counsel's signature to the plea delivered, see *Salter v. Ponsford*, 8 Dowl. 435.

(*x*) *Ante*, 551.

(*y*) *Ante*, 549, 550; and see Com. Dig. Pleader, F. 4; W. 1, 2, 3; *Tippet v. May*, 1 B. & P. 411.

(*z*) *Ante*, 52, note (y), 594.

it professes to answer, (*z*¹) or it will be a discontinuance. (*a*) And it is a rule that an entire replication bad in part is bad for the whole; (*a*¹) as if to a plea of the statute of limitations to two counts of a declaration, the plaintiff should *reply that the accounts were between the plaintiff and defendant as merchants, if this replication should be bad as to one of the counts it is bad also to the other. (*b*) But this rule does not apply where the matter objected to is merely surplusage; (*c*) and where a defendant sued as an executor or administrator has pleaded several judgments outstanding, it would be a sufficient answer to the whole plea to deny the validity of one of the judgments. (*d*)

2dly. It is also a settled rule, that the replication must not depart from the allegations in the declaration in any material matter. (*e*) But if the allegation in the declaration be immaterial, the replication may vary, and state another ground; thus, in detinue, if the declaration state a bailment that is in general immaterial, and therefore if the defendant in his plea state a different bailment, the plaintiff may, without traversing that in the plea, show the detention was wrongful without being guilty of a departure. (*f*) A departure in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder, &c. contains matter not pursuant to the declaration or plea, &c. and which does not support and fortify it. (*g*) A departure in pleading cannot of course take place until the replication, but it may arise in that or any subsequent pleading. (*g*¹) It is not allowed, because the record would,

(*z*¹) [See *Marsteller v. M'Clellan*, 7 Cranch, 156. A replication, which neither admits, denies, nor avoids the averments in the plea, is bad. *Mason v. Craig*, 3 Stew. & P. 389; *Gibbins v. Ogden*, 3 Halst. 288. A good single replication to several pleas, as all containing the same matter, must be good as to each plea singly. *Lapham v. Briggs*, 27 Vt. 26.]

(*a*) Com. Dig. Pleader, F. 4, W. 2; 1 Saund. 338. See this rule illustrated, as it applies to a plea, *ante*, 549. The same principles apply to a replication.

(*a*¹) [See *Martin v. Williams*, 13 John. 268.]

(*b*) Com. Dig. Pleader, F. 25; *Duffield v. Scott*, 3 T. R. 376; 1 Saund. 28, note (3); 2 Saund. 127. This form of replication has been decided to be inapplicable to debt or assumpsit. *Inglis v. Haigh*, 8 M. & W. 769.

(*c*) *Ib.*; *Duffield v. Scott*, 3 T. R. 374, 377; *Taylor v. Eastwood*, 1 East, 219.

(*d*) 1 Saund. 337 b, note (2).

(*e*) See the discussion in *Gledstane v. Hewitt*, 1 Tyr. 445; [*Lindsay v. Jamison*, 4 McCord, 93; *Collins v. Waggoner*, Breese, 26; *Fowler v. Macomb*, 2 Root, 388.]

(*f*) *Gledstane v. Hewitt*, 1 Tyr. 445; 1 Cr. & Jer. 565.

(*g*) 2 Saund. 84 a, note (1); Co. Litt. 304 a; *Palmer v. Stone*, 2 Wils. 98; Com. Dig. Pleader, E. 7, 11; *Dudlow v. Watchorn*, 16 East, 39; *Winstone v. Linn*, 1 B. & C. 460; *Tidd*, 9th ed. 688; *Steph.* 5th. ed. 451, where all the recent cases on the subject are collected; [*Haley v. M'Pherson*, 3 Humph. 104; *M'Aden v. Gibson*, 5 Ala. 341; *Wells v. Teall*, 5 Blackf. 306; *Allen v. Mayson*, 3 Brevard, 207; *Andrus v. Waring*, 20 John. 160; *Wyman v. Mitchell*, 1 Cowen, 319; *Paine v. Fox*, 16 Mass. 129; *Dawes v. Winship*, 16 Mass. 291; *Keay v. Goodwin*, 16 Mass. 1, 2; *Hapgood v. Houghton*, 7 Pick. 451; *Little v. Blunt*, 9 Pick. 488; *Darling v. Chapman*, 14 Mass. 102, 103, 104. *Mellen C. J.* in *Nason v. Allen*, 5 Greenl. 481; *Richardson C. J.* in *Tarleton v. Wells*, 2 N. H. 308; *McGavock v. Whitefield*, 45 Miss. 452. Departure in pleading is a matter of substance. *Tarleton v. Wells*, 2 N. H. 306.]

(*g*¹) [See *Sterns v. Patterson*, 14 John. 132; *Munroe v. Alaïre*, 2 Caines, 320; *Barlow v. Todd*, 3 John. 367; *Spencer v. Southwick*, 10 John. 259; *Bradner v. Demick*, 20 John. 163; *Nason v. Allen*, 5 Greenl. 481.]

by such means, be spun into endless prolixity, for if it were permitted, he who has departed from and relinquished his first ground or plea, might, in every different stage of the cause, resort to a second, third, or even further case or defence and thereby pleading would become infinite ; (*h*) and if parties were permitted to wander from fact to fact, forsaking one to set up another, no issue could be joined, nor could there be any termination of the suit. (*i*) A departure may be either in the *substance* of the action or defence, or the law on which it is founded ; (*k*) as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of parliament. (*l*) So, if in replevin for taking the plaintiff's goods and chattels, to wit, a lime-kiln, the defendant avows under a distress for rent, and the plaintiff pleads in bar * that the lime-kiln was affixed to the freehold ; this is a departure, the declaration being for goods and chattels, and the plea in bar stating the property to be part of the freehold. (*m*) And where in replevin for taking goods of the plaintiff, the defendant made cognizance of the taking as a distress for rent upon a demise to the plaintiff, and she pleaded in bar that she was a married woman at the time of the demise, and when the rent accrued due, it was held that such plea in bar negatived the cause of action, as it was to be presumed the husband was alive, so that the goods could not be the plaintiff's property. (*n*) So where in assumpsit by an executor on several promises, which were all laid to have been made *to the testator*, to which the defendant pleaded the statute of limitations, and the plaintiff replied a subsequent promise *to himself*, the replication was held to be a departure, and therefore bad. (*o*) A variety of other instances are collected in the Digests. (*p*) But where in detinue on a bailment of a promissory note, to be redelivered on request, defendant pleaded that the note was deposited by plaintiff as a pledge for the repayment to defendant of a loan of £50, and the replication stated a tender of £50, on special demurrer the replication was held good and no departure. (*q*) If a declaration describe a bill or note as having been indorsed to the plaintiff by the payee, and the defendant plead that indorsee was a married woman, it is no *departure* in the replication to state that she indorsed by the authority of her husband. (*r*)

(*A*) 2 Saund. 84 *a*, note (1) ; Steph. 5th ed. 460.

(*i*) Summary Treatise on Pleading, 92.

(*k*) Co. Litt. 304 *a* ; 2 Saund. 84 *a*.

(*l*) Co. Litt. 304 *a* ; Com. Dig. Pleader, F. 7, 8 ; The King & Queen v. Larwood, Carth. 306.

(*m*) Niblet v. Smith, 4 T. R. 504 ; 2 Saund. 84 *b*. [See, also, Sibley v. Brown, 4 Pick. 137.]

(*n*) Clarke v. Davies, 7 Taunt. 72.

(*o*) 2 Saund. 63 *g*, 84 *c* ; Hickman v. Walker, Willes, 29 ; Dean v. Crane, 1 Salk. 28 ; 6 Mod. 309 ; The Executors of the Duke of Marlborough v. Widmore, 2 Stra. 890 ; Sarell v. Wine, 3 East, 409.

(*p*) Com. Dig. Pleader, F. 6, 7, 8, 9, &c. ; Bac. Abr. Pleas, L. ; Vin. Abr. Departure, 1 Arch. 247, 253.

(*q*) Gledstane v. Hewitt, 1 Cr. & J. 565 ; 1 Tyr. 450.

(*r*) Prince v. Brunatle, 1 Bing. N. C. 435.

But a departure more frequently occurs in a rejoinder. (s) Thus, if in an action of debt on an arbitration bond, the defendant plead that *no award* was made, and the plaintiff in his replication set out an award, and assign a breach, it has been held that the defendant cannot rejoin that an award was not tendered, (s¹) or that the defendant hath performed or been ready to perform it. (t) If the award be in such case set out by the plaintiff in his replication, and a fatal defect appear on the face of it, the defendant may, it seems, demur; (u) or, if the plaintiff set it out partially, the defendant may set out the whole, * and then demur. (x) So, where in an action on a bond conditioned for the payment of an annuity, the defendant pleaded *no such memorial* as the statute 14 Geo. 3 required; and the plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; and the defendant rejoined that the consideration was untruly alleged in the *memorial* to have been paid to both obligors, for that one of them did not receive any part of it; it was held that this rejoinder, stating a new fact, was bad, as being a departure from the plea. (y) So, if bail plead *no ca. sa.* against the principal, and in their rejoinder allege that the *ca. sa.* stated in the replication did not lie four days in the office, this is a departure. (z) So, in an action of debt on bond, conditioned for performance of covenants, if the defendant plead *performance*, and the plaintiff reply and assign a breach, the defendant cannot rejoin any matter in *excuse* of performance. (a) So, where in trespass for impounding the plaintiff's mare, the defendant pleaded that she was doing damage to the king in his forest of Waltham, and the plaintiff replied a right of common in the forest, and the defendant rejoined that the mare was mangy, and doing damage, and that therefore he took and impounded her; this was held to be a departure from the plea, because the plea was, that the mare was doing a *private* trespass to the king in his forest, and that therefore the defendant impounded

(s) See Com. Dig. Pleader, F. 6, 7, 8, 9, &c. for the instances of a defective rejoinder, and 2 Saund. 83, 84, note (1), 188; 1 Saund. 117, note (3), 346 c. In trespass against three for an assault and battery, all pleaded the general issue, and one justified in defence of his freehold. Replication, unnecessary force by him. A rejoinder, that all the defendants did not use unnecessary force, was held bad on demurrer, as not pursuing the prior pleadings. *Marrow v. Belcher*, 4 B. & C. 704.

(s¹) [See, however, *Allen v. Watson*, 16 John. 205; recognizing *Fisher v. Pimbley*, 11 East, 188, cited below.]

(t) 2 Saund. 188; 1 Sid. 10; Steph. 5th ed. 453. [So, he cannot rejoin that the award is not final. *Barlow v. Todd*, 3 John. 363.]

(u) *Forland v. Marygold*, 1 Salk. 72; 1

Saund. 103, note (1); 2 Saund. 62 b, note (5); *Fisher v. Pimbley*, 11 East, 188.

(x) *Fisher v. Pimbley*, 11 East, 188.

(y) *Praed v. Duchess of Cumberland*, 4 T. R. 585; 2 H. Bl. 280, S. C.; *Dudlow v. Watchorn*, 16 East, 41. See *Fisher v. Pimbley*, 11 East, 188. It should be observed that the case in the text did not turn on the 53 Geo. 3, c. 141, but on the 17 Geo. 3, c. 26, which requires that the deed shall truly state the consideration; and the defendant's rejoinder, therefore, contained an objection which applied more to the deed than the memorial.

(z) *Elliot v. Lane*, 1 Wils. 334; *Dudlow v. Watchorn*, 16 East, 41; *Sandon v. Procter*, 7 B. & C. 800. See *ante*, 486.

(a) 2 Saund. 83 c; Co. Litt. 304 a; Com. Dig. Pleader, F. 6, &c. See instances, Steph. 5th ed. 455, &c.

her, but the rejoinder was, that the mare was mangy, which is a common nuisance. (b) And where in trespass for impounding the plaintiff's ox, the defendant justified the taking *damage feasant*, and the plaintiff entitled himself to common of pasture for one ox, in the place in which, &c. and the defendant rejoined that the plaintiff had surcharged the common with that ox, it was adjudged that the rejoinder was a departure from the plea, because there is a great difference between *damage feasant* and a surcharge of common, and the surcharge should have been pleaded at first. (c) So, in debt on bond conditioned to perform the covenants in a lease, one of which was that at every felling of timber defendant would make a fence, the defendant pleaded that he *had not felled any wood*. Replication, that he felled wood but made no fence; and the court held that a rejoinder that the defendant *did make a fence*, was a departure from the *plea*. (d) The *plea* * should have been that defendant felled wood and made a fence, and in all these cases, to avoid a departure, the whole matter should be shown at once in the plea. (e)

But matter which maintains, explains, and fortifies the declaration or plea, is not a departure. (f) Thus, if bail plead that no *ca. sa.* was *duly* sued out and returned according to the practice of the court, and the plaintiff reply setting out a *ca. sa.* but directed to the sheriff of a wrong county, the defendant may rejoin that the venue was laid in another county, and that therefore the *ca. sa.* was not *duly* sued out. (g) So in trespass for taking a horse, if defendant justify for a *distress damage feasant*, the plaintiff may reply that the defendant afterwards used the horse, which shows that he was a trespasser *ab initio*. (h) So if to debt on bond to indemnify the plaintiff from tonnage due to A. the defendant plead *non damnificatus*, and the plaintiff reply that A. distrained for the said tonnage, and the defendant rejoin that nothing was due to A. for tonnage, this is not a departure, for if nothing were due there was in law no damage. (i) And it seems that in debt on bond conditioned to perform an award, the defendant, though he pleaded *no award made*, may, to a replication setting out an award in part, rejoin setting out the whole award *verbatim*, by which it appeared that the award was bad in law, being made as to matters not within the submission. (k) The court, on demurrer, con-

(b) Palmer v. Stone, 2 Wils. 96; 2 Saund. 84 b.

(c) Countess of Arran v. Crispe, 1 Salk. 221; Ellis v. Rowles, Willes, 638; 2 Saund. 84 c.

(d) Dyer, 253 b.

(e) See Dyer, 253 b; Plowd. 102; Dyer 102 b, S. C.

(f) Com. Dig. Pleader, F. 11; 1 B. & C. 466.

(g) Dudlow v. Watchorn, 16 East, 39.

(h) Ib.; Countess of Arran v. Crispe, 1 Salk. 221; Dye v. Leatherdale, 3 Wils. 20;

Bagshaw v. Goward, Cro. Jac. 148; ante, 193, 200; [Darling v. Chapman, 14 Mass. 103.] Replication, &c. to justification under a *fi. fa. ante*, 638, 639; Lucas v. Nockells, 1 M. & P. 783.

(i) Owen v. Reynolds, Fortesc. 341; Com. Dig. Pleader, F. 11.

(k) Fisher v. Pimbley, 11 East, 188; Dudlow v. Watchorn, 16 East, 39; *sed vide* Morgan v. Man, 1 Sid. 180; Harding v. Holmes, 1 Wils. 122; Praed v. The Duchess of Cumberland, 4 T. R. 585; 2 H. Bl. 280, S. C.

sidered that there was no departure, as the plea of no award meant no legal and valid award, according to the submission. (*k*) And if a declaration on an apprenticeship deed charge that the defendant would not instruct the apprentice, and compelled him to leave his service, and the defendant plead that the apprentice misconducted and absented himself, it will be no departure to reply that after the misconduct, &c. the apprentice offered to return, &c. but the defendant refused; for this supports, explains, and fortifies the declaration. (*l*) And if the plaintiff vary in his replication from his count, or the defendant in his rejoinder from his plea, in *time*, *place*, or other matter, *when immaterial*, it is not a departure. (*l*) As if in a declaration, a promise be stated to have been made twenty years ago, and when the defendant pleads the statute of limitations the plaintiff replies that the defendant did undertake within six years; this is not a departure, because * in this case the statement of the time in the declaration was immaterial. (*m*) So, if in trespass for an assault at H., if the defendant plead *molliter manus imposuit* to remove the plaintiff from his close at A. and the plaintiff replies that he had a way over that close, it is not a departure; for in transitory actions the venue in the declaration is immaterial. (*n*) In the case of a deed or other instrument, the plaintiff may reply or show in evidence that it was really made on a day different to the day of the date; (*o*) and where a bill or note is stated in the declaration to have been made on a day which appears to have been above six years before the commencement of the suit, a subsequent promise or acknowledgment within six years may be shown in evidence under the common replication to the plea of the statute of limitations. (*p*) But where time or place, or any other circumstance, is *material*, the plaintiff cannot, as we have seen, vary from his previous statement of it; (*q*) though where matter of defence has arisen *pending* the suit, it may be pleaded *puis darrein continuance*, *relictâ verificatione* of the former plea. And if in an action against a person as executor, he plead a retainer for a debt due to himself, and the plaintiff reply that he was only *executor de son tort* the defendant may, by way of plea *puis darrein continuance*, rejoin that he has since obtained letters of administration. (*r*)

The only mode of taking advantage of a departure is by de-

(*l*) *Winstone v. Linn*, 1 B. & C. 460. And see an instance in which a surrejoinder in an action upon a bond for the fidelity of a clerk, was held not to be a departure from the replication, *Calvert v. Gordon*, 7 B. & C. 809.

(*l*) [*Thompson v. Fellows*, 21 N. H. 430.]

(*m*) Com. Dig. Pleader, F. 11; *Lee v. Rogers*, 1 Lev. 110; *Cole v. Hawkins*, 10 Mod. 348.

(*n*) Com. Dig. Pleader, F. 11; *Tinner v. Phillips*, 1 Salk. 222; *Serle v. Darford*, 1 Lord Raym. 120.

(*o*) *Hall v. Casenove*, 4 East, 477. See *ante*, 272, 273; *sed vide*, Tidd, 9th ed. 689; *cites Webley v. Palmer*, 1 Salk. 222; *Stone v. Bale*, 3 Lev. 348; *Cole v. Hawkins*, 1 Stra. 22; *Mathews v. Spicer*, 2 Stra. 806.

(*p*) See *ante*, 609. The case of *Stafford v. Forcer*, in 10 Mod. 312, is not law, and what was said in *Cole v. Hawkins*, 1 Stra. 22; and *Mathews v. Spicer*, 2 Stra. 806, as to a promissory note, was extra-judicial.

(*q*) *Ante*, 272, 564, 674.

(*r*) *Vaughan v. Browne*, 2 Stra. 1106.

murrer, (*r*¹) which may be either general or special; (*s*) and if the defendant or the plaintiff, instead of demurring, take issue upon the replication or the rejoinder containing a departure, and it be found against him, the court will not arrest the judgment. (*t*)

3dly. It is a rule that a replication must either, *first*, present matter of *estoppel* to the plea; or, *secondly*, must *traverse*; or, *thirdly*, *confess and avoid* the matter pleaded by the defendant. (*u*) If the plaintiff do not dispute, and cannot avoid the facts stated in the plea, but contends that their legal operation is insufficient to defeat the action, he must *demur* to the plea.

III. MUST
CONTAIN
MATTER
OF ESTOPPEL,
OR TRAVERSE,
OR CONFESS
AND AVOID.

4thly. Another quality essential to a replication is *certainty*; and it is said that more is requisite in a replication than a declaration, * though certainty in a common intent is in general sufficient. (*x*) Where the replication is only to a *part* of the plea, the part alluded to should be ascertained with certainty; as if in *assumpsit* on several promises the defendant has pleaded infancy, and the plaintiff reply that part of the goods were for necessary food, and part for clothes, it is said to be insufficient if he do not show what part was for the one and what for the other. (*y*) In general, also, when material to the action, time, place, and other circumstances must be stated with the same certainty and precision as in the previous pleadings; but where time or place is immaterial it should seem, with analogy to pleas in bar, that as the time and place mentioned in the declaration must when immaterial be adhered to, no repetition of either would be necessary. (*z*) We have seen, that where extreme particularity in pleading would tend to great prolixity and inconvenience, a general allegation is allowed; on which principle it is settled, that in debt on a bond to account for all moneys, &c. which the defendant or a third person should receive in the course of a certain employment, it is sufficient to assign the breach generally, that divers sums of money were received from divers persons, &c. without naming from whom in particular. (*a*) There is so much similarity be-

IV. THE
CERTAINTY,
&c. REQUISITE.

(*r*¹) [Keay v. Goodwin, 16 Mass. 1; Andrus v. Waring, 20 John. 160; Spencer v. Southwick, 10 John. 259; Munroe v. Alaire, 3 Caines, 320; Sterns v. Patterson, 14 John. 132; Harwood v. Tappan, 2 Speers, 536; Brine v. Great Western R. Co. 2 B. & S. 402; Bartlett v. Wells, 1 B. & S. 836; Thames Iron Works & Shipbuilding Co. v. Royal Mail Steam Packet Co. 13 C. B. N. S. 358; but see Reilly v. Rucker, 16 Ind. 303.]

(*s*) 2 Saund. 84 d; Palmer v. Stone, 2 Wils. 96; *quære* if it ought not to be a special demurrer. Com. Dig. Pleader, F. 10; 1 Saund. 117.

(*t*) Lee v. Raynes, Sir T. Raym. 86; 2 Saund. 84 d.

(*u*) See *ante*, 551, 604; Steph. 5th ed. 63, 249, 250; [United States v. Buford, 3 Peters, 31.]

(*x*) Com. Dig. Pleader, F. 17; Amhurst v. Skynner, 12 East, 263. As to certainty in a declaration, see *ante*, 271.

(*y*) Swinburn v. Ogle, Lutw. 241; Com. Dig. Pleader, F. 4.

(*z*) See Ilderton v. Ilderton, 2 H. Bl. 161; 1 Saund. 8 a; Marks v. Lahee, 3 Bing. N. C. 408; 4 Scott, 137, S. C.

(*a*) Barton v. Webb, 8 T. R. 463; Shum

tween pleas and replications, in regard to the rule that a replication must not be argumentative, and must offer matter which is triable, that any further observations than those which were made upon the subject in relation to pleas (*b*) will be unnecessary.

5thly. The replication must not be *double*, or in other words, contain two answers to the same plea. (*c*) For the plaintiff ought not perplex the court with two matters, to attempt to inveigle their judgment, and if two issues were permitted to be joined upon two several traverses on the plaintiff's replication, and one should be found for the plaintiff and the other for the defendant, the court would not know for whom to give judgment, whether for the plaintiff or the defendant. (*d*) And the court will not give leave to *reply* double, (*d*¹) under the statute 4 & 5 Ann. c. 16; (*e*) though under that statute the plaintiff *in replevin* may, with leave of the court, plead several pleas * in bar to an avowry or cognizance. (*f*) So a replication or traverse should be in the *disjunctive* and not *conjunctive*, when if a part of the plea be true the action would not be tenable; as, if to an action by an attorney for fees, the defendant plead that the action was brought for fees at law and in equity, and that plaintiff had not a month before action brought delivered a signed bill; a replication that the bill was not for fees at law *and* in equity is bad, for it should have been in the *disjunctive*. (*g*) But a replication may frequently put in issue several facts, where they amount to only one connected proposition or answer to the plea. (*h*) And, as

v. Farrington, 1 B. & P. 640; *Wilcocks v. Nicholls*, 1 Price, 109; *Calvert v. Gordon*, 7 B. & C. 809; *ante*, 259, 409.

(*b*) *Ante*, 565, 566. See an instance of argumentative traverse of a plea of a custom or liberty to dig for coal, &c. *Bourne v. Taylor*, 10 East, 189.

(*c*) *Cheasley v. Barnes*, 10 East, 73; *Monprivatt v. Smith*, 2 Campb. 176, 177; *Com. Dig. Pleader*, F. 16; *Humphreys v. Churchman*, Rep. temp. Hardw. 289; [*Watriss v. Pierce*, 36 N. H. 236; *Tebbets v. Tilton*, 24 N. H. 120; *Downer v. Rowell*, 26 Vt. 397; *ante*, 249, and notes, 558, 559, and notes. The object of the rule of pleading against duplicity is, to prevent several issues where there is but one demand or cause of action; but if several demands are set out in the declaration, there may be regularly as many issues as there are demands. *Stephen on Pl.* 284; *Wilde J. in Little v. Blunt*, 13 Pick. 475.] See, in general, *ante*, 249; duplicity in a plea, *ante*, 474, 558; *Hulme v. Muggleston*, 3 M. & W. 645; 1 Dowl. N. S. 36, S. C.; *Brooks v. Stuart*, 9 Ad. & El. 854; 1 P. & D. 615, S. C. [The doctrine of duplicity in pleading has been somewhat vague and unsettled. The plaintiff cannot reply two distinct replications to the defendant's plea. This cannot be done at common law. *Fris-*

bie v. Riley, 12 Wend. 249. The objection to pleading for duplicity is an objection of form and not of substance, and can only be taken advantage of on special demurrer. *Ante*, 558, note (*c*¹). Where the plea was that the promise was made by the defendant and a third person, and that a release was executed to such third person, a replication, denying both the joint promise and the release, is bad for duplicity. *Tubbs v. Caswell*, 8 Wend. 129.]

(*d*) 2 Saund. 49, 50.

(*d*¹) [See *Hazard v. Smith*, 1 J. J. Marsh. 66; *Little v. Blunt*, 13 Pick. 473; *Pickering v. Pickering*, 19 N. H. 389.]

(*e*) *Hern v. Scawel*, Fortesc. 335; *Whitby v. Chapman*, Barnes, 364.

(*f*) *Vollum v. Simpson*, 2 B. & P. 368, 376. As to the costs, see *Tidd*, 9th ed. 654, 660; *Cook v. Green*, 1 Marsh. 234.

(*g*) *Moore v. Boulcott*, 1 Bing. N. C. 323.

(*h*) *Robinson v. Raley*, 1 Burr. 317; *Humphreys v. Churchman*, Rep. temp. Hardw. 289; *ante*, 631, 632; *Webb v. Weatherley*, 1 Bing. N. C. 502; [*Russell v. Rogers*, 15 Wend. 351. If several facts are necessary to constitute one single and complete answer to the case made by the previous pleading, the replication or rejoinder embracing them, is not double. *Bell J. in Tebbets v. Tilton*, 24 N. H. 123; *Otis v. Blake*,

we have already seen, a replication may contain several distinct answers to different parts of a plea divisible in its nature; (i) as where infancy has been pleaded to a declaration consisting of several counts, the plaintiff may reply as to part of the demand that it was for necessities, to other part that the defendant was of full age at the time the contract was made, and to other part that he confirmed it after he came of age. (k) So, if an executor or administrator plead several judgments outstanding and no assets *ultra*, the plaintiff may reply as to one of the judgments *nul tiel record*, and to another that it was obtained and kept on foot by fraud. (l) In trespass *de bonis asportatis* of several articles, a plea justifying the removal *quia damage feasant* inures as a *several* plea in respect of each article, and the plaintiff may reply *severally*; thus he may traverse the justification as to *one* article, and as to another reply excess. (m) So if the plea justify the removal of goods of a similar description enumerated in different counts, if the identity of the goods in the different counts be not alleged the plaintiff may reply severally in respect of the articles in each count; (n) and the insufficiency of one of such sectional replications demurred to for duplicity, in putting in issue the whole plea by a traverse *absque tali causa*, where, in respect of matter of title disclosed by the defendant, the plaintiff should have put in issue a portion only of the plea, by traversing *absque residuo causæ*, does not affect the validity of the other replications to the same plea. (n) In an action of debt on bond, conditioned for the performance of covenants, the plaintiff may, and indeed ought, by the statute 8 & 9 W. 3, c. 11, s. 8, to assign as many breaches in his replication as he intends to rely upon at the trial, if such breaches be not assigned in the declaration; and it need not be shown that this is done by virtue of * the statute. (o) And to a plea of set-off, consisting of several demands upon judgment or recognizance of record, and simple contract, the plaintiff in his replication should give several answers, viz. as to the judgment or recognizance *nul tiel record* and as to the simple contract, that he was not indebted; (p) or he may reply as to a part, the statute of limitations. (q) Duplicity in a replication is aided, unless the defendant demur specially, pointing out the particular defect. (r)

6 Mass. 336; McClure v. Ewen, 3 Cowen, 313; Strong v. Smith, 3 Caines, 160; Tucker v. Ladd, 7 Cowen, 450.]

(i) *Ante*, 251, 558, 559. See, also, *Phychian v. White*, 1 M. & W. 216.

(k) *Ante*, 604. [See *Sevey v. Blacklin*, 2 Mass. 542.]

(l) 1 Saund. 337 b, note (2); Ashton v. Sherman, 1 Ld. Raym. 263; 1 Salk. 298, S. C.

(m) *Vivian v. Jenkins*, 5 Nev. & Man. 14; 3 Ad. & El. 741, S. C.

(n) *Ib.*; *Ibid.*

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(o) *Tombs v. Painter*, 13 East, 1, 2, 3; *Webb v. James*, 8 M. & W. 645; 1 Dowl. N. S. 36, S. C.; *post*, vol. ii. 355. See *ante*, 612.

(p) *Solomons v. Lyon*, 1 East, 369. See the form, *post*, vol. ii. 20, and note (s), and *ante*, 608.

(q) *Post*, vol. ii. 20, and note (s); *ante*, 609.

(r) 27 Eliz. c. 5; 4 & 5 Anne, c. 16, s. 1; 1 Saund. 337 b, note (3); Doc. Pl. 147; *Cheasley v. Barnes*, 10 East, 79; [Tubbs v. Caswell, 8 Wend. 129; *Tarleton v. Wells*, 2 N. H. 306.]

CHAPTER IX.

OF REJOINDERS AND THE SUBSEQUENT PLEADINGS ; OF ISSUES, RE-
PLEADERS, JUDGMENTS NON OBSTANTE VEREDICTO, AND PLEAS
PUIS DARREIN CONTINUANCE, OR OF MATTER PENDING ACTION ;
AND OF DEMURRERS AND JOINDERS IN DEMURRER.

OF REJOINDERS. (a¹)

A REJOINDER is the defendant's answer to the replication, (a) and is in general governed by the same rules as those which affect pleas ; (b) with this additional quality, that it must *support* and not *depart* from the plea. (c) If there be several defendants, and they *joined* in the plea, they cannot sever in the rejoinder. (d) It must also be *single* ; and the court cannot give leave to the defendant to rejoin several matters, for the statute of Anne does not extend to rejoinders. (e) Hence it may suffice to refer to the preceding pages, and to the forms which are given in the second volume, without taking further notice of the rejoinder with regard to its general construction and qualities.

When a replication, or a plea in bar in replevin, concludes *to the country*, the defendant can only demur ; or add the common *similiter*, which is, "And the defendant doth the like." And it is material that the defendant should take care that the *similiter* be added, for otherwise he cannot move for judgment as in case of a nonsuit. (f) And where there are several replications, particularly when some conclude *to the country*, and others with a verification, it may be, "And the defendant as to the said replications of the plaintiff to the said second and third pleas of him the defendant, and which the plaintiff hath prayed may be inquired of by the country,

(a¹) [See *Tarleton v. Wells*, 2 N. H. 306 ; *Fowler v. Clark*, 3 Day, 231 ; *Boston Hat Manuf. Co. v. Messinger*, 2 Pick. 223 ; *Warren v. Powers*, 5 Conn. 373 ; *Tuttle v. Smith*, 10 Wend. 386.]

(a) Com. Dig. Pleader, H. [And it will be held bad, if its denial is not as broad as the material averments of the replication. *Judge of Probate v. Ordway*, 3 N. H. 198. *Bell J.* in this case (p. 205), said : "Every pleading must traverse some statement of the previous pleading, or it must admit the

facts alleged, and set forth such new facts as neutralize or avoid the effect of them."]

(b) *Ante*, 547, 571 ; Co. Litt. 303 b.

(c) See *ante*, 674 ; 2 Saund. 189, 190 ; Com. Dig. Pleader, F. 6 to F. 11 ; [Judge of Probate *v. Lane*, 50 N. H. 556, 559.]

(d) *Morrow v. Belcher*, 4 B. & C. 704.

(e) *Warren v. Ivie*, 2 Stra. 908. See *ante*, 249, 558, 679 ; [Judge of Probate *v. Lane*, 50 N. H. 559 ; *Slocumb v. Holmes*, 1 How. (Miss.) 139 ; *Neff v. Powell*, 6 Blackf. 421.]

(f) *Seabrook v. Cave*, 2 Dowl. 691.

doth the like." (g) If the replication conclude to the country, the plaintiff is at liberty to add the *similiter* for the defendant, it being a rule that in all special pleadings, when the plaintiff takes issue upon the defendant's pleading, or traverses the same, or demurs, so that the defendant is not at liberty to allege any new matter, the plaintiff may add the *similiter*; (h) but the defendant may strike it out, and demur to the *replication, which is the usual course when the defendant has no merits, and wishes to obtain time. (i) The consequences of a defect in or omission of a *similiter* have already been considered. (k)

When the replication concludes with a *verification*, the rejoinder usually denies it, and concludes to the country, "and of this he the defendant puts himself upon the country, &c." But when the rejoinder introduces any *new matter*, it must, as in the case of a plea or replication, conclude with a *verification*, in order that the plaintiff may have an opportunity of answering it. (l) If the defendant deny several matters alleged in the replication, the rejoinder may conclude to the country, without putting the matters in issue severally and distinctly; thus, if to a plea of infancy, the plaintiff has replied that a part of the goods was necessary clothing, and the residue necessary food, a general denial in the rejoinder concluding to the country will suffice. (m)

SURREJOINDERS, &c.

Surrejoinders, (m¹) *rebutters*, and *surrebutters*, seldom occur in pleading. (n) It may suffice to observe that they are gov-
SURREJOINDERS, &c.
 erned by the same rules as those to which the previous pleading of the party adopting them is subject, and the forms which most frequently occur in practice are given in the second volume. (o)

OF ISSUES.

From the preceding observations on the different parts of pleading, particularly those relating to traverses, (p) we may collect what points may in general be put in *issue*. As, however,
OF ISSUES.
 the parties respectively may be disinclined to demur, or otherwise to object to their opponent's pleading, it may be advisable to consider on

(g) See forms, *post*, vol. ii. 23.

(h) A *similiter* need not be dated. *Eddin v. Ward*, 8 Dowl. 725.

(i) *Tidd*, 9th ed. 718, 719; *Imp. C. P.* 358; 1 *Sel. Prac.* chap. ix. s. 1.

(k) *Ante*, 626, note (c).

(l) *Ante*, 672; 1 *Saund.* 103, note (1). See the forms, *post*, vol. ii. 23; [*Judge of Probate v. Lane*, 50 N. H. 559; *Leslie v. Harlow*, 18 N. H. 518; *Judge of Probate v. Ordway*, 23 N. H. 205.]

(m) *Swinburn v. Ogle*, *Lutw.* 251; *Com. Dig.* Pleader, H.

(m¹) [*Potter v. Titcomb*, 1 *Fairf.* 53;

Dawes v. Winship, 16 *Mass.* 291; *Williams v. Whitmore*, *Kirby*, 249; *Keay v. Goodwin*, 16 *Mass.* 1; *Oakley v. Romeyn*, 6 *Wend.* 521.]

(n) See these heads in *Com. Dig.* Pleader, I. K. L. There is no technical name for any pleading subsequent to a surrebutter. It is very rarely, if ever, that the pleadings go beyond the surrebutter. It is hardly necessary to observe that the surrejoinder and surrebutter are the plaintiff's pleadings, and that the rebutter is the defendant's pleading.

(o) See *post*, vol. ii. 23.

(p) *Ante*, 642-651.

what *issue* the parties may venture to proceed to trial, so as to obtain the judgment of the court, and to avoid the necessity of a *repleader*, on account of the issue having been upon *immaterial matter*.

An *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant; (*q*) though, in common acceptation, it signifies the *entry* of the pleadings *themselves. (*r*) An issue is either in *law*, upon a demurrer; or in *fact*, (*r*¹) when the matter is triable by the court upon *nul tiel record*, or by a jury upon pleadings concluding to the country. Both these descriptions of issues may occur in the same cause as to distinct parts of the declaration. The term "issue" is proper where only one plea has been pleaded, though it be applied to several counts, and issue is joined upon such plea. (*s*) An issue should in general be upon *an affirmative and a negative*, and not upon two affirmatives; as if the defendant plead that A. is living, and the plaintiff reply that he is dead, it is more formal, though not absolutely necessary, also to deny that he is living. (*t*) Nor should the issue be on two negatives. (*u*) Thus, if the defendant plead that he requested the plaintiff to deliver an abstract of his title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected and refused so to do; the plaintiff cannot reply "that he did not neglect and refuse to deliver such abstract," but should reply, either denying the request, or affirmatively, that he did deliver the abstract. (*x*) But it is not necessary that the negative and affirmative should be in precise words; (*y*) and it will suffice though there be two affirmatives, if the second is so contrary to the first that it cannot in any degree be true. Thus, if *duress* of imprisonment be pleaded to a bond, it is a good replication that the defendant was at large at his own disposal, and executed the bond of his own free will, and not for fear of imprisonment. (*z*) An issue should also be upon a *single and a certain point*; (*a*) but it is not necessary that such point should consist of a single fact; and therefore if the defendant in trespass justify under a right of common, and the replication traverses that the cattle were the defendant's own, and *levant and couchant*, and commonable cattle, it is not multifarious, for all these circumstances are requisite to the point

(*q*) Co. Litt. 126 a. As to issues in general, see Com. Dig. Pleader, R.; Bac. Abr. Pleas, M.; Tidd, 9th ed. 717.

(*r*) As to the form of such entry, see Tidd, 9th ed. 719, 733; and Tidd's App. c. 30, s. 1, &c. Issues in fact are not to be noticed in the demurrer book. Rule of Court, Hil. T. 8th & 9th Geo. 4; 7 B. & C. 642. As to the language of this entry, it is said that the acts of a court ought to be in the present tense, as *præceptum est*, not *præceptum fuit*; but the acts of the party may be in the preterperfect tense, as *venite et protulit hic in curia quondam querelam suam*, and the continuances are in the preterperfect tense, as *venerunt*, not

veniant. The King v. Serjeant, 1 Mod. 81; 2 Saund. 393, note (1); Rex v. Roberts, 1 Stra. 608; but see The King v. Hall, 1 T. R. 320.

(*r*¹) [See Hale v. Dennie, 4 Pick. 501, 503.]

(*s*) Peake's C. N. P. 37.

(*t*) Com. Dig. Pleader, R. 3.

(*u*) Ib.; Hodson v. East India Company, 8 T. R. 280; Bac. Abr. Pleas, I. 3.

(*x*) Martin v. Smith, 6 East, 557.

(*y*) Co. Litt. 126 a.

(*z*) Tomlin v. Penlis, 2 Stra. 1177; 8 C. 1 Wils. 6, by name of Tomlin v. Benlace.

(*a*) Com. Dig. Pleader, R. 4.

of defence. (b) The issue also should not be on a negative pregnant; (c) but it may sometimes be upon a disjunctive averment. (d) In some cases the plaintiff may incorporate in the traverse or issue more than was alleged in the plea. (e)

* The principal quality of an issue is, that it must be upon a *material* point. (f) An *informal* issue is, where a *material* allegation is traversed in an *improper* or *inartificial manner*; (g) and this mistake is aided by verdict by the 32 Hen. 8, c. 30. (h) But a verdict does not help an *immaterial* issue, (i) which is, where a material allegation in the pleadings is not traversed, but an issue is taken on some other point, (i') which, though found by verdict, will not determine the merits of the cause, and would leave the court at a loss for which of the parties to give judgment. (k) Therefore, where in debt on bond, conditioned for the payment of £60 on the 25th of June, the defendant pleaded payment on the 20th of June, according to the form and effect of the condition, and issue was joined, and the verdict found that he did not pay £60 on the 20th, it was held that the plaintiff should not have judgment; for the issue was out of the matter of the condition, and therefore void, and the money might have been paid on the 25th, though it was not paid on the 20th, so that it did not appear that the condition was broken, and it is not aided by the before mentioned statute. (l) So where in an action of assumpsit against an administratrix on promises of the intestate, she pleaded that *she* (instead of the intestate) did not promise, after verdict a repleader was awarded. (m) And where in an action of *debt* against a lessee for years, the defendant pleaded that before the rent became due, he assigned the term to a third person, of which the plaintiff had notice, and issue was joined on the averment of notice, a repleader was awarded; it being perfectly immaterial whether or not the plaintiff had notice of the assignment, if it were executed. (n)

Reg. Gen. Hil. T. 2 W. 4, orders, "that if a defendant, after crav-

(b) Robinson v. Raley, 1 Burr. 316; other instances, *ante*, 631, 646.

(c) See, as to this, *ante*, 643, note (u); Com. Dig. Pleader, R. 5, 6; Bac. Abr. Pleas, I. 6. It must be objected to by demurrer. *Ib.*; 2 Saund. 319, note (6).

(d) Com. Dig. Pleader, R. 7. See *ante*, 643.

(e) Chambers v. Jones, 11 East, 410; *ante*, 611.

(f) Com. Dig. Pleader, R. 8; [United States v. Buford, 3 Peters, 31. On the traverse of a material allegation by one party, the other is bound to take issue. Hapgood v. Houghton, 8 Pick. 450; Dyer v. Stevens, 6 Mass. 389; Dawes v. Winship, 16 Pick. 291.]

(g) Lovelace v. Grimsden, Cro. Eliz. 227;

Serjeant v. Fairfax, 1 Lev. 32; Jones v. Bodinner, Carth. 371; Peck v. Hill, 2 Mod. 137.

(h) Gilb. C. P. 147; 2 Saund. 319, note (6).

(i) 2 Saund. 319 a, note (6); [Postmaster General v. Reeder, 4 Wash. C. C. 678.]

(i') [See Strong v. Smith, 3 Caines, 163.]

(k) *Ib.*; Gilb. C. P. 147; Serjeant v. Fairfax, 1 Lev. 32. See the instances, *Ib.* and Com. Dig. Pleader, R. 18; Dyson v. Wood, 3 B. & C. 449.

(l) Holmes v. Broket, Cro. Jac. 434; Tryon v. Carter, 2 Stra. 994; 2 Saund. 319 b, note (6).

(m) 2 Vent. 96.

(n) Serjeant v. Fairfax, 1 Lev. 32; [McDaniel v. Cater, 21 N. H. 227.]

Of the modern regulations respecting issues. ing oyer of a deed, omit to insert it at the *head* of his plea, the plaintiff, on making up the issue or demurrer book, may if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer. (o)

The Reg. Gen. Hil. T. 4 W. 4, secs. 1 and 2, orders that every declaration and other pleading shall be dated of the day and month when pleaded, and shall be entered on the record made up for trial, and on the judgment-roll under the date of the day of the month and year when the same respectively took place, and without reference * to any other time or date unless otherwise specially ordered by the court or a judge; and no entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *juratur ponitur in respectu*, which is to be retained. Provided, that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause. Provided, also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in bank, or at nisi prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be. Provided, also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the court or a judge shall otherwise order. And in the conclusion of these rules the forms of an issue, and nisi prius record, and judgment, and other forms are given. (p)

OF REPLEADERS.

When the issue is *immaterial*, the court will award a *repleader*, if it will be the means of effecting substantial justice between the parties, but not otherwise. (q) As where in debt on bond, the defendant pleaded performance generally, and the plaintiff replied denying the general performance, and concluding to the country, and stated breaches by way of *suggestion*, instead of *replying* them, after verdict for the plaintiff a repleader was awarded, such issue being insufficient. (r) In trespass for taking the plaintiff's cattle, the defendant justified taking them upon land demised by him

(o) See *Jervis's Rules*.

(p) See forms of issue with notes. 3 Chit. Gen. Prac. by Lush.

(q) 2 Saund. 319 b, note (6); *Staples v. Heydon*, 6 Mod. 1; 2 Ld. Raym. 922; 2 Salk. 579; 3 Salk. 121, S. C.; [*Stafford v. Albany*, 6 John. 1; *Tarrells v. Page*, 3 Hen. & M. 118; *Taylor v. Huston*, 2 Hen. & M. 161; *Havens v. Bush*, 2 John. 388, 389; *Macomb v. Wilber*, 10 John. 227; *Gould v. Ray*, 13 Wend. 638. Where the pleadings are so defective that no valid judgment can

be rendered on them, a repleader will be ordered on the motion of either party. *Gerish v. Train*, 3 Pick. 124; *Eaton v. Stone*, 7 Mass. 312; *Magoun v. Lapham*, 19 Pick. 419. But where the only material fact has been passed upon by the jury the court will not award a repleader. *Jenkins v. Stanley*, 10 Mass. 262. See *Payne v. Barnet*, 2 A. K. Marsh. 312.]

(r) *Plomer v. Ross*, 5 Taunt. 386; 1 Marsh. 95, S. C. See *ante*, 612, 613.

to one W. for rent in arrear. Replication that they were not *levant* and *couchant*. The defendant took issue upon that, and after it was found for the plaintiff, he moved for a repleader, which was refused, because the issue might be material; and a repleader is never granted unless the issue *must* be immaterial. (s) The following rules as to repleaders were laid down in the case of *Staples v. Heydon*: (t) *first*, that at common *law, a repleader was allowed before trial, because a verdict did not cure an immaterial (u) issue, but now a repleader ought not to be allowed till after trial, in any case where the fault of the issue might be helped after verdict by the statute of jeofails. (x) *Secondly*, that if a repleader be denied where it should be granted, or *vice versa*, it is error. *Thirdly*, that the court will not award a repleader excepting where complete justice cannot be answered without it. (y) *Fourthly*, that the judgment of repleader is general, *quod partes replacitent*, and the parties must begin again at the first fault which occasioned the immaterial issue: (z) thus, if the declaration be insufficient, and the bar and replication are also bad, the parties must begin *de novo*, (z¹) but if the bar be good, and the replication ill, at the replication. (a) *Fifthly*, no costs are allowed on either side. (b) *Sixthly*, that a repleader cannot be awarded after a default at *nisi prius*. To which may be added, that in general a repleader cannot be awarded after a demurrer or writ of error, without the consent of the parties, but only after issue joined. (c) Where, however, there is a bad bar, and a bad replication, it is said that a repleader may be awarded upon a demurrer. (d) A repleader also will not be awarded,

(s) *Kempe v. Crews*, 1 Lord Raym. 167; *Jones v. Powell*, 5 B. & C. 649. Where there are several pleas on the record, one of which traverses immaterial matter, the court will not grant a repleader if there are other and material issues raised. *Negolen v. Mitchell*, 1 Dowl. N. S. 110; 7 M. & W. 612. A court of error cannot award a repleader. *Gwynne v. Burnell*, 6 Bing. N. C. 453; 2 M. & W. 495.

(t) 6 Mod. 1; *Staples v. Heydon*, 2 Lord Raym. 922; 2 Salk. 579; 3 Salk. 121, S. C. As to a repleader in general, see Com. Dig. Pleader, R. 18; Bac. Abr. Pleas, M.; Doc. Plac. Repleader; Steph. 5th ed. 108-111; Tidd, 9th ed. 921. See the forms there referred to, and 2 Saund. 30; and 319 b, note (6).

(u) In the 5th edition of Saunders's Rep. (vol. ii. 319 b, note (6)), it is observed that the word immaterial is in the report of this case, but it should seem to be a mistake; for the reason given, if that word alone be used, is wholly unsatisfactory, inasmuch as a verdict does not cure an immaterial issue at this day. It should seem that the reason of the distinction between the practice before and since the statute of jeofails is this—that before the statute a verdict did not cure either an immaterial or an informal issue; and

therefore a repleader was awarded before a trial, because the trial could not have any effect upon the issue, and therefore the court will not interfere until the result of a trial is seen, which may render a motion for a repleader unnecessary.

(x) Bac. Abr. Pleas, M.; Com. Dig. Pleader, R. 18; *Cobb v. Bryan*, 3 B. & P. 352. But where the point in issue is altogether immaterial, and could not be modified by the verdict, because collateral to the merits, it would be otherwise. See, further, *Goodburne v. Bowman*, 9 Bing. 532.

(y) *Goodburne v. Bowman*, 9 Bing. 532.

(z) *Kempe v. Crews*, 1 Lord Raym. 169.

(z¹) [See, however, *Smith v. Walker*, 1 Wash. 135.]

(a) 3 Keb. 664; [*Stevens v. Taliaferro*, 1 Wash. 155.]

(b) Anonymous, 2 Vent. 196; *Lickbarrow v. Mason*, 6 T. R. 131; *Barnes*, 125; *Da Costa v. Clarke*, 2 B. & P. 376.

(c) 3 Salk. 306.

(d) *Semble*, *Grills v. Ridgeway*, Cro. Eliz. 318; 1 And. 167, *sed quere*. [See *Perkins v. Burbank*, 2 Mass. 81. Leave to replead may be granted after argument on demurrer. *Potter v. Titcomb*, 7 Greenl. 302. The court will not award a repleader after judgment on a material issue. *Page v. Walker*,

where the court can give judgment on the whole record; (e) and it is not grantable in favor of the person who made the first fault in pleading. (f)

Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given upon the confession without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto* (f¹) and in such case a writ of inquiry shall issue. (g) The distinction between a repleader and a judgment *non obstante veredicto* is this: that where the plea is good in form, though not in fact, or, in other words, if it contain a defective title, or ground of defence * by which it is apparent to the court, upon the defendant's own showing, that in *any* way of putting it, he can have *no merits*, and the issue joined thereon be found for him, there, as the awarding of a repleader could not amend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or the defendant, then for the more satisfactory administration of justice they will award a repleader. A judgment therefore *non obstante veredicto* is always upon the *merits*, and never granted but in a very clear case; a repleader is upon the *form* and manner of pleading. (h) If a plea be defective, and the defendant succeed at the trial thereon, the question, whether the plaintiff can have judgment *non obstante veredicto*, or whether there ought to be a repleader, depends upon the question, whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment notwithstanding the verdict. If the plea do not confess a cause of action, there must be a repleader. (i)

1 Tyler, 146. See *Dawes v. Gooch*, 8 Mass. 488.

(e) *Parnham v. Pacey*, Willes, 532, 533.

(f) *Kempe v. Crews*, 1 Ld. Raym. 170; *Webster v. Banister*, Dougl. 396; *Taylor v. Whitehead*, Dougl. 747; *Tidd*, 9th ed. 921; 2 Saund. 5th ed. 319 c. [See *Kirtley v. Deck*, 3 Hen. & M. 388; *Bledsoe v. Chounning*, 1 Humph. 85; *Andre v. Johnson*, 6 Blackf. 375]; *sed vide Tryon v. Carter*, 2 Stra. 994. See, further, *Goodburne v. Bowman*, 9 Bing. 532.

(f¹) [*Roberts v. Dame*, 11 N. H. 236.]

(g) *Tidd*, 9th ed. 920; and cases there cited; *Ib.* note (g).

(h) *Tidd*, 9th ed. 922; *Bac. Abr. Pleas, M.*; *Com. Dig. Pleader, R. 18*; *Plomer v. Ross*, 5 Taunt. 386; 1 Marsh. 95, S. C.; *Winstanley v. Head*, 3 Taunt. 237.

(i) *Pitts v. Polehampton*, 1 Ld. Raym. 390; per *Abbott C. J.* *Lambert v. Taylor*, 4 B. & C. 152; 6 D. & R. 199. See the instances. *Ib.*

OF PLEAS OF MATTERS OF DEFENCE THAT HAVE ARISEN PENDING THE ACTION.

Before the uniformity of process act, 2 W. 4, c. 39, it was decided that a payment to assignees of a bankrupt plaintiff, after a *latitat* had issued, and before declaration, might be given in defence under the general issue. (*k*) When matter of defence had arisen after the commencement of the suit, it could not be pleaded in bar of the action *generally*, but must, when it had arisen *before plea* or continuance, be pleaded as to the *further* maintenance of the suit; (*l*) and when it had arisen after plea pleaded, and before replication, or *after issue joined*, then *puis darrein continuance*. (*l*) The instances of a defendant having obtained his certificate as a bankrupt pending the suit, and *before plea*, (*m*) and of an executor pleading judgments obtained * against him after the issuing of the writ, and before plea, were exceptions. (*n*)

If any matter of defence has arisen after an *issue in fact* has been joined, or after a joinder in demurrer, (*o*) it may be pleaded by the defendant; as that the plaintiff has given him a release; (*p*) or that

OF PLEAS OF
MATTERS OF
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ACTION. (*j*)

(*j*) As to these pleas in general, see Bac. Abr. Pleas, Q.; Com. Dig. Abatement, I. 24, 34; Doct. Plac. 297; Bul. N. P. 309; Gilb. C. P. 101; Tidd, 9th ed. 847; and see the forms, *post*, vol. ii. 453, 454; and see Reg. Gen. Hil. T. 4 W. 4, reg. 2.

(*k*) Crofton v. Poole, 1 B. & Ad. 568; and Worswick v. Beswick, 10 B. & C. 676.

(*l*) Le Bret v. Papillon, 4 East, 507; *ante*, 578; Rainbow v. Worrall, Lutw. 1178; Com. Dig. Abatement, I. 24; plaintiff became an alien enemy; Harman v. Kingston, 3 Campb. 152. [See Child v. Eureka Powder Works, 44 N. H. 358; S. C. 45 N. H. 547; Rogers v. Odell, 39 N. H. 419, 457; Wisheart v. Legro, 33 N. H. 182; Cutter v. Folsom, 17 N. H. 140; Kimball v. Wilson, 3 N. H. 101; Rowell v. Hayden, 40 Maine, 583; Boyd v. Weeks, 5 Hill (N. Y.), 393; Cowell v. Weston, 20 John. 414; Yeaton v. Lynn, 5 Peters, 224; Andrews v. Hooper, 13 Mass. 472; Feagin v. Thompson, 42 Ala. 332. In some states it has been held that payment after action brought may be given in evidence under the general issue, in reduction of damages. Hendrickson v. Hutchinson, 29 N. J. (Law) 180; M'Millan v. Wallace, 3 Stewart, 165; Pemigewasset Bank v. Brackett, 4 N. H. 557; Moore v. M'Nairy, 1 Dev. (Law) 319.]

(*l*) [Rowell v. Hayden, 40 Maine, 585; Semmes v. Naylor, 12 Gill & J. 361; Bank of United States v. Merchants' Bank of Baltimore, 7 Gill, 415; Yeaton v. Lynn, 5 Peters, 224; Longworth v. Flagg, 10 Ohio, 300; Burns v. Hindman, 7 Ala. 531; Tuffs v. Gibbons, 19 Wend. 639; Morrow v. Morrow, 3 Brevard, 394; Thomas v. Van Dozen, 6 Misson. 201; Wyatt v. Richmond, 4 Humph. 365. Such matter cannot be given in evidence at the trial. Jackson v. Rich,

8 John. 194; Jackson v. Ramsey, 3 Cowen, 75.]

(*m*) Harris v. James, 9 East, 82.

(*n*) Le Bret v. Papillon, 4 East, 507, 508; Harris v. James, 9 East, 84; Prince v. Nicholson, 1 Marsh. 70, 280; 5 Taunt. 333, S. C.; [Wisheart v. Legro, 33 N. H. 182;] and an executor may plead *puis darrein continuance*, a judgment purposely confessed by him for a *bond fide* debt, though such judgment be in debt on a simple contract. Prince v. Nicholson, 5 Taunt. 665; 1 Marsh. 280, S. C.; Lyttleton v. Cross, 3 B. & C. 317; 5 D. & R. 175.

(*o*) Stoner v. Gibson, Hob. 81; Com. Dig. Abatement, I. 24, *acc.*; Sparkes v. Crofts, 1 Ld. Raym. 266; Martin v. Wyvill, 1 Stra. 493, *contra*. See Com. Dig. Abatement, I. 24.

(*p*) Bul. N. P. 309; [Kimball v. Wilson, 3 N. H. 96.] See the form, *post*, vol. ii. 454. But in ejectment the defendant is not allowed to plead a release by the lessor of the plaintiff. Doe v. Brewer, 4 M. & Sel. 300; 2 Chit. Rep. 323, S. C.; and see Doe *dem.* Loche v. Franklin, 7 Taunt. 9. And where a landlord, with the permission of his bailiff, who had made a distress for rent, commenced an action, in the bailiff's name, against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the landlord's privity, released to the sheriff, who pleaded it *puis darrein continuance*, the court of C. P. set aside the plea, and ordered the release to be delivered up to be cancelled; Hickey v. Burt, 7 Taunt. 48; Tidd, 9th ed. 678, 848; so where husband and wife lived separate under a deed, by which he stipulated that his wife should enjoy as her separate property all effects, &c. which she might acquire, and that

the plaintiff is a bankrupt, (*q*) or has been outlawed or excommunicated; (*r*) or that there has been an award made on a reference after issue joined. (*s*) And if the defendant became bankrupt, and obtain his certificate after issue joined, he should plead this defence *puis darrein continuance*; (*s*¹) and if he neglect to do so he cannot plead his certificate to an action upon such judgment. (*t*) So it may be pleaded in abatement that a feme sole plaintiff has married; (*u*) or in an action by an administrator, that the plaintiff's letters of administration have been revoked, *puis darrein continuance*. (*x*) So a defendant sued as executor *de son tort* may plead that he has since obtained letters of administration, so as to support a previous plea of retainer in the character of executor. (*y*)

* Pleas of this kind are either in abatement or in bar. (*z*) If anything happen pending the suit, which would in effect abate it, this might have been pleaded *puis darrein continuance*, though there has been a plea in bar; because the latter plea only waives such matters in abatement as existed at the time of pleading, and not matter which arose afterwards; but if matter in abatement be pleaded *puis darrein continuance*, the judgment, if against the defendant, will be peremptory, as well on demurrer as on trial. (*a*) A plea *puis darrein contin-*

he would not do any act to impede the operation of that deed, but would ratify proceedings in their names for recovering such property; and the wife having, as executrix of N. R., commenced an action on a promissory note against defendants, in the names of her husband and herself, and the husband released the debt, which release was pleaded *puis darrein continuance*, the court, on application, ordered the plea to be taken off the record, and the release to be given up to be cancelled. *Innell v. Newman*, 4 B. & Ald. 419. So a plea *puis darrein continuance* of a release by one of several plaintiffs was set aside by the court of Q. B. without costs, on the terms of indemnifying the plaintiffs, who had released the action, against the costs of it, although their consent had not been obtained before action brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees of an insolvent person. 1 Chit. Rep. 390. But unless a very strong case of fraud be made out, the court will not control the legal power of a co-plaintiff to execute a release. *Jones v. Herbert*, 7 Taunt. 421; Tidd, 9th ed. 678, 848; 4 Moore, 192; 7 Moore, 356; *ante*, 486. See, also, *Johnson v. Holdsworth*, 4 Dowl. 63; *Hubert v. Piggott*, 2 Dowl. 392, and other cases collected on this subject; *Chitty's Arch. Pr.* 7th ed. 299.

(*q*) Tidd, 9th ed. 847; *Kinnaird v. Tarrant*, 15 East, 622; *Biggs v. Cox*, 4 B. & C. 920; 7 D. & R. 409, S. C. As to the effect of the plaintiff's bankruptcy, see *ante*, 25.

(*r*) *Supra*, note (*p*).

(*s*) 2 Esp. Rep. 504.

(*s*¹) [*Lewis v. Shattuck*, 4 Gray, 572.]

(*t*) *Todd v. Maxfield*, 6 B. & C. 105; 9 D. & R. 171, S. C. It would seem to be advisable and perhaps necessary in such case, to plead the bankruptcy specially, and not in the general form prescribed by the stat. 6 G. 4, c. 16, s. 126; *Tower v. Cameron*, 6 East, 413; 2 Smith's Rep. 659; 1 McClell. & Y. 350; Mr. Justice Ashhurst's Paper Books, vol. xxiv. 154; Tidd, 9th ed. 847, note (*d*); *Clarke v. Hoppe*, 3 Taunt. 46; *Sidaway v. Hay*, 3 B. & C. 23; *post*, vol. ii. 316, 318; but see *Quin v. Keefe*, 2 H. Bl. 553; *Harris v. James*, 9 East, 82; Tidd, 9th ed. 647, 648. See *Whitmore v. Bantock*, M. & M. 122.

(*u*) Bro. Abr. Continuance, pl. 57; Bal. N. P. 310.

(*x*) Bul. N. P. 309; Com. Dig. Abatement, L. 24.

(*y*) *Vaughan v. Browne*, 2 Stra. 1106; 1 Saund. 265, note (2). [Accord and satisfaction may be pleaded *puis darrein continuance*. *Watkinson v. Inglesby*, 5 John. 392. Where two actions are brought for the same cause, satisfaction of the judgment in one suit may be pleaded *puis darrein continuance* to the other suit. *Bowne v. Joy*, 9 John. 221; *Yeaton v. Lynn*, 5 Peters, 231, 232. See *Commercial Bank of Buffalo v. Love*, 19 Wend. 98.]

(*z*) Com. Dig. Abatement, I. 24; Tidd, 9th ed. 849. See form, *Ib.* Appendix, c. 37, s. 4.

(*a*) Gilb. C. P. 105; Alleyn, 66; Freeman, 252; *Vaughan v. Browne*, 2 Stra. 1106; [*McKeen v. Parker*, 51 Maine, 389; *Kimball v.*

uance is not a departure from but is a waiver of the first plea, (a¹) and no advantage can afterwards be taken of it, nor can even the plaintiff afterwards proceed thereon. (b)

With respect to the time when matter of this description is to be pleaded, if the ground of defence arose after plea, or after issue joined, and before the return of the *venire facias*, it should be pleaded in *bank*; (d) but matter arising after the return of the *venire facias* may be pleaded at *nisi prius*, although there was an opportunity of pleading it previously in *bank*. (e) And where the defendant, after pleading, obtained his certificate as a bankrupt, and then pleaded it in *bank*, as a matter which had arisen after the last continuance, but in fact another continuance had intervened between the certificate and plea, the court permitted him to plead it *nunc pro tunc*, on payment of costs; (f) but matters which have arisen after the trial, and before the day in *bank*, cannot be so pleaded; (g) and though such a plea may be pleaded after the jury have gone from the bar, yet it cannot after they have given their verdict. (h) A plea of bankruptcy in the defendant after the last continuance was set aside as having been pleaded after the proceedings had been stayed in an action upon the bail bond. (i) But a plea *puis*

TIME OF
PLEADING
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FORE THE
RECENT
RULE.

Huntington, 10 Wend. 675; Renner v. Marshall, 1 Wheat. 215; Culver v. Barney, 14 Wend. 162.]

(a¹) [Yeaston v. Lynn, 5 Peters, 324; Wallace v. M'Connell, 13 Peters, 136.]

(b) Rex et Regina v. Larwood, 1 Salk. 158; Vaughan v. Browne, 2 Stra. 1106; Stoner v. Gibson, Hob. 81; Pincer v. Nicholson, 1 Marsh. 70, 280; 5 Taunt. 333; S. C. Tidd, 9th ed. 849; [Scott v. Brokaw, 6 Blackf. 241; Den v. Sanderson, 3 Harr. 426; Sadler v. Fisher, 3 Ala. 200; Sanderlin v. Danbridge, 3 Humph. 99; Rayner v. Dyett, 2 Wend. 300; Wallace v. M'Connell, 13 Peters, 152; Culver v. Barney, 14 Wend. 161; Kimball v. Huntington, 10 Wend. 675; Spofford v. Woodruff, 2 McLean, 191; Parker C. J. in Webb v. Steele, 13 N. H. 238, 239; Eastman J. in Wisheart v. Legro, 33 N. H. 182; Pemigewasset Bank v. Brackett, 4 N. H. 557, 561. It is said to be dangerous to rely upon such a plea without due consideration, for it confesses the matter which was before in dispute between the parties. Parker C. J. in Webb v. Steele, 13 N. H. 238.]

(c) See Tidd, 9th ed. 847, 848; Duff v. Campbell, 3 B. & Ald. 577; Soutten v. Soutten, 1 D. & R. 521; 5 B. & Ald. 852, S. C.; Dowson v. Levi, 4 B. & Ald. 249; Lyttleton v. Cross, 3 B. & C. 317.

(d) See Com. Dig. Abatement, I. 24; 2 Smith's Rep. 396. See the form, *post*, vol. ii. 453.

(e) Prince v. Nicholson, 5 Taunt. 333, 665; S. C. in 1 Marsh. 70, 280; [Broome v. Beardsley, 3 Caines, 173; Lafarge v. Carrier,

1 Wend. 89; Ludlow v. M'Cres, 1 Wend. 228; Palmer v. Hutchings, 1 Cowen, 42; Field v. Goodman, 3 Wend. 310; Rangely v. Webster, 11 N. H. 299.]

(f) 2 Smith's Rep. 396; Tidd, 9th ed. 848. See a plea in vol. xxiv. 154, Mr. Justice Ashhurst's Paper Books, MS. [After one continuance, it is a matter of discretion to receive or reject such plea. Rowell v. Hayden, 40 Maine, 582; Cummings v. Smith; 50 Maine, 569; Stephens v. Thompson, 15 N. H. 410. See Morgan v. Dyer, 9 John. 255; Merchant's Bank v. Moore, 2 John. 294; Rangely v. Webster, 11 N. H. 299. But even after more than one continuance has intervened, it is in the discretion of the court to receive the plea or not, and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea. Morgan v. Dyer, 10 John. 161; Wilson v. Hamilton, 4 Serg. & R. 238; Lyons v. Miller, 4 Serg. & R. 281; Tuffs v. Gibbons, 19 Wend. 639; Rangely v. Webster, 11 N. H. 299; Lyon v. Marclay, 1 Watts, 271; Nettles v. Swasee, 2 Misson. 100.]

(g) Tidd, 9th ed. 848, 849.

(h) Doct. Plac. 177; Bul. N. P. 310; Vanbrynen v. Wilson, 9 East, 321; Com. Dig. Abatement, I. 34. See, further, Duff v. Campbell, 3 B. & Ald. 577; Soutten v. Soutten, 1 D. & R. 521; 5 B. & Ald. 852, S. C.; Dowson v. Levi, 4 B. & Ald. 249; Tidd, 9th ed. 849. [But an insolvent has been allowed to plead his discharge even after verdict. Mechanic's Bank v. Hazard, 9 John. 392.]

(i) Dowson v. Levi, 4 B. & Ald. 249.

darrein continuance of new matter may be pleaded although the defendant were under terms of rejoining issuably and taking short notice of trial. (*k*)

The Reg. Gen. Hil. T. 4 W. 4, reg. 2, puts an end to the entry of continuances, except the *juratur ponitur in respectu* which is to be retained. But the same rule provides "that in all cases in which a plea *puis darrein continuance* is now by law pleadable in *bank*, or at *nisi prius*, the same defence may be pleaded with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be." Provided "that no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the court or a judge shall otherwise order."

Great certainty was always required in pleas of this description; (*l*) and it was not sufficient to say generally "that after the last continuance" such a thing happened, but the *day* of the continuance must have been shown, (*l*¹) and also the *time* and *place* must have been alleged where the matter of defence arose. (*m*) The present forms of such pleas, whether pleaded in *bank* or at the assizes, are given in the second volume. (*n*) The plea, when it contains matter in abatement, concludes by praying judgment of the writ, and that the same may be quashed; (*o*) or if the writ would be abated *de facto*, by praying judgment if the court will further proceed. (*p*) In *bar* the conclusion of the plea is, that the plaintiff ought not *further* to maintain his action, and not that the former inquest should not be taken, because it is a substantive bar of itself, in lieu of the former, and consequently must be pleaded to the action. (*q*)

Pleas after the last continuance must, even before Reg. Gen. Hil. T. 4 W. 4, reg. 2, have been verified *on oath* before they could be allowed, whether pleaded in *bank* or at *nisi prius*; (*r*) but the affidavit need not have been entitled in

(*k*) *Bryant v. Perring*, 2 M. & P. 760; 5 Bing. 414, S. C. After a plea of this kind the plaintiff may always discontinue without payment of costs. *Waller v. Smith*, 9 Ad. & El. 505.

(*l*) Doc. Plac. 297; *Ewer v. Moile*, Yelv. 141; *Hawkins v. Moore*, Cro. Jac. 261; *Freem.* 112; *Campion v. Baker*, 2 Lutw. 1143; *Peirce v. Paxton*, 2 Salk. 519; *Paris v. Salkeld*, 2 Wils. 139; Co. Ent. 517 *b*; *Rast. Ent.* 549.

(*l*¹) *Jewett v. Jewett*, 58 Maine, 234.]

(*m*) *Ib. Ibid.*; Bul. N. P. 309; [*Cummings v. Smith*, 50 Maine, 568; *Vicary v. Moore*, 2 Watts, 451.]

(*n*) *Post*, vol. ii. 454; and see Bul. N. P.

310; Co. Ent. 517; *Rast. Ent.* 549; *Tidd*, 9th ed. 850.

(*o*) *Gilb. C. P.* 105; *Campion v. Baker*, 2 Lutw. 1143; in general, *ante*, 475.

(*p*) *Hallowes v. Lucy*, 3 Lev. 120; Bul. N. P. 311.

(*q*) *Cockaine v. Witnam*, Cro. Eliz. 49; *Campion v. Baker*, 2 Lutw. 1143; Bul. N. P. 310; [*M'Gowan v. Hoy*, 4 J. J. Marsh. 223; *Pickering v. Pickering*, 19 N. H. 339.]

(*r*) *Freem.* 252; *Martin v. Wyvill*, 1 Stra. 493; 2 *Smith's Rep.* 396. See an instance where the affidavit was dispensed with, *Hibblewhite v. Reynolds*, 7 Scott, 232. Form of affidavit of plea of bankruptcy, *M'Clell. & Y.* 350. As to pleas in abatement, *ante*, 478.

the cause when annexed to the plea. (s) The Reg. Gen. Hil. T. 4 W. 4, reg. 2, we have just seen, also requires that the affidavit state that the matter of defence arose *within eight days* next before the pleading such plea, or that the court or a judge has otherwise ordered. (t) These pleas, it is said, cannot be amended after the assizes are over; (u) nor can there be * more than one plea *puis darrein continuance*, (x) and such a plea cannot, it is said, be pleaded after a demurrer. (y) But if a plea *puis darrein continuance* be filed and verified on oath, the court cannot set it aside on motion, but are bound to receive it, (z) provided it be pleaded in proper time. (a) When a plea *puis darrein continuance* is put in at the assizes, the plaintiff is not to reply to it there, for the judge has no power to accept of a replication, nor to try it, (a¹) but ought to return the plea as parcel of the record of *nisi prius*; and if the plaintiff demur, it cannot be argued there. (b) Where the plea *puis darrein continuance* is certified on the back of the postea, and the plaintiff demurs, if the defendant, on the expiration of a rule given for him to join in demurrer, neglect to do so, the plaintiff may sign judgment. (c)

The courts will sometimes set aside a plea *puis darrein continuance* when it is manifestly fraudulent, and against the justice of the case. But where an action was brought by two out of four executors, and those who were not joined in the action released to the defendant, and who pleaded such release *puis darrein continuance*, the court refused to set aside such plea, the plaintiff having failed to establish a case of

When pleaded at the assizes the affidavit should be sworn before one of the judges, not before a commissioner, but the judge at *nisi prius* may allow it to be resworn before him. Chitty's Arch. Pr. 7th ed. 301. [In *Jackson v. Peer*, 4 Cowen, 418, it was held that a plea of this character may in general be pleaded without verification, by affidavit. See *M'Gowan v. Hoy*, 4 J. J. Marsh. 223; *Morrow v. Morrow*, 1 Const. Rep. 455; *Nicholl v. Mason*, 21 Wend. 339.]

(s) *Prince v. Nicholson*, 1 Marsh. 70; 5 Taunt. 333, S. C.; *sed vide*, 3 Price, 200.

(t) See *Powell v. Duncan*, 5 Dowl. 550; *Todd v. Emly*, 9 M. & W. 506; 1 Dowl. N. R. 598, S. C. It seems that the rule of H. T. 2 W. 4, extends the eight days to nine when the eighth falls on a Sunday. *Dudden v. Priquet*, 7 Dowl. 171.

(u) *Bac. Abr. Pleas*, 2; *Moore v. Hawkins*, Yelv. 181; *Freem. 252*; *Bul. N. P. 309*; but see 2 Smith's Rep. 659, where such a plea was amended upon terms; and vol. xxiv. of Mr. Justice Ashhurst's Paper Books, 154, *acc.*

(x) *Bro. Abr. Continuance*, pl. 5, 41; *Jenk. 160*; *Gilb. C. P. 105*.

(y) *Martin v. Wyvill*, 1 Stra. 493, cites *Stoner v. Gibbons*, Sir F. Moore, 871; and see *Sparkes v. Crofts*, 1 Ld. Raym. 266; 6

Mod. 9; but see *Stoner v. Gibbons*, as reported in *Hob. 81*, *contra*; *Com. Dig. Abatement*, I. 24.

(z) *Paris v. Salkeld*, 2 Wils. 137; *Prince v. Nicholson*, 1 Marsh. 70, 280; 5 Taunt. 333, S. C.; *Fitch v. Toulmin*, 1 Stark. 62; Chitty's Arch. Pr. 7th ed. 301.

(a) When or not set aside. *Herbert v. Pigott*, 2 Cr. & M. 384; *The King v. Taylor*, 3 B. & C. 612; *Wild v. Williams*, 6 M. & W. 490.

(a¹) [When pleaded at *nisi prius*, a copy of it need not then be served. *Jackson v. Clow*, 13 John. 157.]

(b) *Com. Dig. Abatement*, I. 24. If pleaded by one of several defendants, the plaintiff cannot, at the trial, confess the plea, &c.; 3 C. & P. 372. A judge at *nisi prius* is bound to accept a plea *puis darrein continuance* even after the jury are sworn, provided it be tendered in due form, accompanied with the proper affidavit, but it seems such affidavit is unnecessary, where the subject-matter of the plea arises in the presence of the judge. *Todd v. Emly*, 1 Dowl. N. S. 598.

(c) *Bac. Abr. Pleas*, Q.; *Bul. N. P. 311*; *Fitch v. Toulmin*, 1 Stark. 62. As to costs, see *Lyttleton v. Cross*, 4 B. & C. 117; 6 D. & R. 81, S. C.; 1 M. & P. 138.

fraud; and as a general rule a plea of that nature is not to be set aside unless in a case of gross fraud. (*d*)

OF DEMURRERS. (*e*)

When the declaration, plea, or replication, &c. appears on the face of it, and without reference to *extrinsic* matter, to be defective, either in substance or form, the opposite party may in general demur. (*f*) A demurrer has been defined to be a declaration that the party demurring * will "go no further," because the other has not shown sufficient matter against him that he is bound to answer. (*g*) Where the pleading is defective in *substance* it is advisable in general to demur, because the party succeeding thereon is entitled to costs; but where the judgment is reversed on a writ of error, &c. (*h*) no costs are recoverable. (*h*¹)

(*d*) *Herbert v. Piggott*, 2 Cr. & M. 384; but see *Smith v. Newman*, 4 B. & Ald. 419; *Jones v. Herbert*, 7 Taunt. 421; *Mountstephen v. Brooke*, 1 Chit. Rep. 390.

(*e*) As to demurrers in general, see Bac. Abr. Pleas, N.; Com. Dig. Pleader, Q.; Saund. Rep. Index to notes, Demurrer; Tidd, 9th ed. 694; Steph. 5th ed. Index, Demurrer. As to the practice respecting demurrers, see Chitty's Arch. Pr. 7th ed. 658-668; Reg. Gen. Hil. T. 4 W. 4, reg. 4, orders that no demurrer nor pleading subsequent to the declaration shall in any case be filed with any officer of the court, but shall always be delivered between the parties.

(*f*) Anonymous, Sir F. Moore, 551; [Thomson v. O'Sullivan, 6 Allen, 303.] Surplusage not demurrable. *Lord v. Houstoun*, 11 East, 65; Plead. Ass. 292; ante, 252. [Upon demurrer to a plea the issue must be decided upon the pleadings, without other evidence *abunde*, unless by consent of parties; and when the plea is sufficient upon its face, the demurrer will be allowed. *Wells v. Jackson Iron Company*, 44 N. H. 61. But where a plea is sufficient upon its face, a motion may be made to reject it, upon the ground that certain facts exist which, when taken in connection with the plea, will render it impossible to frame a replication raising the issue intended to be tried upon the plea as filed; and upon proof of such facts and a proper case made, the court will reject the plea and allow the defendant to plead anew. *Wells v. Jackson Iron Company*, *supra*; *Orange v. Berry*, 24 N. H. 105.]

(*g*) 5 Mod. 132; Co. Litt. 71 b. [The defendant is not obliged to demur to a declaration which discloses no cause of action; but may, at the trial, object to the maintenance of the action, on the ground that the facts stated, though proved, are insufficient. *Hervey v. Moseley*, 7 Gray, 479. See *Crocker v. Gilbert*, 9 Cush. 131; *Oliver v. Colonial Gold Company*, 11 Allen, 283; *Hubbard v. Moseley*, 11 Gray, 170. But objections to the form of a declaration, or that the same

does not sufficiently set forth the ground of the plaintiff's claim, must be raised by demurrer. *Shawmut Mut. Fire Ins. Co. v. Stevens*, 9 Allen, 334; *Batchelder v. Batchelder*, 2 Allen, 105; *Clay v. Brigham*, 8 Gray, 162; *Beatty v. Rundall*, 5 Allen, 441; *Upham v. Damon*, 13 Allen, 98; *Thomson v. O'Sullivan*, 6 Allen, 304.]

(*h*) *Wyvill v. Stapleton*, 1 Stra. 617; Tidd, 9th ed. 1181. [By statute, in Massachusetts, no error in law in a civil action, in which the defendant appeared, and a verdict was rendered, except such as occurs after verdict, can be assigned in a writ of error. Genl. Sts. c. 146, § 3. Nor shall any judgment be reversed, in any civil action, for any defect or imperfection in matter of form which might by law have been amended. Genl. Sts. c. 146, § 3. But notwithstanding the above provision, error will lie to reverse a judgment rendered on default, if the declaration allege no cause of action. *Hollis v. Richardson*, 13 Gray, 392.] As to costs where the judgment is arrested, see *Cameron v. Reynolds*, Cowp. 407; Tidd, 9th ed. 985. On a new trial; Tidd, 9th ed. 916; and where a *venire de novo* is awarded. Tidd, 9th ed. 923. It seems, that although an objection appear on the record, and might be taken advantage of by motion in arrest of judgment, or writ of error, yet if it be of such a nature that the action clearly cannot be maintained, the judge at *nisi prius* will nonsuit the plaintiff. *Sadler v. Robins*, 1 Campb. 256; *Cameron v. Reynolds*, Cowp. 407.

(*h*¹) [*Howe v. Gregory*, 1 Mass. 81; *Durrell v. Merrill*, 1 Mass. 411; *Brown v. Chase*, 4 Mass. 436; *Mountfort v. Hall*, 1 Mass. 443. But in Massachusetts the party prevailing on a writ of error in a civil action is now entitled to his costs against the adverse party, by statute. Genl. Sts. c. 146, § 10; *Butler v. Fessenden*, 12 Cush. 78; *Jarris v. Blanchard*, 6 Mass. 4; *Blanchard v. Wild*, 1 Mass. 342. Writs of error are abolished in New York. Code, § 457.]

It should, however, be remembered that a demurrer admits the *facts* pleaded, (i) and merely refers the question of their *legal* sufficiency to the decision of the court. (i¹) If, therefore, there be reason to deny the facts, it is better not to demur, but to plead thereto, especially if the defect in the opposite pleading be of so substantial a nature that even after a verdict on the issue the judgment might be arrested, or a writ of error could be sustained. (k) But the common doctrine, that a demurrer admits the facts stated in the pleading demurred to, must be understood with this qualification, that it is so only upon the argument, for it has been held that the statements in a special plea which has been holden bad on demurrer are *not evidence* for the plaintiff on the general issue, although the jury are to assess damages as well as to try the case on the general issue. (l)

When the objection is a defect in matter of *form*, a *special* demurrer is still permitted; for as observed by Lord Hobart, "the statute of Elizabeth requiring a special demurrer does not utterly reject form, for that would be destructive of the law as a science, but it only requires that the defect in form be discovered, and not used as a secret snare to entrap." (m) And it was observed by Eyre, Chief Justice, that "infinite mischief has been produced by the facility of the courts in overlooking errors in form; it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practice the drawing of pleadings." (n) Where, however, there are merits to be tried, it is in practice more liberal not to demur for a mere mistake in form. But it sometimes becomes material to demur, although the objection be of a mere technical description, if the adverse party will not alter his pleading; as in instances in which the defective pleading imposes upon the opponent * the necessity of ad-

(i) That is, when well pleaded. Com. Dig. Pleader, Q. 6; 1 Saund. 337 b, note (3); Steph. 5th ed. 155; 11 Price, 235; [Washington &c. Road v. State, 19 Md. 239; Lyon v. O'Kell, 14 Iowa, 233; Smith v. Henry, 15 Iowa, 385; Morgan v. Ballard, 1 A. K. Marsh. 558; Neal v. Claunice, 7 Harr. & J. 372; M'Collough v. Cowan, Const. Rep. 516; Coxe v. Gulick, 5 Halst. 328; Pease v. Phelps, 10 Conn. 62; Catlin v. Glover, 4 Texas, 151; Chambers v. Miller, 9 Texas, 236.] *ante*, 563; but see note, *infra*. A demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the *innuendo*. Wheeler v. Haynes, 1 P. & D. 55. [Nor does a demurrer admit a mere statement of a conclusion of law from the facts averred. Millard v. Baldwin, 3 Gray, 484; Smith v. Henry, 15 Iowa, 385; Chapin v. Curtis, 23 Conn. 388; Craft v. Thompson, 51 N. H. 536.]

(i¹) [Weems v. Millard, 2 H. & Gill, 143; Brooke v. Widdicombe, 39 Md. 407; Neal v. Claunice, 7 Harr. & J. 372.]

(k) 4 Co. Rep. 14 a. As to the expediency of demurring or pleading in general, see Steph. 5th ed. 165. What defects are cured by pleading over, and by verdict, &c. *post*, 703.

(l) Montgomery v. Richardson, 5 C. & P. 247; Firmin v. Crucifix, 5 C. & P. 247; [Stinson v. Gardiner, 33 Maine, 94.]

(m) Heard v. Baskerville, Hob. 232; 1 Saund. 337, note (3); [Pease v. Phelps, 10 Conn. 62; Perry v. Rice, 10 Texas, 367; Stinson v. Gardiner, 33 Maine, 94. Under the practice act of Massachusetts it is required that a demurrer shall specifically point out the particular in which the alleged defect in pleading consists. Genl. Sts. c. 129, §§ 11, 12. Formal errors or defects which are not specifically assigned as causes of demurrer must be deemed to be waived. Clav v. Brigham, 8 Gray, 161; Whittemore v. Ware, 101 Mass. 352; Worthington v. Houghton, 109 Mass. 486; Washington v. Eames, 6 Allen, 417.]

(n) Margan v. Sargent, 1 B. & P. 59.

ducing more evidence than would have been requisite, had the pleading been properly framed; as if *nil debet* be pleaded to a declaration on a deed, or *de injuriâ* generally be replied where the replication should traverse one only of the several matters alleged in the plea.

There are some well-founded objections to pleadings, but which cannot be the ground of demurrer; such are principally the non-compliance with some rule of *practice* not affecting the *substance of pleading*. (o) Thus if, contrary to Reg. Gen. Hil. T. 4 W. 4, reg. 8, venue be repeated in the body of a declaration, the defendant cannot on that account demur, but if taken advantage of at all, should obtain a summons and judge's order to strike out the objectionable venue. (p) So in general an inaccuracy in the form of *commencing* a declaration is not ground of demurrer. (q)

Demurrers are either *general* or *special*; *general* when no particular cause is alleged; *special*, when the particular imperfection is pointed out, and insisted upon, as the ground of demurrer; the former will suffice when the pleading is defective in *substance*, (q¹) and the latter is requisite where the objection is only to the *form* of pleading. (r) At common law a special demurrer was not necessary, except in the case of duplicity, (s) and the party was at liberty on a general demurrer to take advantage of any objection, however trifling. (t) To remedy this the 27 Eliz. c. 5, after reciting "that excessive charges and expenses, and great delay and hindrance of justice, have grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking, or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law, and the very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else

TO WHAT
OBJECTIONS THE
OPPONENT
CANNOT DEMUR.
WHEN GENERAL OR SPECIAL

(o) Vere v. Goldsborough, 1 Bing. N. C. 353, 354; 4 M. & Scott, 417; Tyndall v. Ulleshorpe, 3 Dowl. 2; Darling v. Gurney, 2 Dowl. 235. [The sufficiency of the plea can be determined only on demurrer. Day v. Hamburgh, 1 Browne, 75. A demurrer does not reach the order of pleading. Cleveland v. Chandler, 3 Stewart, 489.]

(p) Farmer v. Champneys, 1 Cr., M. & R. 369; 2 Dowl. 680, S. C.; Fisher v. Snow, 3 Dowl. 27; Townsend v. Gurney, 3 Dowl. 29.

(q) 4 Moore & Scott, 417; Strachan v. Buckle, 1 Har. & Wol. 519; Turner v. Denman, 4 Tyr. 313.

(q¹) [Departure and misjoinder of counts may be demurred to generally. Keay v. Goodwin, 16 Mass. 1; Fairfield v. Burt, 11 Pick. 244.]

(r) Bac. Abr. Pleas, N. 5; Co. Litt. 72 a;

[Singleton v. Carr, 1 Bibb, 554; Dole v. Weeks, 4 Mass. 451; Tucker v. Randall, 2 Mass. 283; ante, 554, note (n); Snider v. Croy, 2 John. 428; Moreland v. Atchison, 34 Texas, 351. Special demurrers are an established part of the practice in Connecticut, and they are not affected by the statute in that state which provides that no pleading shall abate or be reversed for mere circumstantial defects, if the person or cause can be rightly understood. Andrews v. Thayer, 40 Conn. 156.]

(s) Powdick v. Lyon, 11 East, 565. [Duplicity can be taken advantage of only by special demurrer. Seymour v. Mitchell, 3 Root, 146; Smith v. Northup, 1 Root, 387; Otis v. Blake, 6 Mass. 336; Stewardson v. White, 3 Harr. & M'H. 355; Martin v. Ray, 1 Blackf. 291.]

(t) 3 Salk. 122.

after long time and great trouble and expenses, to renew again their suits," enacted, "that from thenceforth, after demurrer joined and entered in any action or suit in any court of *record* within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any *imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading*, process, or course of proceeding whatsoever, except those only which the party demurring shall *specialy* and particularly set down and express, together with his demurrer; and that no judgment to be given * shall be reversed by any writ of error for any such imperfection, defect, or want of form, as is aforesaid, except such only as is before excepted."

The chief difficulty that arose in the construction of this statute, was the distinguishing between what was matter of form and matter of substance; and many defects which are *now* deemed mere form were holden not to be aided by this statute, such as the omission of the words *vi et armis contra pacem, &c.* (u) To remedy this the 4 & 5 Ann. c. 16, directs, "that where any demurrer shall be joined and entered in any action or suit in any *court of record* within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any *imperfection, omission, or defect, in any writ, return, plaint, declaration, and other pleading*, process, or cause or proceedings whatsoever *except those only which the party demurring shall specialy and particularly set down and express, together with his demurrer, as causes of the same*, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be *matter of substance, and not aided by the above-mentioned statute*, so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause." And it is then so provided, "that no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of entering pledges upon any bill or declaration, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever, mentioned in the declaration or other pleadings, or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration, or of or for the omission of *vi et armis, et contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare, or hoc paratus est verificare per recordum*; or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or

(u) Com. Dig. Pleader, 3 M. 7; Bac. Abr. Pleas, N. 6; 1 Saund. 81, note (1); Heard v. Backerville, Hob. 233; Sav. 88.

any other matter of like nature, (x) except the same shall be specially and particularly set down and shown for cause of demurrer." It was provided by the seventh section that the act should not extend to proceedings upon any penal statute; but this was altered by the 4 Geo. 2, c. 26, s. 4. (y)

Since these statutes, the party on a general demurrer can only take advantage of defects in substance; (y¹) and therefore, if the defect objected to be not clearly of that nature, it is safest to demur specially, in which case the party may not only take advantage of those particularly pointed out, but also of any substantial defect, though not * specified. (z) The effect produced on the right to demur generally or specially, by the circumstance of the defendant being under terms of pleading issuably, has already been considered. (a) The plaintiff need never demur specially to a plea in abatement. (b)

A demurrer is either to the whole, or to a part only of a declaration.

Where only to a part of the pleading. If in covenant there be several distinct assignments of breaches of covenant, some of which are sufficient, and the others not, or if a declaration contain several counts, and only one be bad; the defendant should only demur to the defective assignment of breach, or the insufficient count; for if he were to demur to the whole declaration, the court would give judgment against him. (c) This rule equally applies to one count, part of which is

(x) See observations as to extent of these words, *Bolton v. The Bishop of Carlisle*, 2 H. Bl. 262; *Bowdell v. Parsons*, 10 East, 359.

(y) *Myddleton v. Wynn*, Willes, 601.

(y¹) [*Farlin v. Macomber*, 5 Greenl. 415; *Hord v. Dishman*, 2 Hen. & M. 600.]

(z) 1 Saund. 337 b, note (3); *Tidd*, 9th ed. 695; *Anon.* 2 Wils. 10; [*Burnet v. Bisco*, 4 John. 235. Under the Massachusetts practice act (Genl. Sta. c. 129, §§ 11, 12), the causes of demurrer must be specially assigned in all cases; and the party demurring will be confined to the causes of demurrer specified by him, although the pleading demurred to may be defective on grounds not specified. *Washington v. Eames*, 6 Allen, 417; *Suffolk Bank v. Lowell Bank*, 8 Allen, 356; *Joannes v. Burt*, 6 Allen, 236; *Beatty v. Randall*, 5 Allen, 442; *Proctor v. Stone*, 1 Allen, 193. General demurrers are thus practically abolished in Massachusetts. *Bigelow C. J.* in *Washington v. Eames*, 6 Allen, 420. If a demurrer goes to the whole ground of action, the cause is sufficiently stated by alleging "that the matters set out in the declaration are insufficient in law to enable the plaintiff to maintain his action." *Chenery v. Holden*, 16 Gray, 125. See *Suffolk Bank v. Lowell Bank*, 8 Allen, 356; *Dennehy v. Woodsum*, 100 Mass. 195. But an assignment of cause of demurrer, under

the Indiana Code, that the complaint "is not good and sufficient in law," is not equivalent to alleging that the complaint does not state facts sufficient to constitute a cause of action, but is wholly insufficient. *Porter v. Wilson*, 35 Ind. 348; *Kemp v. Mitchell*, 29 Ind. 163; *Piper v. Newcomer*, 25 Iowa, 221; *Singer v. Cavers*, 26 Iowa, 178.]

(a) *Ante*, 545, 546. If a plaintiff amends his declaration after the defendant has obtained time to plead on the usual terms of pleading issuably, &c. the latter is at liberty to demur specially to the declaration. *Children v. Mannering*, 8 Dowl. 120.

(b) *Lloyd v. Williams*, 2 M. & Sel. 485.

(c) [*Gill v. Stebbins*, 2 Paine, 417; *Taylor v. Pope*, 2 Ala. 190; *Concord v. Delaney*, 56 Maine, 201; *Brown v. Tomlinson*, 2 Greene (Iowa), 525; *Hale v. Omaha National Bank*, 49 N. Y. 626; *McCoy v. Hill*, 2 Litt. (Ky.) 374; *Minturn v. Manuf. Ins. Co.* 10 Gray, 501; *Sears v. Trowbridge*, 15 Gray, 184, 185; *Colburn v. Phillips*, 13 Gray, 64; *Belton v. Gibbon*, 7 Halst. 76; *Wolf v. Lurster*, 1 Hall, 146; *Ward v. Sackrider*, 3 Caines, 265; *Scott v. Leary*, 34 Md. 389; *Roe v. Crutchfield*, 1 Hen. & M. 361; *Whitney v. Crosby*, 3 Caines, 89; *Backus v. Richardson*, 5 John. 476; *Kingsley v. Bills*, 9 Mass. 199, 200; *Martin v. Williams*, 13 John. 264; *Monell v. Colver*, 13 John. 402; *Adams v. Willoughby*, 1 John. 65; *Mamford v. Fitz*

sufficient, and the residue is not, provided the matters alleged are *divisible* in their nature, (c¹) as if a plaintiff declare in tort for taking his money, and also certain goods, without showing that the goods were his property, the count will be good as to the money, and if the defendant demur generally to the whole count, the plaintiff will have judgment. (d) So, where the * plaintiff declared in *scire facias*, upon a judgment in Q. B. with a *prout patet per recordum*, and also an affirmance of that judgment in error in the exchequer chamber, without a *prout patet, &c.* and the defendant demurred to the whole, the court held the demurrer too large, as the plaintiff's demand was divisible, and judgment was given for the plaintiff. (e) So, if part of a breach be good, it is no cause of demurrer to the whole, that special

hugh, 18 John. 457; Brown v. Stebbins, 4 Hill, 154; Farnham v. Hay, 3 Blackf. 167; Lusk v. Cook, 1 Breese, 53; Nash v. Nash, 16 Ill. 70; Hooks v. Smith, 18 Ala. 338; Lockwood v. Rogers, 1 Chand. 21; Cochran v. Scott, 3 Wend. 229; Wise v. Bush, 4 Litt. 429; Smith v. Lloyd, 16 Grattan, 295; Singer v. Cavers, 26 Iowa, 178.] As to the effect of a demurrer to a declaration being too large, see Duke of Bedford v. Alcock, 1 Wils. 248; The Mayor of Exeter v. Trinlet, 2 Wils. 95; Judin v. Samuel, 1 N. R. 43; 6 East, 333; Powdick v. Lyon, 11 East, 565; 5 B. & Ald. 712, 715; Spyer v. Thelwell, 2 Cr., M. & R. 692; Tyr. & G. 191; Price v. Williams, Tyr. & G. 197; 1 M. & W. 6; Ferguson v. Mitchell, Tyr. & G. 179; 2 Cr., M. & R. 687; Boydell v. Jones, 4 M. & W. 451; Webb v. Baker, 7 Ad. & El. 841; 3 N. & P. 87; per Tindal C. J. Davies v. London & Blackwall Railway Company, 1 M. & G. 801; [Blanchard v. Hoxie, 34 Maine, 376; Swift v. Patrick, 11 Maine, 181,] for the modern law; and Bressay v. Humphreys, Cro. Jac. 557; S. C. not S. P. 2 Roll. Rep. 144; Andrew v. Delahay, Hob. 178; Richard Godfrey's case, 11 Co. Rep. 45 a; Batty v. Trevillian, Sir F. Moore, 281; Woody v. —, Cro. Jac. 104; Duppa v. Mayo, 1 Saund. 286; Pinkey v. Inhabitants de Rotel, 2 Saund. 379, 380, note (14); Benbridge v. Day, 1 Salk. 218; Amory v. Brodrick, 5 B. & Ald. 712, 716; 1 D. & R. 361; Bac. Abr. Pleas, B. 6; and the notes to Hinde v. Gray, 1 M. & G. 201; and Ferguson v. Mitchell, 4 Dowl. 524, for the old law on the subject. At common law, after declaration, the defendant might call upon the court to pronounce judgment in his favor, upon the plaintiff's own showing. If the declaration contained several counts, or assigned several breaches, the defendant might either demur separately to each, or, adopting a more compendious form, he might file a demurrer to the whole declaration. If one count only were good, or if one breach only were well assigned, the court awarded that the plaintiff should recover upon such count or breach, and should be barred for the residue. But the more modern decisions sup-

port the text, and if the defendant demur to a good and bad count, judgment will be given generally for the plaintiff, on the ground of the demurrer being too large; but if the judgment be entered on both counts, the defendant may, it seems, bring error. Wainwright v. Johnson, 5 Dowl. 317. A special demurrer to two or more counts, commencing by alleging that the declaration is insufficient in law, but assigning separate causes to each count, is a demurrer to the whole declaration. Parrett Navigation v. Stower, 8 Dowl. 405. Where a defendant demurs to a replication and new assignment for that "they are not, nor is either of them sufficient in law," and shows for causes that the replication is bad in itself, and both together bad for duplicity, the demurrer is divisible, and judgment may be given for the defendant on the replication, and for the plaintiff on the new assignment. Monkman v. Shepherdson, 11 Ad. & El. 411. See, also, Calvert v. Moggs, 10 Ad. & El. 632.

(c¹) [See Minturn v. Manuf. Ins. Co. 10 Grav. 501, 503.]

(d) 2 Saund. 374, 379, note (1); 5 Rep. 34 b; Benbridge v. Day, 1 Salk. 218; 2 Saund. 171 a, note (1); 1 Mod. 271; Com. Dig. Pleader, C. 82. See the form, 1 Saund. 108, 109. In 8 Moore, 379, the plaintiff declared in trespass for breaking and entering his close, and also his house, and seizing and taking his goods, to wit, one hundred articles of furniture, without describing their nature or quality. The defendant, though under terms of pleading issuably, demurred generally to the whole declaration. The court held that the plaintiff could not sign judgment as for want of a plea; for the declaration was substantially defective as regarded the goods. *Semble* (notwithstanding Mr. Justice Burrough's observations), that the case cannot be considered an authority that the whole of the declaration should have been demurred to. The rule in the text would not apply to a count in assumpsit upon a contract, the whole of which is considered entire.

(e) Powdick v. Lyon, 11 East, 565.

damage is laid which is not recoverable; (*f*) but where there is a misjoinder either of parties or causes of action or breaches the demurrer must be to the whole. (*g*) And if a *plea*, *avowry*, or *replication*, each of which, we have seen, is in its nature entire, be bad in part, it is bad for the whole; (*h*) and in that case the demurrer should be to the whole plea or replication, (*i*) or it will be a discontinuance. (*k*) There is an exception in the case of a plea of *set-off*, which contains a statement that distinct debts are due from the plaintiff, for such averments are considered to be similar to separate counts in a declaration; and if one part be good, a general demurrer to the whole will be bad. (*l*)

In general a party cannot demur, unless the objection appear on the face of the preceding pleadings; (*m*) but in some cases, where the plaintiff in the declaration partially states a deed which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, thereby making it part of the declaration, and then demur either in respect of the defect in the deed, or the improper manner in which the plaintiff has stated it; and this is the proper course, when

As to setting out a deed on oyer, and demurring.

(*f*) *Amory v. Brodrick*, 5 B. & Ald. 712; 1 D. & R. 361, S. C.; *Duffield v. Scott*, 3 T. R. 374.

(*g*) *Kingdon v. Nottle*, 1 M. & Sel. 355; *Jennings v. Newman*, 4 T. R. 347; *ante*, 228; 2 Saund. 210, and 210 *a*; [*Fernald v. Garvin*, 55 Maine, 414.]

(*h*) *Ante*, 572, 593; 1 Saund. 23, and 1 Saund. 28 *b*, note (2); 2 Saund. 124, note (7); *Parker v. Atfield*, 1 Salk. 312; *Trueman v. Hurst*, 1 T. R. 40; *Duffield v. Scott*, 3 T. R. 374. Effect of one plea referring to another, 1 M. & P. 147; 2 Y. & J. 11, S. C. [In *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502, *Chapman J.* said: "Under the system of special pleading, if a plea contained distinct matters, divisible in their nature, the plaintiff, instead of a general demurrer to the whole plea, should confine his demurrer to the matters illy pleaded, and traverse the residue of the plea. *Douglass v. Satterlee*, 11 John. 16-21, and authorities cited. Under our (Massachusetts) system, defences are made by answer, and different consistent defences may be made in the same answer: thus, by a single answer, the defendant may set up as many defences as he might have done by double pleading; the plaintiff may demur to the answer on the ground that it does not state a legal defence to the declaration, or some count thereof. The replication may raise an issue in law by the statement that the defendant demurs to the answer, or to so much thereof as applies to one or more counts in the declaration, as the case may be, assigning specially the causes of demurrer; and in

like manner either party may demur to the allegation of the other party. This last clause includes a right to demur to a particular and distinct allegation as well as to the whole answer, or to a distinct allegation in a count as well as to a whole count; and this makes the right to demur under our statute (Genl. Sts. c. 129) co-extensive with the right to demur under the system of special pleading. See *Sevey v. Blacklin*, 2 Mass. 541; *Harrison v. McIntosh*, 1 John. 385; *Cuyler v. Rochester*, 12 Wend. 169; *Vermont v. Society for Propagating the Gospel*, 2 Paine, 545; *Patterson v. Wilkinson*, 55 Maine, 42. It is error to demur and reply to the same plea. *Lang v. Lewis*, 1 Rand. 277; *Riley v. Harkness*, 2 Blackf. 34. The defendant cannot plead and demur to the same count at the same time; *Taylor v. Rhea*, Minor, 414; *Gavle v. Smith*, Minor, 83; *Hair v. Weaver*, 1 Blackf. 77; *Rickett v. Snyder*, 5 Wend. 104; unless the matters alleged in it are divisible. *Harwood v. Tompkins*, 4 Zab. (N. J.) 425. Where the defendant demurs and pleads to the same matter, and issues of fact are tried, he will be presumed to have waived his demurrer. *Morrison v. Morrison*, 3 Stewart, 444; *Braham v. Collins*, Minor, 169.]

(*i*) See an exception in an avowry, 1 Saund. 286.

(*k*) Com. Dig. Pleader, Q. 3.

(*l*) *Dowland v. Thompson*, 2 Bl. Rep. 910; *ante*, 572.

(*m*) *Helyer v. Whiteacre*, Moore, 551. See the forms and notes, 2 Saund. 364-367; Com. Dig. Pleader, 3; Wils. 119.

upon oyer it would appear that a bail bond is defective. (n) So a deed untruly stated in a plea, being set out upon oyer by the plaintiff, becomes part of the plea, and if it thereby appear that the plea is false, the plaintiff need not show any matter in his replication to maintain his action, but may demur; (o) for it is a general rule, that an indenture set out upon oyer becomes * part of the preceding plea. (p) We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders "that if a defendant, after *craving oyer* of a deed omit to insert it at the head of his plea, the plaintiff, on making up the *issue* or *demurrer book*, may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer."

In point of *form*, no precise words are necessary in a demurrer, and a plea which is in substance a demurrer, though very informal, will be considered as such; (r) and it is a general rule that there cannot be a demurrer to a demurrer. (s) Before the Reg. Gen. Hil. T. 4 W. 4, reg. 14, the usual form of a *general* demurrer to a *declaration*, after stating the title of the court and term, and the names of the parties in the margin, and the defence as in the commencement of a plea, (t) alleged that the declaration and the matters therein contained, as therein stated, were not sufficient in law to enable the plaintiff to support his action, and concluded with a verification and an appropriate prayer of judgment, though a verification was unnecessary; (u) or if the demurrer were to a particular count or breach, it was qualified accordingly. (x) A general demurrer to a *plea in abatement* stated that it was not sufficient to quash the bill or writ, and prayed judgment that the defendant might answer over or further to the declaration. (y) To a *plea in bar* the demurrer was, that the plea and the matters, &c. were not sufficient in law to bar the plaintiff, &c. wherefore for want of a sufficient plea he prayed judgment and his damages, &c. (according to the nature of the action). (z) If the demurrer were to a *replication*, *rejoinder*, &c. after stating that the same and the matters therein contained were not sufficient in law, it concluded with a prayer of judgment.

Form of demurrer before Reg. Gen. Hil. T. 4 W. 4.

(n) 2 Saund. 60, in *notis*. See the exceptions, and when the facts must be pleaded, *ante*, 447; and 1 Saund. 295 b. But if the deed be described in the declaration, and on the defendant's setting it out on oyer, and demurring, it appears that as to some part of the deed immaterial to the action, there is a variance between the deed as described and as set out on oyer, this will not support the demurrer, not even if the variance be such as would be available on a plea of *non est factum*. *Ross v. Parker*, 1 B. & C. 358; 2 D. & R. 662, S. C.; *ante*, 450.

(o) 1 Saund. 316, 317.

(p) 1 Saund. 317; *ante*, 449.

(r) 5 Mod. 131; *The King v. Butler*, 3 Lev. 222; 2 Saund. 129, note (6); *Plowd.* 400. As to the form in general, see *Com. Dig. Pleader*, Q. 3; [*Silvers v. The Junction R. R. Co.* 43 Ind. 435, and cases there cited; *Meyer v. Bohlring*, 44 Ind. 238.]

(s) *Bac. Abr. Pleas*, N. 2; *Lamplough v. Shortridge*, Salk. 219; *Steph.* 2d ed. 281; [*State v. Beasom*, 40 N. H. 372.]

(t) As *ante*, 575; and see the form, *post*, vol. ii. 25.

(u) *Ib.*; *Co. Litt.* 71 b; 1 Leon. 24.

(x) *Post*, vol. ii. 25.

(y) *Post*, vol. ii. 24, 25.

(z) *Co. Litt.* 71 b; *post*, vol. ii. 24, 25

ment either against or for the plaintiff, according to the situation of the party demurring. (a) If the demurrer were *special*, the assignment of the *causes of demurrer* were usually introduced at the end of the general demurrer in the following words:—"And the said——, according to the form of the statutes in such case made and provided, (b) states and shows to the court here the following causes of demurrer to the said declaration, [or, 'to the said *first count* of the said declaration,' or, 'to the said *breach of covenant* first above assigned,' or, 'to the said *plea*,' &c.]" (c) And it was usual, after stating the causes of demurrer, to conclude, "and also for that the said declaration, (or, '*first count*,' or '*plea*,' or '*replication*,') is in *other respects uncertain, informal, and insufficient;" but these latter words were wholly unavailable, for when it was necessary to demur *specially* it was not sufficient to aver that the pleading "wants form," but it must be shown specially in what point in particular the form is defective, and as it has been said, the statutes oblige the party demurring to lay his finger upon the very point. (d) Therefore a demurrer for duplicity, *that it is double and wants form*, is not sufficient, and it should show in what the duplicity consists; (e) and after the passing of the statute of Elizabeth a rule was made, "that upon demurrer the causes shall be specially assigned, and not involved with general unapplied expressions of 'double,' 'negative pregnant,' 'uncertainty,' 'wanting form,' and the like; but shall show specially wherein, in order that the other party may, as the cause shall require, either join in demurrer or amend, or discontinue his action." (f) If the plaintiff demurred to a plea in abatement, as if it had been a plea in bar, it was a discontinuance; (g) and a demurrer to such plea should have concluded with praying judgment that the writ or bill might be adjudged good, and that the defendant might answer further or over thereto. (h)

If the plaintiff or the defendant *joined in demurrer*, the joinder concisely contradicted the demurrer by stating that the declarations (or the plea, &c.) "and the matters therein contained, in manner and form as stated, were sufficient in law to bar the action," if the demurrer were to a

Form of
joinder in
demurrer
before Reg.
Gen. III. T.
4 W. 4

- (a) *Post*, vol. ii. 24, 25.
- (b) 4 & 5 Anne, c. 16.
- (c) *Post*, vol. ii. 24, 25.
- (d) *Com. Dig. Pleader*, Q. 9; *Heard v. Baskerville*, Hob. 232; per Holt C. J. *Lamplough v. Shortridge*, 1 Salk. 219; 1 Saund. 160, note (1); 337, note (3).
- (e) *Cheasley v. Barnes*, 10 East, 79; *Ryley v. Parkhurst*, 1 Wils. 219; *Lamplough v. Shortridge*, 1 Salk. 219; 1 Saund. 160, note (1); 337 b, note (3); *Lambert v. Stroother*, Willes, 220; *Doc. Plac.* 147; *Rowles v. Lusty*, 1 M. & P. 102; 4 Bing. 428, S. C.;

Smith v. Clinch, 2 G. & D. 225; [*ante*, 694, note (s)]; *Currie v. Henry*, 2 John. 433; *Stewardson v. White*, 3 Harr. & M'H. 455; *Ryan v. Watson*, 2 Greenl. 382; *Commonwealth v. Blake*, 20 Pick. 356; *Wolf v. Luyster*, 1 Hall, 146.]

(f) *Rule Michaelmas Term A. D. 1654*, sec. 17; *Lambert v. Stroother*, Willes, 220; 1 Saund. 160, note (1); 337 b, note (1).
(g) *Carter v. Davies*, 1 Salk. 218; *ante*, 480, 481.

(h) 2 Saund. 210 g, note (9); *ante*, 481.

declaration, or "to quash the bill" or "writ," if in abatement, or "to preclude the plaintiff from maintaining his action," if to a plea in bar; and usually offered to verify the declaration or plea, and concluded with a prayer of judgment, though the latter seemed unnecessary. (i) A joinder in demurrer to a replication to a plea in abatement should not have concluded with praying judgment for debt and damages, for to conclude in chief in such case was a discontinuance, and the plaintiff should have prayed judgment that the defendant might answer over; (k) but if the defendant had demurred to a declaration, and concluded his demurrer as in abatement, the plaintiff might have joined in bar, and had judgment accordingly. (l)

* The Reg. Gen. Hil. T. 4 W. 4, reg. 14, however, now orders that "The form of a demurrer shall be as follows, 'The said defendant by — his attorney, [or "in person, &c." or "plaintiff,"] says that the declaration [or "plea, &c."] is not sufficient in law,' showing the special causes of demurrer, if any."

Form of demurrer as prescribed by Reg. Gen. Hil. T. 4 W. 4.

And that the form of a *joinder* in demurrer shall be as follows, "The said plaintiff [or 'defendant'] says that the declaration [or 'plea &c.'] is sufficient in law."

Form of joinder in demurrer as prescribed by Reg. Gen. Hil. T. 4 W. 4.

Perhaps these are two of the best instances of what *conciseness* may suffice in pleading.

The Reg. Gen. Hil. T. 4 W. 4, reg. 2, contains a further excellent regulation requiring an explicit statement in the margin of the demurrer of *at least one prima facie* well founded objection. It orders that "In the margin of *every* demurrer, before it is signed by counsel, *some matter of law* intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a *frivolous statement*, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea. Provided that the party demurring may at the time of the argument insist upon *any further* matters of law, of which notice shall have been given to the court in the usual way." (m)

Reg. Gen. Hil. T. 4 W. 4, reg. 2, requires one well founded objection to be stated in margin.

(i) Co. Litt. 71 b; French v. Watson, 2 Wils. 74. The court cannot compel a party to join in demurrer before the time allowed by Reg. Gen. Hil. T. 4 W. 4, s. 3; Hall v. Popplewell, 5 M. & W. 341; Mullins v. Cox, 7 Dowl. 660.

(k) 2 Saund. 210 g.

(l) Frumpton v. Pettis, 3 Lev. 23.

(m) Reg. Gen. Hil. T. 4 W. 4, reg. 3, orders that, "No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four

days after such demand to deliver the same, otherwise judgment." Reg. 4. "To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof." Reg. 5. "The issue or demurrer book shall, on all occasions, be made up by the suitor, his attorney or agent, as the case may be, and not as heretofore, by any officer of the court." Reg. 6. "No motion or rule for a *concilium* shall be required; but demurrers, as well as all special cases and special verdicts shall be set down for argument, at the request of

When the court will give judgment against the first defective pleading.

A party should not demur unless he be certain that his own previous pleading is substantially correct, for it is an established rule that upon the argument of a demurrer, the court will, notwithstanding the defect of the pleading demurred to, give judgment against the party whose pleading was first defective in *substance*, (*m*¹) as if the plea which is demurred to be bad, the defendant may avail himself of a substantial defect in the declaration, (*n*) unless such defect has been * aided by pleading over; (*l*) and if the first fault would constitute *error*, the court will decide upon it, though it be not noticed in the margin of the demurrer book; (*m*) for on demurrer, the court will consider the *whole* record, and give judgment for the party who thereon appears to be entitled to it. (*n*) But the rule that the court will view the *whole* record on

either party, with the clerk of the rules in the queen's bench and exchequer, and a secondary in the common pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party." Reg. 7. "Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the queen's bench, or common pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies or deposited with the clerk of the rules in the queen's bench and exchequer, or the secondary in the common pleas, as the case may be, a sufficient sum to pay for such copies."

(*m*¹) [Kilgour v. Miles, 6 Gill & J. 268; Boteler v. The State, 8 Gill & J. 383; Murdock v. Winter, 1 H. & Gill, 471; Allen v. Crofoot, 7 Cowen, 46; The Ordinary v. Bracey, 1 Brevard, 191; Reynolds v. Torrance, 3 Brevard, 49. See Hord v. Dishman, 2 Hen. & M. 652; Smith v. Walker, 1 Wash. 135; Patcher v. Sprague, 2 John. 465; Bennett v. Irwin, 3 John. 366; United States v. Arthur, 5 Cranch, 257; Barruso v. Madan, 2 John. 149; Gelston v. Burr, 11 John. 482; Haynes v. Lucas, 50 Il. 436; Bell v. Lamprey, 52 N. H. 41, 49; Claggett v. Simes, 31 N. H. 28, 29; Calais v. Bradford, 51 Maine, 414; Menifee v. Clark, 35 Ind. 304; Brehen v. O'Donnell, 34 N. J. (Law) 408. All the pleadings, therefore, previous to that which is held bad must be considered as having been regarded good in form. Burgess v. Lloyd, 7 Md. 178; Spencer v. Southwick, 7 Md. 583, 587; Hallett v. Holmes, 18 John. 30; Wyman v. Mitchell, 1 Cowen, 316; Phoebe v. Jay, 1 Breeze, 207; Inglehart v. State, 2 Gill & J. 235; Bender v. Graham, Minor, 269; Clark

v. Murphy, 1 Misson. 114; Slack v. Price, 1 Bibb, 272; Bodine v. Wade, 1 Bibb, 458; Sargeant v. Johnson, 1 McCord, 336; Roger v. Smiley, 2 Porter, 249; Tillotson v. Stipp, 1 Blackf. 77; Headington v. Neff, 7 Ohio, 229; Pearsall v. Dwight, 2 Mass. 84; Frost v. Hammatt, 11 Pick. 70; Day v. Pickett, 4 Munf. 104; Morgan v. Morgan, 4 Gill & J. 395; Dorsey v. Pannell, 4 Gill & J. 471; Griswold v. Nat. Ins. Co. 3 Cowen, 96. See, however, Keay v. Goodwin, 16 Mass. 3. If the declaration contain two counts, one good and one bad, and the defendant plead a plea which goes to the whole cause of action, to which the plaintiff demurs, the latter is, notwithstanding his having committed the first fault in pleading, entitled in the judgment on the count which is good. Ward v. Sackrider, 3 Cainea, 263; Tubbs v. Caswell, 8 Wend. 129; Sprigg v. The Bank of Mount Pleasant, 10 Peters, 257, 264; Sears v. Trowbridge, 15 Gray, 184; Minturn v. Manuf. Ins. Co. 10 Gray, 501; Colburn v. Phillips, 13 Gray, 64, where it was held, that although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in matter of substance. The fact that pleas are double, or that portions of them are surplusage, are held not to be matters of substance, and hence not open after they are answered by other pleas. Sargent J. in Bell v. Lamprey, 52 N. H. 50; Weld v. Locke, 18 N. H. 141.]

(*n*) 1 Saund. 119, note (7), 285, note (5); Hob. 56; Bullythorpe v. Turner, Willes, 476; Anonymous, 2 Wils. 150; Le Bret v. Papillon, 4 East, 502. [The rule is the same whether the demurrer be general or special. Cooke v. Graham, 3 Cranch, 229, 235. But where a defendant has pleaded the general issue, he cannot, upon a demurrer to the replication, attack the declaration. Russell v. Rogers, 15 Wend. 353; Dearborn v. Kent, 14 Wend. 183.]

(*l*) Darling v. Gurney, 2 Cr. & M. 226; 2 Dowl. 101; *post*, 703.

(*m*) Darling v. Gurney, 2 Dowl. 104, 108.

(*n*) See note (*n*), *supra*; Steph. 5th ed. 154,

demurrer does not enable either party to call in aid *other* parts of the pleadings in the cause, which are expressly withdrawn from the consideration of the court upon demurrer, and have become the subject of an issue in *fact* between the parties. If, therefore, the court consider the pleading of a party is defective, they will give judgment against him, although it appear from, and is admitted upon *other* parts of the pleadings on the record, not demurred to, that his opponent has become a bankrupt, and that his assignees have the right, &c.; for the court can, in giving judgment upon demurrer, look only to that part of the record upon which the demurrer arises, and not to other collateral parts of the record not connected with it. (*o*) And although on the whole record the right may appear to be with the plaintiff, the court will not adjudge in favor of such right, unless the plaintiff have himself put his action upon that ground. Thus, where on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach that the defendant would not pay the sum awarded, and the defendant pleaded that before the award made, he revoked by deed the authority of the arbitrators, to which the plaintiff demurred; the court held the plea good, as being a sufficient answer to *the breach alleged*, and therefore gave judgment for the defendant; although they also were of opinion that the matter stated in the plea would have entitled the plaintiff to maintain his action, if he had alleged by way of breach that the defendant prevented the arbitrators from making their award. (*p*) And the rule that the court will decide upon demurrer against the party who has committed the first fault in pleading, does not apply where the objection to the preceding pleading is merely a defect *in form*, and such as would be aided, on a *general* demurrer, by the statute of Elizabeth or Anne, or at common law. (*q*) By pleading over many defects in form are aided; (*r*) and we have seen, that upon a demurrer to a plea in *abatement* no objection can be taken to the form of the declaration. (*s*)

* The points relating to *amendments* have already been partially considered, and are so fully treated of in the books of practice (*t*) that any further observations upon them in this treatise are unnecessary.

AMENDMENTS.

[*Claggett v. Simes*, 31 N. H. 28, 29; *Inglehart v. The State*, 2 Gill & J. 236.]

(*o*) *Davies v. Penton*, 6 B. & C. 216. [The defect must be in the direct line of the pleadings as they are constituted. *Bell v. Lamprey*, 52 N. H. 41, 49.]

(*p*) *Marsh v. Bulteel*, 5 B. & Ald. 507.

(*q*) *Humphreys v. Bethily*, 2 Vent. 222; Steph. 2d ed. 177.

(*r*) *Post*, 703; *Bushell v. Lechmere*, 1 Ld. Raym. 369, 370; *Matravers v. Fosset*, 3

Wils. 297; *Bullythorpe v. Turner*, Willes, 476; *Hart v. Weston*, and *Same v. Hingeston*, 5 Barr. 2588; *Stutfield v. Somerset*, Cro. Eliz. 825; Com. Dig. Pleader, E. 37.

(*s*) *Bellasyre v. Hester*, Lutw. 1592; *Routh v. Weddell*, Lutw. 1667; *Powis v. Williams*, Lutw. 1604; *Hastrop v. Hastings*, Salk. 212; Steph. 5th ed. 157.

(*t*) *Tidd*, 9th ed. 696. Amendment at the trial of variances in setting out written instruments, *ante*, 327

The 3 & 4 W. 4, c. 42, sect. 34, enacts, that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf. (u) But in a new case it is sometimes the practice to direct that the costs shall abide the event of the action. (x)

Costs on demurrer under 3 & 4 W. 4, c. 42, sect. 34.

(u) See Jervis's Rules, 279.

(x) *Farmer v. Champneys*, 1 Cr., M. & R. 369; 2 Dowl. 681, S. C. [As to withdrawing demurrer and pleading over after demurrer overruled, see *Greening v. Brown*, Minor, 353; *Bruce v. Mathers*, 2 Bibb, 294; *Patrick v. Conrad*, 3 A. K. Marsh. 612; *Surlott v. Pratt*, 3 A. K. Marsh. 174; *Ralston v. Bullits*, 3 Bibb, 261; *Violet v. Dale*, 1 Bibb, 144; *Miller v. Heath*, 7 Cowen, 101; *Hancock v.*

Vawter, Hardin, 510; *Trigg v. Shields*, Hardin, 168; *O'Brien v. Hardy*, 3 Harr. & J. 434; *Acre v. Ross*, 3 Stewart, 288. In *Pickering v. Mississippi &c. Tel. Co.* 47 Missou. 457, it was held that an answer to the merits, after the overruling of a demurrer, operates as an abandonment of the demurrer, without any formal withdrawal thereof.]

DEFECTS IN PLEADING, WHEN AND HOW AIDED.

THERE are several different methods by which defects in pleading are aided or cured, without any actual *amendment*, viz. 1st, By *pleading over*; 2dly, By *intendment or presumption* DEFECTS, WHEN AIDED. *after verdict*; and 3dly, By the *statutes of jeofails*. (a)

A defect in pleading is *aided*, if the adverse party *plead over* to, or answer the defective pleading in such a manner that an omission or informality therein is *expressly* or *impliedly* supplied, 1st. By pleading over. (b) or rendered formal or intelligible. (c) The following are a few instances of an *express* aider. In an action of debt on a bond, where the declaration specified no place in which the bond was made, it was held that a plea of duress "*apud B.*" supplied the omission in the declaration; as such a plea contained a distinct admission that the bond was made at the place where the alleged duress was. (d) In an action for slander, where the declaration averred that the plaintiff was *forsworn*, without showing how, it was determined that this defect was aided by a plea of justification, which alleged that the plaintiff, who was stated in the declaration to be a constable, had taken a

(a) It is unnecessary to refer to the law of amendment, as it is fully noticed in the books of practice. See Tidd, 9th ed.; Chitty's Arch. Prac. 7th ed. Index, "Amendment." See, as to amendment at the trial in case of variances in setting out written instruments, &c. *ante*, 327, 328. As to the distinction between the doctrine of amendment and the doctrine of defects being aided or cured by the above means without amendment, see *post*, 705-716; Chit. Col. Stat. 14, note (a); Tidd, 9th ed. 928.

(b) See *Darling v. Gurney*, 2 Cr. & M. 226, 230; 2 Dowl. 235, S. C.; *Peacock v. Day*, 3 Dowl. 291.

(c) Com. Dig. Pleader, C. 85, E. 37; Co. Litt. 303 b; *Fowle v. Welsh*, 1 B. & C. 29; *Fletcher v. Pagon*, 3 B. & C. 192; Steph. 5th ed. 160; *Banks v. Angell*, 7 Ad. & El. 843; *France v. White*, 1 M. & Gr. 731. [A plea to the merits admits the right in which the plaintiff sues. *Newman v. Murphy*, 1 Hill (S. Car.), 153; *Edwards v. Ford*, 2 Bailey, 461. See *Green v. Craig*, 47 Missou. 90; *Brown v. Powell*, 45 Ala. 149. And also the character in which he sues. *Carpenter v. Whitman*, 15 John. 208. And the reg-

ularity of the writ. *Grey v. Young*, Harper, 38; *Hamner v. Eddins*, 3 Stewart, 192. And the authority of the attorney to act for the plaintiff. *Lucas v. Bank of Georgia*, 2 Stewart, 147. A defective declaration may be aided at common law by the plea, and a defective plea by the replication. *United States v. Morris*, 10 Wheat. 246; *Cummings v. Gray*, 4 Stew. & P. 397. For other cases showing how far defects are regarded as waived or cured by pleading, *Schermerhorn v. Jenkins*, 7 John. 373; *Long v. Kinard*, Harper, 47; *Wade v. Kelley*, 2 Stewart, 443; *Garland v. Chatte*, 12 John. 430; *Robinson v. Cornwell*, 2 Bailey, 137; *Anderson v. Read*, 2 Overton, 205; *Hays v. M'Kee*, 2 Blackf. 11; *Roberts v. Dame*, 11 N. H. 226; *Moore v. Lesure*, 18 Ala. 606; *Murry v. Meredith*, 25 Ark. 164. If one party expressly avers a fact omitted by the other side, the omission is supplied. *Hill v. George*, 5 Texas, 87.]

(d) *Dyer*, 15 a; Com. Dig. Pleader, C. 85; *Parlow v. Bailly*, 2 Lord Raym. 1039; *Mellor v. Barber*, 3 T. R. 387; *ante*, 299, 290.

false oath at the sessions. (e) And again, in an action of trespass for taking a hook, where the plaintiff omitted to state that it was *his* hook, or that it was in his possession; and the defendant, in his plea, justified the taking the hook *out of the plaintiff's hand*, the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. (f)

Many instances are to be found in the older reports and writers, * of certain defects being aided by an *implied* admission in the subsequent pleading of the adverse party. (f¹) Thus, where in an action by an administrator *durante minore etate*, it was not averred that the executor was within the age of seventeen years, it was held that by pleading to the merits of the action, the defect was aided, since the defendant thereby admitted that the plaintiff had authority to sue. (g) There are many cases in which it has been held that where a particular fact has been informally alleged, and the opposite party, in *pleading over*, admits the particular fact, either by pleading to some other matter alleged in the defective pleading; (h) or by pleading in confession and avoidance of the matter so informally alleged; (i) the defect will be aided by the admission resulting and to be collected from such subsequent pleading. If in debt on bond to make an estate to A., the defendant plead that he enfeoffed another to the use of A. (without showing that A. was a party, or had the deed), yet if the plaintiff reply that "the defendant *did not enfeoff*," this aids the plea. (k) So, if the defendant plead an award, without sufficient certainty, and the plaintiff's replication import that the award was made, the uncertainty of the plea in stating that the award was made is aided. (l)

It is, however, unnecessary to make any further mention of those cases which have been decided with reference to the aider of mere *formal* defects by *pleading over*; for we have already seen, that, at the present day, by virtue of the statutes relative to demurrer, in all cases where any pleading is defective, and the adverse party demurs *generally*, he will be entirely precluded from availing himself afterwards of any *formal* defects in such previous pleading, by the mere effect of his having *omitted to point out such defects upon a special demurrer.* (m) And we shall see hereafter, in treating of the effect of the statutes of jeofails, that according to the construction now put

(e) *Drake v. Corderoy*, Cro. Car. 288; Com. Dig. *ut supra*.

(f) Sid. 184; Bac. Abr. Trespass, 608. See another instance, *post*, 709.

(f¹) [*Slack v. Lyon*, 9 Pick. 62; *Dunning v. Owen*, 14 Mass. 157.]

(g) Com. Dig. Pleader, C. 85; *Beale v. Simpson*, Lutw. 632.

(h) *Muscott v. Ballet*, Cro. Jac. 369, 370; 2 Saund. 324, 328; *Norden v. Fox*, 3 Lev. 393; Com. Dig. Pleader, C. 87, E. 37.

(i) *Mathewson v. Rowe*, Cro. Jac. 125; *Slack v. Bowsal*, Cro. Jac. 668; *Buckland v. Otley*, Cro. Jac. 682; Com. Dig. Pleader, E. 37; *Courtney v. Greenville*, Cro. Car. 209.

(k) *Stutfield v. Somerset*, Cro. Eliz. 825; *post*, 710.

(l) Com. Dig. Pleader, E. 37.

(m) See *ante*, 703 *et seq.*

upon these enactments, after verdict or judgment by default, all *formal* defects are entirely aided. (n)

With regard to a defect *in substance*, it seems that it cannot be *impliedly* cured by the mere effect of pleading over thereto. (o) Therefore, if the defendant plead accord, and do not show satisfaction, and the replication merely deny the *agreement*, this traverse cannot cure the fault in the plea, namely, the omission to show a *satisfaction* to the plaintiff in regard to the cause of action. (p) * If, however, the adverse pleading *expressly admit* the fact which ought to have been stated in the defective pleading, and which is substantially incorrect in omitting it, the error becomes, it seems, immaterial; as in the instance before put of a declaration in trespass for taking goods, omitting to show any title to or possession of the goods, and the plea admitting the defendant's possession. (r) And we have seen that if a *declaration* incorrectly set forth a deed, the variance is aided if the defendant set out the deed on oyer, and plead *non est factum*. (s)

The second mode by which defects in pleading may be, in some cases aided, is by *intendment after verdict*. (s¹) The doctrine upon this subject is founded on the *common law*, and is independent of any statutory enactments. (t) The general principle upon which it depends, appears to be that where there is any defect, imperfection, or omission in any pleading, whether in *substance* or *form*, which would have been a fatal objection upon demurrer; yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is *cured by the verdict*. (u)

(n) *Post*, 705, 714-716.

(o) 8 Rep. 120 b; *Badcock v. Atkins*, Cro. Eliz. 416; 7 Rep. 25 a; *Lapworth v. —*, Cro. Jac. 87; Com. Dig. Pleader, C. 85, E. 37; *Anonymous*, 2 Wils. 150; *Clark v. Lazarus*, 2 M. & Gr. 167; *Galloway v. Jackson*, 3 Scott's N. R. 753; [*Bartlett v. M'Daniel*, 3 Missou. 55.]

(p) Com. Dig. Pleader, E. 37.

(r) *Ante*, 750. [And so, where the defendant in an action for libel, explicitly concedes, in his answer, that a charge of fraud, in the alleged libellous publication, applied to the plaintiff, he cannot, at the trial, take advantage of a defect in the declaration in omitting to sufficiently allege such application. *Whittemore v. Ware*, 101 Mass. 352.]

(s) *Ante*, 449, 450.

(s¹) [Under statutes in Massachusetts, no judgment shall be arrested for any cause existing before the verdict, unless the same affects the jurisdiction of the court. Genl. Stats. c. 129, § 79. Nor shall any judgment

in a civil action be reversed on error for any defect or imperfection in matter of form which might by law have been amended. Genl. Stats. c. 146, § 3.]

(t) See 1 Saund. 228, note (1). See, also, *Hudson v. Nicholson*, 5 M. & W. 437; *Sheen v. Rickie*, 5 M. & W. 173; *Harris v. Goodwyn*, 2 M. & Gr. 405; 9 Dowl. 409, S. C.; *Adams v. Jones*, 12 Ad. & El. 455; *King v. Burrell*, 12 Ad. & El. 460.

(u) 1 Saund. 228, note (1); and see the authorities there cited. *Rushton v. Aspinall*, Dougl. 679; and see per Lord Ellenborough, *Jackson v. Pesked*, 1 M. & Sel. 237; *Steph.* 5th ed. 161, 164; *Tidd*, 9th ed. 919; [*Smith v. The Eastern Railroad*, 35 N. H. 363, 364; *Bridge v. Fisk*, 23 N. H. 180, 181; *Vander-smith v. Washmeir*, 1 H. & Gill, 43; *Bowie v. City of Kansas*, 51 Missou. 454; *Flanders v. Stewartstown*, 47 N. H. 549, 550. After verdict the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. *Warren v.*

2dly. By
intendment
after verdict.

The expression *cured by verdict* signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings was duly proved at the trial. (*u*¹) And such intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved must always be such as can be implied *from the allegations on the record, by fair and reasonable intendment.* (*x*) And, on the other hand, a verdict for the party in whose favor such intendment is made, is indispensably necessary, for it is in consequence of such verdict, and in order to support it, that the court is induced to put a liberal construction upon the allegations on the record. Thus, if to a declaration on a bill of exchange the plea improperly state that there was no consideration, without stating the circumstances with particularity, yet if the plaintiff reply, the defect in the plea will be aided after verdict. (*y*) So,

Litchfield, 7 Greenl. 63; Dobson v. Campbell, 1 Sumner, 319; Vaughan v. Dinkens, Harper, 26; Addington v. Allen, 11 Wend. 375; Maxwell v. Maxwell, 14 Vt. 14; Morey v. Homan, 10 Vt. 584; Carroll v. Peake, 1 Peters, 24; Hamilton v. Harvey, 4 Yeates, 129; Jersey Co. v. Halsey, 2 South. 750. But nothing will be presumed to have been proved even after verdict excepting what is alleged, or necessarily implied from what is alleged. Harding v. Craigie, 8 Vt. 509; S. P. Vadakin v. Soper, 1 Aiken, 289. A declaration, or other pleading, setting forth a good title or ground of action defectively, will be cured by a verdict. Read v. Chelmsford, 16 Pick. 128; Ward v. Bartholomew, 6 Pick. 409; Moor v. Boswell, 5 Mass. 306; Riddle v. Locks & Canals, 7 Mass. 169; Wheeler v. Train, 3 Pick. 255; Spear v. Bicknell, 5 Mass. 125; Robbins v. Luce, 4 Mass. 476; Crocker v. Whitney, 10 Mass. 316, 318; Cushing v. Adams, 18 Pick. 100; Worster v. Canal Bridge, 16 Pick. 541; Avery v. Tyringham, 3 Mass. 160; Morey v. Homan, 10 Vt. 565; Richardson v. Woodstock &c. 6 Vt. 496; Haselton v. Weare, 8 Vt. 483; Fulham v. Lightfoot, 1 Call, 250; White v. Concord Railroad, 30 N. H. 188; New Hamp. Mut. Fire Ins. Co. v. Walker, 30 N. H. 324; as want of an averment of special demand or notice; Chester Glass Co. v. Dewey, 16 Mass. 94; Colt v. Root, 17 Mass. 229; Kingsley v. Bill, 9 Mass. 198; Crocker v. Gilbert, 9 Cush. 131; Bliss v. Arnold, 8 Vt. 252; or seisin in a writ of entry; Ward v. Bartholomew, 6 Pick. 409; or want of particularity or certainty; Richardson v. Eastman, 12 Mass. 505; Ingersoll v. Jackson, 9 Mass. 495; Livermore v. Boswell, 4 Mass. 437; Coffin v. Coffin, 2 Mass. 358; Lahiffe v. Hunter, Harper, 184; a verdict will cure an omission to add a joinder to a replication tendering an issue. Morrison v. Hart, Hardin, 150; so, an omission of a *sim-*

iliter; Ripley v. Coolidge, Minor, 11; Stone v. Van Carter, 2 Vt. 115; Babcock v. Huntington, 2 Day, 394; so, an omission of the sum paid and the amount of damages claimed in the declaration; Robinett v. Morris, Hardin, 93; so, a defective statement of the consideration; Hendrick v. Seeley, 6 Conn. 176; Martin v. Blodget, 1 Aiken, 375; so, a failure to allege performance of a condition precedent; Bailey v. Clay, 4 Rand. 346; so, the allegation of a promise before the date of the writ; Bemis v. Faxon, 2 Mass. 263; but where no title or ground of action is set out, the declaration will not be aided by verdict; Williams v. Hingham &c. Turnpike, 4 Pick. 341; Carlisle v. Weston, 1 Met. 26; Needham v. M'Auley, 13 Vt. 68; Griffin v. Pratt, 3 Conn. 513; Phelps v. Sill, 1 Day, 315; Chichester v. Vass, 1 Cull, 83; Merrick v. Trustees &c. 8 Gill, 59; so, where no consideration is alleged in an action of contract; Hitchcock v. Page, 1 Root, 293; so, where the *ad damnum* is blank and there is a verdict for the plaintiff; Hoit v. Moloney, 2 N. H. 223; so, where there is no plea or issue entered. Pratt v. Phillips, 4 Yeates, 467; Channing v. Caskaden, Minor, 73.]

(*u*¹) [Bedell v. Stevens, 28 N. H. 118; White v. Concord Railroad, 30 N. H. 188; New Hamp. Mut. Fire Ins. Co. v. Walker, 30 N. H. 324.]

(*x*) See per Lord Ellenborough, Jackson v. Pesked, 1 M. & Sel. 237; per Buller J. Spieries v. Parker, 1 T. R. 145; Taylor v. Devey, 7 Ad. & El. 409; Davis v. Black, 1 G. & D. 432; Hayter v. Moat, 2 M. & W. 56; Tebbutt v. Selby, 6 Ad. & El. 786; Tidd, 9th ed. 919; and cases there cited. See post, 714, 715; [Colebrook v. Merrill, 46 N. H. 160; Walpole v. Marlow, 2 N. H. 385; White v. Concord Railroad, 30 N. H. 209; N. Hamp Mut. Fire Ins. Co. v. Walker, 30 N. H. 324; Bedell v. Stevens, 28 N. H. 118.]

(*y*) Easton v. Pratchett, 4 Tyr. 472.

* the decision in *Humphreys v. Pratt*, in the House of Lords, turned on ground that the verdict aided the defect. (z)

It is obvious that the doctrine now under consideration does not apply to the case of a judgment *by default*. Such a judgment affords no ground for raising any intendment in favor of the plaintiff; it admits such facts only as are actually alleged, (a) and there is no necessity for the plaintiff proving anything further. Where an intendment is made in favor of a party, it is always a presumption relative to matter of fact, viz. that such a particular circumstance was duly proved at the trial; but it is impossible to raise a presumption of this description when no trial has taken place. In the case, therefore, of a judgment by default, the court cannot, upon a motion in arrest of judgment, or writ of error, intend anything in favor of the plaintiff; the only question they will have to consider is, whether the alleged defect is or is not cured by the effect of any express legislative enactment. And as it appears from the more modern cases that the different statutes of jeofails (the operation of which was extended to judgments by default by the statute for the amendment of the law), (b) cure such defects only as are now considered matters of form, it follows that any objection to the declaration, made after judgment by default, will be considered precisely in the same manner as if it had arisen upon general demurrer; and that if the defect be matter of form it will be aided, but if matter of substance it will be fatal. (c)

It is therefore often very material to attend to the distinction between the doctrine of intendment and the effect of the statutes of jeofails, in aiding defects in pleading. The statutes of jeofails operate not by way of intendment, but by positive enactment; (d) and as they do not extend to cure defects which are clearly matters of substance, there are necessarily many defects of this nature which may be aided by a verdict, but which are not reached by those statutes, and are consequently still fatal after a judgment by default. (e)

Having thus explained the general nature of the doctrine of *intendment*, and shown that it is confined to those cases only in which a *verdict* has been given in favor of the party for whom the intendment is required to be made, we shall now proceed to notice some of the cases which have arisen upon the subject, in order to show under what particular circumstances the court will or will not make an intendment in support of the verdict, and what is the nature of the intendment they will make. Before we notice these cases, it may,

(z) 1 Dow & Clarke Rep. 288.

(a) 1 Saund. 228, note (1).

(b) 4 & 5 Ann. c. 16; post, 714, 715.

(c) Collins v. Gibbs, 2 Burr. 899; Bowdell v. Parsons, 10 East, 359, 363; Higgins v. Highfield, 13 East, 407; Steph. on Plead-

ing, 5th ed. 164; 1 Saund. 228, note (b); ante, 276.

(d) See 1 Saund. 5th ed. 28 a, note (k).

(e) Ib. 228, note (1); Vandeput v. Lord, 1 Stra. 78; Collins v. Gibbs, 2 Burr. 899.

* however, be proper to remark that it is unnecessary at the present day to have recourse to the doctrine of intendment with respect to defects which are not matters of substance; for we have already observed, and shall hereafter see more particularly, that defects which are mere matters of *form* are aided after verdict by the effect of the statutes of jeofails, without there being any necessity to have recourse to the doctrine of intendment. (*f*)

The authorities in the books are very numerous on the subject of defects being aided after verdict. It is quite unnecessary to detail a great number of the older cases on the subject, the great majority of them having arisen upon matters which would now be considered mere form. And it would be a task of some difficulty to reconcile all the decisions upon the subject, partly because the courts have in later times become much more liberal than they were formerly in discriminating between form and substance, and partly because the distinction we have before adverted to, between the doctrine of intendment at common law and the statutes of jeofails, is very often but little attended to in many of the older reports and treatises. (*g*)

In an action of *assumpsit* the declaration stated that the defendant had sold to the plaintiff a quantity of furze then growing upon certain land, to be taken away by the plaintiff before a certain day; and that in consideration thereof the defendant promised that he would permit the plaintiff peaceably to enjoy and take away the furze without disturbance; and then alleged that the defendant did not permit him to enjoy it, but disturbed him from taking a quantity away. After a verdict for the plaintiff, it was objected upon a writ of error that no time was shown when the disturbance took place, and that unless it were shown to be before the stipulated day there could be no good ground of action; but the court held that after the verdict it would be intended within the given time; for otherwise there could have been no proof of any cause to have damages. (*i*) This case very clearly illustrates the principles we have above laid down: the plaintiff had not *expressly* made the allegation which was contended to be necessary, but had merely averred that the defendant had committed a breach of his promise by the alleged disturbance; the particular part of the averment in the declaration which related to the disturbance was ambiguous, since it might mean either a disturbance before or a disturbance after the particular day by which the furze was to be taken away; but from the whole declaration it was

(*f*) *Supra*; post, 716.

(*g*) See the observations of Mr. Serjeant Williams, 1 Saund. 228 *b*, *c*, note (1).

(*h*) See a further instance in *Humphreys v. Pratt*, 2 Dow & Clarke, 295, 296, and cases there quoted.

(*i*) Cro. Jac. 407. It was also held in this case, that it was not material to allege the time of the disturbance, for it was collateral to the promise.

evident that nothing but proof of a disturbance before the particular day would * amount to a breach of the contract set out, so as to entitle the plaintiff to recover; and as in point of fact he *had* recovered, the court were in reason and justice bound to presume that such proof had been given. So also in an action of assumpsit brought by an off-going tenant against his landlord to recover compensation, according to the custom of the country, for tilling, fallowing, and manuring *arable* land, where the plaintiff, after setting out the custom, averred that he had tilled, fallowed, and manured, and had sown with wheat and seeds certain *lands* forming part of his farm, but without expressly averring that such lands were *arable*, it was held, on motion in arrest of judgment, after a verdict for the plaintiff, that as the declaration showed that the plaintiff could not be entitled to recover without proving that the lands were arable, it must be intended that he had given such evidence at the trial; and that therefore the defect or ambiguity, if any, in the declaration was helped by the verdict. (*k*) The following cases will also further elucidate this doctrine: In an action of assumpsit against the executors of the maker of a promissory note, the plaintiff, after setting out the note, alleged that the testator at the time of his death was indebted to the payee for the amount of the principal sum secured by the note and interest thereon; and then averred that after the payee's death it was found upon inquest, by the oaths of honest and lawful men (but without showing how many), that the payee was *felo de se*, whereby the note and the money due thereon became forfeited to the crown, and the plaintiff then set out a grant to him under the king's sign manual. After a verdict for the plaintiff it was objected in arrest of judgment, — 1st, that a promissory note was only assignable by indorsement, and that though the crown could assign a debt, yet it was not alleged that this was the case of a debt, nor did the plaintiff sue as the assignee of a debt but only of a promissory note; and, 2dly, that it was not averred in the declaration that the inquisition had been taken by twelve men, which it was contended was necessary. But the court held that the allegation that the maker, at the time of his death, was indebted to the payee in the principal sum secured by the note and interest thereon, was a sufficient averment that the note was a security for a debt; and also, that supposing it to be necessary that the coroner's inquest should be taken by twelve men to vest chattels in the crown, it must be intended after verdict that the inquisition in question had been so found. (*l*) And where in assumpsit the plaintiff stated in his declaration that he had, at the request of certain persons therein mentioned, sold and delivered to them goods of a certain value, whereof the defendant had notice, and that in consideration thereof, and also in con-

(*k*) *Dalby v. Hirst*, 1 B. & B. 224; 3 Moore, 336, S. C. (*l*) *Lambert v. Taylor*, 4 B. & C. 138.

sideration that the plaintiff, at the defendant's request, would forbear *and give day of payment of the said sum of money (but without saying to whom), the defendant promised to pay the same at a particular time, and then averred that the plaintiff did forbear and give day of payment of the said money; after a verdict for the plaintiff, the court held that by necessary intendment the vendees of the goods must have been the persons to whom the plaintiff forbore; and that, though not specifically alleged, it appeared to be so with a sufficient degree of certainty, but that at all events the defect, if any, was cured by the verdict. (m) We have formerly seen, in treating of the mode in which contracts should be stated, and the degree of certainty required in pleading, (n) that in general uncertainty is only matter of form, and that it will consequently be aided either on general demurrer, or after verdict or judgment by default, by the statutes of jeofails. In a case in which the declaration in assumpsit stated that the plaintiff had sold to the defendant a *certain horse*, at and for a *certain quantity of certain oil*, to be delivered within a *certain time*, which had elapsed before the commencement of the suit, it was contended that the judgment ought to be arrested, since the plaintiff had professed to declare on a special contract, but had not specified in any manner what the terms of the contract were; but it was answered on the other side, that though the objection might hold on demurrer, yet after a verdict it must be intended that the jury had ascertained those circumstances; and after some hesitation the court finally decided that after verdict the declaration was sufficient. (o) In another case of an action in assumpsit, the declaration stated that the plaintiff had retained the defendant (who was not an attorney) to lay out £700 in the purchase of an annuity, and that defendant promised to lay it out securely, that the plaintiff *delivered the money* to the defendant accordingly, but that the defendant laid it out on a bad and insufficient security. After verdict it was objected on a writ of error, that no consideration appeared in the declaration; that it was not averred that the promise was in consideration of the retainer, nor that the retainer was for reward; but the court held that it was absolutely necessary under the declaration that the plaintiff should have proved at the trial that he had actually delivered the money to the defendant, and that the latter had engaged to lay it out; that the delivery of the money for this purpose was a sufficient consideration to support the promise; and that although it was not expressly alleged in the declaration that the delivery of the money was in fact the consideration for the promise, the court would intend after verdict that such was the consideration. (p)

(m) *Marshall v. Birkenshaw*, 1 New Rep. 172.

(n) *Ante*, 259, 276.

(o) *Ward v. Harris*, 2 B. & P. 265; [*ante*, 260, 276.]

(p) *Whitehead v. Greetham*, 2 Bing. 464; 1 M'Clel. & Y. 205, S. C.

In all these cases the form of action was *assumpsit*. We shall proceed to give a few more instances of intendments made after verdict *in different forms of action; but whatever may be the form of action, or the particular pleading which is alleged to be defective, the principles which govern the decision of the court must of course be always the same. In an action of *debt*, in which the plaintiff sought to recover penalties for money lost in gaming, he alleged in his declaration that he sued as well for himself as for the poor of the parish of St. Paul, Covent Garden, but did not afterwards show that the money had been lost in that parish, but merely "at Westminster aforesaid." After a verdict finding that the defendant did owe part of the money to the plaintiff and the poor of the said parish, it was held, on a writ of error, that it must have been proved on the trial that the money was lost in the particular parish, or the jury could not have found their verdict, and that consequently the defect was cured; for wheresoever it may be presumed that anything must of necessity have been given in evidence, the want of mentioning it on record will not vitiate it after a verdict. (q) So in an action of debt upon a bond given by a bailiff to a sheriff for the due discharge of his office in returning warrants, &c. the defendant in his plea cravedoyer of the condition, which recited that the bailiff had been appointed for a particular hundred only, and pleaded performance; the plaintiff assigned as a breach, that a particular warrant had been directed to him which had not been duly returned. It was objected in arrest of judgment after a verdict for the plaintiff, that he had not shown that the warrant was to be executed in the particular hundred, and that consequently it did not appear that it was a warrant which the bailiff was bound to return, but the court held that this objection could not prevail after verdict; for, independently of the necessity of intending that the warrant was proved to be such a one as the bailiff must return, the defendant had in fact admitted that it was by traversing the breach assigned, and that it would in fact be raising an intendment against the verdict, and against the defendant's own admission to hold that the objection should prevail. (r) Again, in an action upon the *case* for refusing to comply with a *subpœna duces tecum*, by producing the required document, in consequence whereof the plaintiff had been nonsuited, where the plaintiff did not in express terms allege that the defendant had the particular instrument in his possession, but only that he could and might have produced it, and that he had no lawful and reasonable excuse or impediment to the contrary, it was held after verdict, upon motion in arrest of judgment, that the plain import of these words was, that the defendant had the instrument in his possession, and consequently that

(q) *Frederick v. Looknp*, 4 Burr. 2018, 2020; and see *Hitchins v. Stevens*, Sir T. Raym. 487; *St. John v. St. John*, Hob. 78; *Alston v. Buscough*, Carth. 304.

(r) *Weston v. Mason*, and *Same v. Chapman*, 3 Burr. 1725. See *ante*, 703, 704. See, as to this objection upon demurrer, *Alleyn*, 10.

it was to be intended that this had been proved at the trial; and not that the judge had suffered the allegations to be proved * in a strained and unnatural sense, as by showing that the defendant might have acquired the means of producing the instrument by applying to others who might have it in their custody. (s)

Many other cases might be cited in support of the proposition, that in all cases where the general allegations in the declaration or other pleadings are such as to require proof of any particular fact which is not expressly stated, in order to entitle the plaintiff to a verdict, it will be intended, after a verdict for him, that such fact was duly proved, and the defect in the particular pleading will be aided. (t) Thus, a plea of prescription for common in a *que estate* is good after verdict, though it be not alleged *expressly* that the owners of the estate have used it immemorially; for unless a prescriptive right had been proved, the party pleading it could not have recovered a verdict. (u) So, where the grant of a reversion, a rent-charge, advowson, or other incorporeal hereditament, which lies in grant, and can only be conveyed by deed, is not alleged in pleading to have been *by deed*, yet if the grant be put in issue and found by a jury, the imperfection in pleading is cured by the verdict at common law. (x) And we have seen that an imperfect averment of the performance by the plaintiff of a *condition precedent*, or matter to be performed by him, (y) or that he gave a proper *notice* to the defendant, (z) or *requested* the defendant to perform his promise, (a) will sometimes be cured by verdict; and that after verdict, an averment in a declaration for a libel, that the defendant "*printed and caused to be printed the libel in a newspaper,*" not expressly showing a publication, may be sufficient. (b)

It will be observed that in all the cases we have given upon this subject, although the particular matter was not stated in *express terms*, the declaration or other pleading in each case contained terms sufficiently general to comprehend it in fair and reasonable intendment. (c) The allegations on the record, taken by themselves, might have been ambiguous, and have been capable of bearing two different constructions, but when they were coupled with the verdict, it became clear that they might and ought to be interpreted in that sense alone, which was absolutely necessary in order to account for and to support

(s) *Amey v. Long*, 9 East, 473.

(t) See *Mackmurdo v. Smith*, 7 T. R. 518, 522; *Prance v. Tringer*, Cro. Jac. 44; *Cook v. Pettit*, 2 Wils. 5; *Wicker v. Morris*, Rep. temp. Hardw. 116; 1 Mod. 292; *Mornington v. William*, 1 Vent. 108, 109; 1 Sid. 365; *Anonymous*, 2 Ld. Raym. 1060; *Roe v. Hersey*, 3 Wils. 275; *Farnworth v. The Bishop of Chester*, 4 B. & C. 555.

(u) *Clark v. King*, 3 T. R. 147.

(x) *Hutt*, 54; 1 Saund. 228, note (1); Steph. 5th ed. 162.

(y) *Ante*, 336, 337. See *ante*, 331; and *post*, 713.

(z) *Ante*, 338. But the omission of an averment of notice of non-payment, in an action against the drawer of a bill, is fatal after verdict. *Ib.*; *post*, 713, 714.

(a) *Ante*, 340.

(b) *Ante*, 421. Statement that damages accrued after action when cured, *ante*, 414.

(c) See per Lord Ellenborough, *Jackson v. Pesked*, 1 M. & Sel. 236; per Buller J. *Spieres v. Parker*, 1 T. R. 145.

the verdict. Some cases, however, have arisen which it is not very easy to bring within the operation of the rule as thus restricted, but in which the courts, in their anxiety to support verdicts, have held particular * defects to be aided. Thus, in an action on the case for a malicious prosecution, it is necessary to allege in the declaration that the prosecution is at an end; (*d*) or that the commission or fiat has been superseded; (*e*) but it has been held that the want of this averment is cured by verdict. (*f*) It is said, that it will be then presumed that proof of the fact of the determination of the prosecution has been given at the trial; but although such a fact may be a reasonable inference from the verdict alone, yet it appears difficult to say how it is comprehended, even by fair, and reasonable intendment, in the allegations in the declaration, for there is nothing on the record which in any manner appears to imply that the prosecution has been determined. So the omission to allege a notice or demand of rent in an action against the sheriff for not paying a year's rent pursuant to 8 Anne, c. 14, is aided by verdict. (*g*) Again, in another case of an action to recover an amerciament in an inferior court, where the declaration omitted a necessary allegation, viz. that the defendant was a resiant, it appears to have been considered that the fact of residence must be intended to have been proved at the trial, as otherwise the jury could not have found that there had been any debt due. (*h*) But the doctrine which this case would appear to establish, that matters extrinsic of the record are to be *intended* after a verdict, by inference drawn from the verdict *alone*, has been denied by Mr. Justice Buller in a subsequent case; (*i*) and appears to be in some degree inconsistent with many other decisions. However, one of the most recent cases establishes that, although the declaration do not contain the requisite averment, still the defendant must, if the plaintiff do *not prove* the essential fact the same as if it had been averred, insist on the plaintiff being nonsuited, or have a verdict against him, for otherwise the verdict for the plaintiff will aid as well the defects in the declaration as in the evidence. (*k*)

It is at all events clear that the courts will never, in order to support a verdict, make an intendment which is *inconsistent* with the

(*d*) 10 Mod. 209; *Fisher v. Bristow*, Dougl. 215; *Morgan v. Hughes*, 2 T. R. 225; *ante*, 149; *Combe v. Capron*, Mood. & Rob. 398.

(*e*) *Whitworth v. Hall*, 2 B. & Ad. 695; when not proved, *Combe v. Capron*, Mood. & Rob. 398.

(*f*) 1 Saund. 228 *a*; 1 Sid. 15; 2 Selw. N. P. 6th ed. 1055, note (7); *Dalby v. Hirst*, 1 B. & B. 224; *Amery v. Long*, 9 East, 473; *Fippet v. Hearn*, 5 B. & Ald. 634; in which it was said, that a count for maliciously in-

dicting the plaintiff for perjury, without setting out the indictment, is good after verdict; but this, it should seem, is by the statutes of jeofails.

(*g*) *Palgrave v. Windham*, 1 Stra. 212; 7 Price, 566.

(*h*) *Wicker v. Norris*, Rep. temp. Hardw. 116.

(*i*) *Spieries v. Parker*, 1 T. R. 141, 145, 146.

(*k*) *Whitworth v. Hall*, 2 B. & Ad. 695.

allegations on the record. Thus, in an action of assumpsit, the declaration stated that a certain person had become bankrupt, and that at his last examination under the commission, in consideration that his assignees and the commissioners, at the request of the defendant, would forbear to examine the bankrupt touching certain moneys * which the bankrupt had received, and for which he had not accounted, the defendant undertook to pay the assignees all sums received by the bankrupt, and not accounted for by him. After a verdict for the plaintiff, it was held on a writ of error, that this contract was void, as being against the policy of the bankrupt laws, and calculated to deprive the creditors of the advantages they might derive from an examination of the bankrupt. And although it was contended that after verdict the court would intend that the sum which the verdict found to be due to the plaintiff had been ascertained to be the full amount of all moneys received and not accounted for by the bankrupt, and so no injury could arise to the creditors; it was held that no such intendment could be made, since it was expressly averred in the declaration that the amount had not been ascertained at the time the contract was made, and it appeared, that by entering into the contract, the assignees had deprived themselves of the opportunity of ascertaining the amount. And the court appears to have considered that it would be equally improper to intend after verdict, that the contract had been entered into with the consent of the creditors, since there was nothing in the allegations on the record to warrant such an intendment. (l) So, if a declaration expressly show that a condition precedent was *not* performed by the plaintiff, and state matter which is no excuse for the non-performance, the declaration will be bad after verdict. (m) And in another case, it was laid down by the court that nothing could be intended after verdict but what was expressly stated in the record, or necessarily implied from those facts which were stated. (n)

The main rule on the subject of intendment is, that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title*, or cause of action. (o) Instances in illustration of the former part of this rule have already been given; and we have also seen that there can be no presumption to support the verdict, if the presumption be negatived by, and be *inconsistent* and at variance with, a material statement in the record. (p) We may here add

(l) *Nerot v. Wallace*, 3 T. R. 17, 25, 26.

(m) *Worsley v. Wood*, 6 T. R. 710; *ante*, 331, 336.

(n) *Spieres v. Parker*, 1 T. R. 141. See Tidd, 9th ed. 919.

(o) *Crowther v. Oldfield*, Salk. 365; Lord Raym. 1225, S. C.; 1 Saund. 228, note (1); *Bishop v. Hayward*, 4 T. R. 470; *Farnworth v. The Bishop of Chester*, 4 B. & C. 555; [*Smith v. The Eastern Railroad*, 35 N. H.

365; *Walpole v. Marlow*, 2 N. H. 386; *Elliot v. Heath*, 6 N. H. 428; *Worcester v. Proprietors of Canal Bridge*, 16 Pick. 549; *Read v. Chelmsford*, 16 Pick. 128.] But there are some defects of *substance* as well as *form*, which are aided by pleading over or by verdict. *Hitch v. Stevens*, 2 Show. 244; *Wright v. Goddard*, 8 Ad. & El. 144.

(p) *Ante*, 392-401.

some cases in explanation of the rule that if the plaintiff *totally omit* to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption to maintain the verdict. (q) If, therefore, in an action upon a bill of exchange, the plaintiff omit to aver presentment to, and a refusal by the drawee; (r) or that the defendant had notice of non-payment; (s) when such * averments are necessary, the declaration will be bad even after verdict. So, in case for a libel or slander, if the matter as charged be not in itself a libel, and the declaration do not contain any introductory matter, or other averment rendering it so, and connecting the plaintiff with the libellous imputation, and giving it an actionable meaning, as applied to the plaintiff, the declaration will not be aided by verdict, although there be an *innuendo* that the defendant meant to charge that the plaintiff was guilty of a specified offence. (t) And a verdict will not cure a statement in a declaration that the defendant published a libel "in *substance* as follows;" or spoke slanderous words "to the *tenor* following;" although the matter be set out in *hæc verba*. (u) So, where the plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated a certain injury to have been committed, but omitted to allege that the reversion was, in fact, prejudiced, or to show any grievance which, in its nature, would necessarily prejudice the reversion; the court arrested the judgment, after • a verdict had been given in favor of the plaintiff, and held the fault to be one which the verdict could not cure. (x) And where a declaration in debt, for not setting out tithes, on the statute 2 & 3 Edw. 6, c. 13, s. 1, omitted to state that the tithes had been yielded and paid, and of right ought to have been paid, within forty years next before the passing of the act; the court held that it was defective, even after verdict, and the judgment was arrested. (y)

Where several causes of action have been stated in one count, one of which is sustainable, but the others not, if there be a verdict for the plaintiff with general damages upon the whole count, such verdict will be sustained by the intendment and presumption that the judge duly directed the jury not to find damages upon the defective allegations. (z) But if a declaration contain several counts, any of which is wholly defective, and general

When a count in part defective is aided by verdict.

(q) Tidd, 9th ed. 919.

(r) *Rushton v. Aspinall*, Dougl. 679; *Williams v. Germaine*, 7 B. & C. 468; 1 M. & Ry. 394, 403, S. C.

(s) *Ante*, 338.

(t) *Ante*, 422.

(u) *Ante*, 419.

(x) *Jackson v. Pesked*, 1 M. & Sel. 234.

(y) *Butt v. Howard*, 4 B. & Ald. 655; and see *Daman v. Marrett*, 1 Taunt. 128; *Dartnall v. Howard*, 4 B. & C. 345; 6 D. & R. 438, S. C.; *Farnworth v. The Bishop of Chester*, 4 B. & C. 555; 7 D. & R. 56, S. C.; *Goldstein v. Foss*, 6 B. & C. 154; *Rolph v. Peckham*, 6 B. & C. 164; 10 Moore, 446.

(z) 2 Tyr. 648.

damages upon the whole declaration be given, the judgment would be arrested or reversed on error. (a)

3dly. Mistakes and omissions in the *declaration*, and other subsequent *pleadings*, are oftentimes cured by the statutes of jeofails, which declare, (b) that "judgment, *after verdict*, (c) shall not be stayed or * reversed by reason of any *mispleading*, lack of color, *insufficient pleading*, or *jeofail*, or other default or negligence of the parties, their counsellors or attorneys; (d) *want of form* in any count, declaration, plaint, bill, suit, or demand; (e) lack of averment of any life, so as the person be proved to be alive; (f) *want of any profert*, or the omission of *vi et armis*, or *contra pacem*, mistaking the Christian name or surname of either party, (g) sums, day, month, or year, in any bill, declaration, or pleading, being right in any writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the *plaintiff*" (or more properly the *defendant*) "might have demurred, and shown the same for cause; want of the averment of *hoc paratus est verificare* or *hoc paratus est verificare per recordum*, or for not alleging *prout patet per recordum*, or the want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid; (h) *or any other matters of like nature, not being against the right of the matter of the suit, nor whereby the issue or trial is altered.*" (i)

The statutes of jeofails are extended by the statute for the amendment of the law (k) to judgments entered upon *confession*, *nihil dicit*, or *non sum informatus*, (l) in any court of record; and it is thereby

(a) *Ib.*; *ante*, 426, 427, where see the course of proceeding. [Misjoinder of a count in case with a count in trespass, will not be aided by intendment after a general verdict, in the absence of any showing that the recovery was not upon both counts. *Dalson v. Bradberry*, 50 Ill. 82.]

(b) See Tidd, 9th ed. 923; Chit. Col. Stat. Amendments and Jeofails.

(c) Distinction between the common law effect of a verdict, and its operation under the statutes, 1 Saund. 227, note (1); *ante*, 707. An informal issue is cured by this statute, but a verdict will not cure an immaterial issue, *ante*, 687. Immaterial traverse, *ante*, 652.

(d) 32 Hen. 8, c. 30.

(e) 18 Eliz. c. 14.

(f) 21 Jac. 1, c. 13.

(g) *Richards v. Simons*, 3 Wils. 40.

(h) The statute 16 & 17 Car. 2, c. 8, which cures the want of a right venue, so as the cause be tried by a jury of the proper county where the action is laid, seems to extend, not only to cases where there is a wrong venue in a right county, but also to those where the

cause has been improperly tried in a wrong county. *The Mayor of London v. Cole*, 7 T. R. 583; and see *Leving v. Culverley*, 1 Ld. Raym. 320; *Carth. 448*, S. C.; *The Bailiffs &c. of Litchfield v. Slater*, Willes, 431; *Stevenson v. Lambard*, 2 East, 580; 1 Saund. 248, (3); 2 Saund. 5, (3), 5th ed. But where, in ejectment for lands in Cardiganshire, the venire was awarded out of Shropshire, upon the suggestion of its being the next English county, the court, after verdict for the plaintiff, arrested the judgment on the ground of a mistrial, Herefordshire being the next adjoining county to South Wales, although it appeared that Shropshire was in fact nearer to the lands in question, and the cause might have been more conveniently tried there than in Herefordshire. *Goodright v. Williams*, 2 M. & Sel. 270. See *ante*, 289, 290.

(i) 16 & 17 Car. 2, c. 8. These latter words should be construed literally. See the observations of Lord Ellenborough, 4 & 5 Anne, c. 16, s. 2, in *Bowdell v. Parsons*, 10 East, 363, 364.

(k) 4 & 5 Ann. c. 16, s. 2.

(l) But this statute does not seem to apply

enacted, "that no such judgment shall be reversed; nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter or thing whatsoever, which would have been aided and cured by any of the said statutes of *jeofails*, in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to law." (m) A motion in arrest of judgment, after judgment *by default*, is to be considered exactly the same as if the question had arisen on a general demurrer; (n) and on *demurrer*, we may remember, that by the statute *4 & 5 Ann. c. 16, the court are required to give judgment according to the very right of the cause, without regarding any such imperfections, omissions, and defects, as are particularly mentioned in the act, or any other matter of like nature, except the same shall be specially set down and shown for cause of demurrer, notwithstanding the same might have heretofore been taken to be matter of substance, and not aided by the statute of Queen Elizabeth, so as sufficient matter appear in the pleadings upon which the court may give judgment, according to the very right of the cause. (o) As there cannot however be the same intendment in support of a judgment by default as after a verdict, it has been holden that the statutes of *jeofails* do not protect judgments *by default* against objections that are cured by a *verdict at common law*, but such only as are remedied after a verdict by the statutes. (p)

It has been determined that the statute of 32 Hen. 8, c. 30, extends to *penal* actions. (q) And by the statute 4 Geo. 2, c. 26, which provides that all legal proceedings shall be in the *English* language, "all statutes for the reformation and amending of the delays arising from any *jeofails* shall and may extend to all and every form and forms, and to all proceedings in courts of justice (except in *criminal* cases), when the forms and proceedings are in *English*; and all errors and mistakes are amendable and remedied thereby in like manner as if the proceedings had been in *Latin*." And though by the 16 & 17 Car. 2, c. 8, the several omissions, variances, and defects therein mentioned are required to be *amended* by the judges of the court where the judgment is given, or the record removed by writ of error, yet

to judgments on *nul tiel record*. Tidd, 9th ed. 927, note (d).

(m) By a subsequent act, 9 Ann. c. 20, s. 7, this and all the statutes of *jeofails* are extended to writs of *mandamus*, and informations in nature of a *quo warranto*. But pleadings on writs of extent are not considered as proceedings for the recovery of the king's debts within the meaning of the statute 4 & 5 Ann. c. 16, s. 24. 5 Price, 621.

(n) Collins v. Gibbs, 2 Burr. 899.

(o) *Ante*, 694-696; and see Bowdell v. Parsons, 10 East, 359.

(p) Hayes v. Warren, 2 Stra. 933; and see 1 Saund. 228, (1); Higgins v. Highfield, 13 East, 407; Tidd, 9th ed. 927; *ante*, 706.

(q) Sedgwick v. Richardson, 3 Lev. 375; Phillips v. Smith, 1 Stra. 136; Wynne v. Middleton, 2 Stra. 1227; Richards v. Brown, Dougl. 115; *ante*, 695.

an actual amendment is never made on this statute ; but the court will allow the benefit of the act to be attained by overlooking the exception. (*r*)

(*r*) *Rex v. Bishop of Llandaff*, 2 Stra. 1011 ; 315 ; Tidd, 9th ed. 928 ; Chit. Col. Stat. vol. Conden *v.* Coulter, Cas. temp. Hardw. 314, i. 14, note (*a*).

APPENDIX.

THE PRINCIPAL STATUTES AND RULES

AFFECTING

PLEADING IN GENERAL.

[See the Statutes of Amendments and Jeofails collected Chitty Col. Stat. tit. Amendments and Jeofails.]

4 ANNE, CAP. 16.

An Act for the better Amendment of the Law, and the better Advancement of Justice. [1705.]

FOR the amendment of the law in several particulars, and for the easier, speedier, and better advancement of justice, be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of Trinity Term which shall be in the year of our Lord one thousand seven hundred and six, where any demurrer shall be joined, and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be matter of substance, and not aided by the statute made in the twenty-seventh year of Queen Elizabeth, intituled, "An act for the furtherance of justice in case of demurrer and pleadings," so as sufficient matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause; and therefore from and after the said first day of Trinity Term no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alleging the bringing into court any bond,

By 9 Anne c. 20, sect. 7, this statute is extended to writs of mandamus and informations in nature of quo warranto.

Judges shall give judgment on demurrer, &c. without regarding any defect in writ, declaration, or other pleading, unless there be a special demurrer showing the defect.

27 Elis. cap. 6.

bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *vi et armis et contra pacem*, or either of them; or of or for the want of averment of *hoc paratus verificare*, or, *hoc paratus est verificare per recordum*; or of or for not alleging *prout putet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer.

* II. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term, all the statutes of jeofails shall be extended to judgments which shall at any times afterwards be entered upon confession, *nihil dicit*, or *non sum informatus*, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of inquiry of damages executed thereon be stayed or reversed, for or by reason of any imperfection, omission, defect, matter, or thing whatsoever, which would have been aided and cured by any of the said statutes of jeofails in case a verdict of twelve men had been given in the said action or suit, so as there be an original writ or bill, and warrants of attorney duly filed according to the law as is now used.

III. Provided always, and be it enacted by the authority aforesaid, that the attorney for the plaintiff or demandant in any action or suit shall file his warrant of attorney with the proper officer of the court where the cause is depending the same term he declares; and the attorney for the defendant or tenant shall file his warrant of attorney as aforesaid the same term he appears, under the penalties inflicted upon attorneys by any former law for default of filing their warrants of attorney.

IV. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence.

XI. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, to show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.

XII. And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term, where any action of debt shall be brought upon any single bill, or where action of debt, or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit, and where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of

a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors, or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded.

The like on bonds.

XIII. And be it further enacted by the authority aforesaid, that if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every defendant of and from the same accordingly.

Principal and interest on bonds paid in court, &c.

9 GEO. IV. CAP. 14.

An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements. [9th May, 1828.]

Whereas by an act passed in England in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade * of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after: and whereas a similar enactment is contained in an act passed in Ireland in the tenth year of the reign of King Charles the First: and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments and to the intention thereof: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more

English act, 21 Jac. 1, c. 16.

Irish act, 10 Car. 1, sess. 2, c. 6.

In actions of debt, or upon the case, no acknowledgment shall be deemed sufficient unless it be in writing or by part payment.

joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

II. And be it further enacted, that if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

III. And be it further enacted that no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

IV. And be it further enacted, that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification* shall be made by some writing signed by the party to be charged therewith.

9 GEO. IV. CAP. 15.

An Act to prevent a Failure of Justice by reason of Variances between Records and Writings produced in Evidence in Support thereof. [9th May, 1828.]

Whereas great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the

trial is had, in matters not material to the merits of the case ; and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time ; for remedy thereof, be it enacted, that it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, and any court of oyer and terminer and general goal delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared ; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record ; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly.

In cases where a variance shall appear between written or printed evidence and the record, the court may order the record to be amended on payment of costs.

2 WILL. IV. CAP. 39.

An Act for Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster. [23d May, 1832.]

Whereas the process for the commencement of personal actions in his majesty's superior courts of law at Westminster, is, by reason of its great variety and multiplicity, very inconvenient in practice ; for remedy thereof be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the process in all such actions commenced in either of the said courts, in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament, according to the provisions contained in the statute passed in the sixth year of the reign of his late majesty King George the Fourth, entitled "An act to amend the laws relating to bankrupts," shall, whether the action be brought by or against any person entitled to the privilege of peerage, or of parliament, or of the court wherein such action shall be brought, or of any other court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed, marked No. 1, and which process may issue from either of the said courts, and shall be called a writ of summons ; and in every such writ, and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned ; and such writ shall be issued by the officer of the said courts respectively by whom process serviceable in the county therein mentioned hath been heretofore issued from such court

Serviceable process for the commencement of personal actions.

6 G. 4, c. 16.

Writs may be served within two hundred yards of the border of the county.

and every such writ may be served in the manner heretofore used in the county * therein mentioned, or within two hundred yards of the border thereof, and not elsewhere, and the person serving the same shall and is hereby required to indorse on the writ the day of the month and week of the service thereof.

The day of service to be indorsed on writ.

II. And be it further enacted, that the mode of appearance to every such writ, or under the authority of this act, shall be by delivering a memorandum in writing according to the form contained in the said schedule, and marked No. 2, such memorandum to be delivered to such officer or person as the court out of which the process issued shall direct, and to be dated on the day of the delivery thereof.

Mode of appearance to serviceable process.

III. And be it further enacted, that in case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of distringas as to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such distringas shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation; and if such writ of distringas shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit to the satisfaction of the court out of which such writ of distringas issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution.

Appearance may be enforced by writ of distringas in case a defendant cannot be served with the writ of summons.

IV. And be it further enacted, that in all such actions wherein it shall be intended to arrest and hold any person to special bail who may not be in the custody of the marshal of the marshalsea of the court of king's bench or of the warden of the Fleet prison, the process shall be by writ of capias, according to the form contained in the said schedule, and marked No. 4; and so many copies of such process,

Ballable process for the commencement of personal actions.

together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon or served therewith, shall be delivered therewith to the sheriff or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest; and if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon in the manner and according to the directions contained in a certain act of parliament made in the fourth and fifth years of the reign of King William and *Queen Mary, intituled "An act for delivering declarations against prisoners:" provided always, that it shall be lawful for the plaintiff or his attorney to order the sheriff, or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or other officer or person; and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other.

4 & 5 W. &
M. c. 21.

Proceed-
ings to out-
lawry.

V. And be it further enacted, that upon the return of *non est inventus* as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona* as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum* issued after an original writ; provided always, that every such writ of *exigent* and proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of *exigent* and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed.

VI. And be it further enacted, that after judgment given in any action commenced by writ of summons or *capias* under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ; provided always, that every outlawry or waiver had under the authority of this act shall and may be vacated

Proceedings
to outlawry
may be had
after judg-
ment given
under the
authority of
this act.

or set aside by writ of error or motion, in like manner as outlawry or waiver founded on an original writ may now be vacated or set aside.

VII. And be it further enacted, that for the purpose of proceeding to outlawry and waiver upon such writs of *capias* or *distringas* returnable in the court of exchequer, it shall and may be lawful for the lord chief baron of the said court, and he is hereby required to appoint, from time to time, a fit person holding some other office in the said court, to execute the duties of a flazer, exigenter, and clerk of the outlawries in the same court.

Flazer to be appointed in the court of exchequer.

VIII. And be it further enacted, that when it shall be intended to detain in any such action any person being in the custody of the marshal of the marshalsea of the court of king's bench, or of the warden of the Fleet prison, the process of detainer shall be according to the form of the writ of detainer contained in the said schedule, and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered together with such process to the said marshal or warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said courts, and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the judges of the said courts.

Mode of detaining a prisoner in the custody of the marshal or of the warden of the Fleet.

IX. And be it further enacted, that in all such actions wherein it shall be intended to proceed against a member of parliament according to the provisions of the said statute made in the sixth year of the reign of his late * majesty King George the Fourth, the process shall be according to the form contained in the said schedule marked No. 6, and which process, and a copy thereof, shall be in lieu of the summons, or original bill and summons, and copy thereof, mentioned in the said statute.

Mode of proceeding against a member of parliament to enforce the stat. 6 G. 4, c. 16, s. 10.

X. And be it further enacted, that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or

Duration of writs.

Proviso as to statute of limitations.

other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney, suing out the same as the case may be.

XI. And whereas, according to the present practice, in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created; for remedy thereof be it enacted, that if any writ of summons, capias, or detainer issued by authority of this act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: provided always, that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then in every such case the Wednesday after Easter Day shall be considered as the last of such eight days: provided also, that if such writ shall be served or executed on any day between the tenth day of August and the twenty-fourth day of October in any year, special bail may be put in by the defendant in bailable process, or appearance entered, either by the defendant or the plaintiff, on process not bailable, at the expiration of such eight days: provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said tenth day of August and twenty-fourth day of October.

Proceedings on writs served or executed at certain times.

Proviso for Sunday, &c.

XII. And be it further enacted, that every writ issued by authority of this act shall bear date on the day on which the same shall be issued, and shall be tested in the name of the lord chief justice or the lord chief baron of the court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said court, and shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such an attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

Date and teste of writs.

Indorsement of the name of the attorney or party suing.

* XIII. And be it further enacted, that every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or on any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city

Service of writs of summons on corporations and on inhabitants of hundreds and towns.

or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, or some peace officer thereof.

XIV. And be it further enacted, that it shall and may be lawful to and for the judges of the said courts, and they are required from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper, and for that purpose to meet as soon as conveniently may be after the passing hereof.

XV. And be it further enacted, that it shall be lawful in term time, for the court, out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts, in vacation, to make orders, for the return of any such writ; and every such order shall be of the same force and effect as a rule of court made for the like purpose; provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of court.

Proceedings in default of appearance or special bail.

XVI. And be it further enacted, that all such proceedings as are mentioned in any writ, notice, or warning issued under this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

Attorney to declare whether writ issued by his authority; and to declare name and place of abode of his client, if ordered.

If writ not issued by authority of the attorney, the defendant may be discharged.

XVII. And be it further enacted, that every attorney whose name shall be indorsed on any writ issued by authority of this act shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or any judge of the same or of any other court shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall have appeared to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance.

XVIII. And be it further enacted, that it shall and may be lawful to and for the judges of each of the said courts from time to time to make such rules and orders for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of this act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors.

XIX. Provided always, and be it further enacted, that nothing in this act

Proviso for persons privileged from arrest, &c.

Places, parcel of one county and situate in another, to be deemed part of each.

**Writes here-
inbefore au-
thorized to
be the only
writes for
commence-
ment of per-
sonal
actions.**

**Commence-
ment of act.**

Act may be altered this session.

Indorsement to be made on the Writ before Service thereof.

This writ was issued by *E. F.* of attorney for the said *A. B.*

Or,

This writ was issued in person by *A. B.* who resides at [mention the city, town, or parish, and also the name of the hamlet, street, and the number of the house of the plaintiff's residence, if any such.]

Indorsement to be made on the Writ after Service thereof.

This writ was served by me *X. Y.* on the day of 18 . *X. Y.*

* No. 2.

Forms of entering an Appearance.

A., plaintiff, against *C. D.* { The defendant, *C. D.*, appears in person.
or, *E. F.*, attorney for *C. D.*, appears for him.
against *C. D.* and another, { *G. H.*, attorney for the plaintiff, appears for the
or, defendant, *C. D.*, according to the statute
against *C. D.* and others. {
Entered the day of 18 .

No. 3.

Writ of Distringas.

WILLIAM the Fourth, &c.

To the sheriff of greeting :

We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of forty shillings, in order to compel his appearance in our court of to answer *A. B.* in a plea of trespass on the case [or debt, as the case may be] ; and how you shall execute this our writ you make known to us in our said court on the day of now next ensuing.

Witness at Westminster, the day of in the year of our reign.

Notice to be subscribed to the foregoing Writ.

In the court of

Between { *A. B.*, plaintiff,
and
C. D., defendant.

Mr. *C. D.*

Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said court to answer to the said *A. B.* according to the exigency of a writ of summons bearing teste on the day of ; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution [or if the defendant be subject to outlawry, will cause proceedings to be taken to outlaw you].

No. 4.

Writ of Capias.

WILLIAM the Fourth, &c.

To the sheriff of

or,

To the constable of Dover Castle,

or,

To the mayor and bailiffs of Berwick-upon-Tweed,

or,

[*as the case may be*] greeting:

We command you [*or, as before, or, often, we have commanded you*], that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take *C. D.* of if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made *deposit with you according to law in an action on promises [*or, of debt, &c.*] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said *C. D.* And we hereby require the said *C. D.* to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And we do further command you the said sheriff, that immediately after the execution hereof you do return this writ to our said court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said court or by any judge thereof.

Witness at Westminster, the day of .

Memoranda to be subscribed to the Writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the stat. 7 & 8 Geo. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond.

4. If a defendant, having been served only with this writ, and not arrested

thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £ by affidavit,

Or,

Bail for £ by order of [*naming the judge making the order*], dated the day of .

This writ was issued by *E. F.* of attorney for the plaintiff [*or plaintiffs*] within named.

Or,

This writ was issued in person by the plaintiff within named, who resides at [*mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be*].

No. 5.

Writ of Detainer.

WILLIAM the Fourth, &c.

To the marshal of the marshalsea of our court before us [*or, to the warden of our prison of the Fleet.*]

We command you, that you detain *C. D.* if he shall be found in your *custody at the delivery hereof to you, and him safely keep, in an action on promises [*or, of debt, &c. as the case may be*], at the suit of *A. B.*, until he shall be lawfully discharged from your custody. And we do further command you, that on receipt hereof you do warn the said *C. D.*, by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our court of to the said action; and that in default of his so doing the said *A. B.* may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you the said [*marshal or warden, as the case may be*], that immediately after the service hereof you do return this our writ, or a copy hereof, to our said court, together with the day of the service hereof.

Witness at Westminster, the day of .

N. B. *This writ is to be indorsed in the same manner as the writ of capias, but not to contain the warning on that writ.*

No. 6.

Writ of Summons to be served on a Member of Parliament, in order to enforce the Provisions of the Statute 6 Geo. 4, c. 16, s. 10.

WILLIAM the Fourth, &c.

To *C. D.* of, &c. Esquire, having privilege of parliament, greeting:

We command you, that within one calendar month next after personal service hereof on you, you do cause an appearance to be entered for you in our court of in an action [*on promises, debt, &c. as the case may be*], at the suit of *A. B.*; and you are hereby informed, that an affidavit of debt for the

sum of hath been filed in the proper office, according to the provisions of a certain act of parliament made and passed in the sixth year of the reign of his late majesty King George the Fourth, intituled "An act to amend the laws relating to bankrupts," and that unless you pay, secure, or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you, within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness at Westminster, the day of .

N. B. *This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.*

Direction. — *This summons is to be indorsed with the name of the plaintiff or his attorney in like manner as the writ of capias.*

2 & 3 WILL. IV. CAP. 71.

An Act for shortening the Time of Prescription in certain Cases.

[1st August, 1832.]

Whereas the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the *same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, and benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claims to right of common and other profits & prandre, not to be defeated after thirty years' enjoyment by showing the commencement;

after sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be

In claims of right of way

or other easements, the periods to be twenty years and forty years.

enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Before mentioned periods to be deemed those next before suits for claims to which such periods relate.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation: and

In actions on the case the claimant may allege his right generally, as at present.

that in all

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other mat-

pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time *immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done: and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of

fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

ters to be replied specially.

VI. And be it further enacted, that, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim.

Restricting the presumption to be allowed in support of claims herein provided for.

VII. Provided also that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

Proviso for infants, &c

VIII. Provided always, and be it further enacted, that when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term for life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

What time to be excluded in computing the term of forty years appointed by this act.

IX. And be it further enacted, that this act shall not extend to Scotland or Ireland.

Not to extend to Scotland or Ireland.

X. And be it further enacted, that this act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

Commencement of act.

XI. And be it further enacted, that this act may be amended, altered, or repealed, during this present session of parliament.

Act may be amended.

3 & 4 WILL. IV. CAP. 42.

An Act for the further Amendment of the Law and the better Advancement of Justice. [14th August, 1833.]

Whereas it would greatly contribute to the diminishing of expense in suits in the superior courts of common law at Westminster if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they now are according to the course and practice of pleading in several forms of action; but this cannot be conveniently done otherwise than by rules or orders of the judges of the said courts from time to time to be made, and doubt may arise as to the power of the said judges to make such

alterations without the authority of parliament: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled,

Judges to have power to make alterations in the mode of pleading in the superior courts, &c.

and by the authority of the same, that the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may, by any rule or order * to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect,

make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders, or regulations shall be laid before both houses of parliament, if parliament be then sitting, immediately upon the making of the same, or if parliament be not sitting, then within five days after the next meeting thereof, and no such rule, order, or regulation shall have effect until six weeks after the same shall have been so laid before both houses of parliament; and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said courts, and all other courts of common law, and on all courts of error into which the judgments of the said courts or any of them shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament: provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be

Not to deprive any person of the power of pleading the general issue.

expressly enacted by parliament: provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be

in force.

II. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators

of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person;

and actions may be brought against executors for an injury to property, real or personal, by their testator.

and further that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or adminis-

trators shall have taken upon themselves the administration of the estate and

effects of such person ; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person.

III. And be it further enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after ; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant of debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after ; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after ; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or * suits, but not after ; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

Limitation
of action of
debt on
specialties,
&c.

IV. And be it further enacted, that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert, non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done ; and that if any person or persons against whom there shall be any such cause of action is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Infants,
femes cov-
ert, &c.

Absence of
defendants
beyond seas
provided for.

V. Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the

Proviso in
case of ac-
knowledg-
ment in
writing or
by part
payment.

time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

VI. And nevertheless be it enacted, that if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

The limitation after judgment or outlawry reversed.

VII. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed, in the twenty-first year of the reign of King James the first, intituled "An act for limitation of actions, and for avoiding of suits in law."

VIII. And be it further enacted, that no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

Restriction as to plea in abatement for non-joinder of a co-defendant.

IX. And be it further enacted, that to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

*** X.** And be it further enacted, that in all cases in which after such plea in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every

Reply of plaintiff to plea in abatement of non-joinder.

Provision in the case of subsequent proceedings against the persons named in a plea in abatement.

defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person; provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

XI. And be it further enacted, that no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the cost of such application shall be paid by the party applying, if the judge shall think fit.

Misnomer
not to be
pleaded in
abatement.

XII. And be it further enacted, that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such person by the same initial letter or letters or contraction of the Christian or first name or names instead of stating the Christian or first name or names in full.

Initials of
names may
be used in
some cases.

XIII. And be it further enacted, that no wager of law shall be hereafter allowed.

Wager of
law to be
abolished.

XIV. And be it further enacted, that an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator.

Action of
debt on sim-
ple contract.

XV. And whereas it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes; be it further enacted, that it shall and may be lawful for the said judges, or any such eight or more of them as aforesaid, at any time within five years after this act shall take effect, to make regulations by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose at a reasonable time before the trial, of one party to the other of all such written or printed documents, or copies of documents as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory in all courts of common law, and of the like force as if the provisions therein contained had been expressly enacted by parliament.

Power to the
judges to
make regula-
tions as to
the admis-
sion of writ-
ten docu-
ments.

XVI. And whereas it would also lessen the expense of trials and prevent

delay if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned, were tried before the sheriff of the county where the venue is laid; be it therefore enacted, that all writs issued * under and by virtue of the statute passed in the session of parliament held in the eighth and ninth years of the reign of King William the Third, intituled "An act for the better preventing frivolous and vexatious suits," shall, unless the court where such action is pending, or a judge of one of the said superior courts, shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices or justice of assize or nisi prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain, in term or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or nisi prius.

Writs of inquiry under the statute 8 & 9 W. 3, c. 11, to be executed before the sheriff, unless otherwise ordered.

XVII. And be it further enacted, that in any action depending in any of the said superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues.

XVIII. And be it further enacted, that at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge, before whom such trial shall be had, shall certify under his hand upon such writ that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury on the trial of such issue or issues shall be as valid and of the like force as the verdict of a jury at nisi prius; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are hereinafter given to judges at nisi prius.

Power to direct issues joined in certain actions to be tried before the sheriff or any judge.

Upon the return of a writ of inquiry or a trial of issues, judgment to be signed, unless, &c.

Sheriff, as to such issues, to have the like powers as judges at nisi prius.

XIX. Provided also, that all and every the provisions contained in the statute made and passed in the first year of the reign of his present majesty, intituled "An act for the more speedy judgment and execution in actions brought in his majesty's courts of law at Westminster, and in the court of common pleas of the county palatine of Lancaster, and for amending the law as to judgment on a *cognovit actionem* in cases of bankruptcy," shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry and writs for the trials of issues in like manner as if the same were expressly reenacted herein.

Provisions of 1 W. 4, c. 7, to extend to such writs of inquiry and issues.

XX. And be it further enacted, that from and after the first day of June, one thousand eight hundred and thirty-three, the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

Sheriffs to name deputies to be resident in London.

* XXI. And be it further enacted, that it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant), by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct.

Defendant to be allowed to pay money into court in certain actions by judge's order.

XXII. And whereas unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen; be it therefore enacted, that in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place.

Power to direct local actions to be tried in any county.

XXIII. And whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record; and whereas

Allowing amendments to be made on the record in certain cases.

it is expedient to allow such amendment as hereinafter mentioned to be made on the trial of the cause; be it therefore enacted, that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at nisi prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ,* as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet.

XXIV. And be it further enacted, that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court or the court from which the record has issued shall, if they shall think the said vari-

Power for the court or judge to direct the facts to be found specially.

ance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

XXV. And be it further enacted, that it shall be lawful for the parties in any action or information, after issue joined, by consent and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or of *nolle prosequi*, immediately after the decision of the case, or otherwise as the court may think fit; and judgment shall be entered accordingly.

Power to state a special case without proceeding to trial.

XXVI. And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favor of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him.

Witnesses interested solely on account of the verdict to be admissible.

XXVII. And be it further enacted, that the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.

Direction to indorse the name of the witness on the record.

XXVIII. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

Jury empowered to allow interest upon debts.

* XXIX. And be it further enacted, that the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money re-

In certain actions the jury may give damages in the nature of interest.

coverable in all actions on policies of assurance made after the passing of this act.

Interest to be allowed on all writs of error for the time that execution has been delayed.

XXX. And be it further enacted, that if any person shall sue out any writ of error upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof.

Executors suing in right of the testator to pay costs.

XXXI. And be it further enacted, that in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

One or more of several defendants in any action having a *nolle prosequi* or a verdict shall have costs.

XXXII. And be it further enacted that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

Where *nolle prosequi* entered upon any count, &c.

XXXIII. And be it further enacted, that where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.

Plaintiff in *scire facias*, and plaintiff or defendant on demurrer, to have costs.

XXXIV. And be it further enacted, that in all writs of *scire facias* the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default as well as upon a judgment after plea pleaded or demurrer joined; and that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf.

Costs of special juries in case of a nonsuit.

6 G. 4, c. 50.

XXXV. And whereas it is provided in and by a statute passed in the sixth year of the reign of his late majesty, intituled "An act for consolidating and amending the law relative to jurors and juries," that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall immediately after the verdict, certify under his hand, upon the back of the record, that the same was

a cause proper to be tried by a special jury; and whereas the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the judge should have such power of certifying as well when the plaintiff is nonsuited as when he has a verdict against him; be it therefore enacted, that the said provisions of the said last-mentioned act of parliament, and everything therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.

XXXVI. And whereas it would tend to the better dispatch of business, and would be more convenient, and better assimilate the practice and promote * uniformity in the allowance of costs, if the officers on the plea side of the courts of king's bench and exchequer, and the officers of the court of common pleas at Westminster, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen or may arise in each of the said courts indiscriminately; be it therefore enacted, that it shall be lawful for the judges of the said courts, or such eight or more of them as aforesaid, by any rule or order to be from time to time made, in term or vacation, to make such regulations for the taxation of costs by any of the said officers of the said courts indiscriminately as to them may seem expedient, although such costs may not have arisen in respect of business done in the court to which such officer belongs, and to appoint some convenient place in which the business of taxation shall be transacted for all the said courts, and to alter the same when and as it may seem to them expedient.

Power to make regulations as to the officers of each court at Westminster taking costs.

XXXVII. And be it further enacted, that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

Executors of lessor may distrain for arrears in his lifetime.

XXXVIII. And be it further enacted, that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made as aforesaid.

Arrears may be distrained for within six months after determination of term.

XXXIX. And whereas it is expedient to render references to arbitration more effectual; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of nisi prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator

Submission to arbitration by rule of court, &c. not to be revocable without leave of the court.

or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award.

XL. And be it further enacted, that when any reference shall have been made by any such rule or order as aforesaid, or by any submission contained in such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order; provided always, that every person whose attendance shall be so required shall be entitled to the like conduct-money, and payment of expenses and for loss of time, as for and upon attendance at any trial; provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found; provided * also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce, at a trial, or to attend at more than two consecutive days, to be named in such order.

XLI. And be it further enacted, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

XLII. And whereas it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended; be it further enacted by the authority aforesaid, that the lord high chancellor, lord keeper or lord's commissioners of the great seal, the said courts of law, and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England and dominion of

Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open court in which such affidavit shall be entitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge.

XLIII. And whereas the observance of holidays in the said courts of common law during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; be it therefore enacted by the authority aforesaid, that none of the several days mentioned in the statute passed in the sessions of parliament holden in the fifth and sixth years of the reign of King Edward the Sixth, intituled "An act for keeping holidays and fasting days," shall be observed or kept in the said courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord and the three following days, and Monday and Tuesday in Easter week.

For the abolition of certain holidays.

5 & 6 Edw. 6, c. 8.

XLIV. And be it further enacted, that this statute shall commence and take effect on the first day of June, one thousand eight hundred and thirty-three.

Commencement of act.

XLV. And be it further enacted, that nothing in this act shall extend to that part of the United Kingdom called Ireland, or that part of the United Kingdom called Scotland, except in the cases hereinbefore specially mentioned.

Not to extend to Ireland or Scotland

3 & 4 VICT. CAP. 24.

* *An Act to repeal Part of an Act of the Forty-third Year of the Reign of Queen Elizabeth, intituled "An Act to avoid trifling and frivolous Suits in Law in Her Majesty's Courts in Westminster," and of an Act of the Twenty-second and Twenty-third Year of the Reign of King Charles the Second, intituled "An Act for laying Impositions on Proceedings at Law;" and to make further Provisions in lieu thereof.* [3d July, 1840.]

Whereas an act passed in the forty-third year of the reign of Queen Elizabeth, intituled "An act to avoid trifling and frivolous suits in law in her majesty's courts in Westminster," and another act in the twenty-second and twenty-third years of the reign of King Charles the Second, intituled "An act for laying impositions on proceedings at law," which recites that many good subjects of this realm have been and daily are undone by such suits, contrary to the intention of the said statute of Queen Elizabeth; but the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provisions for the prevention thereof. Now be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and

48 Eliz. c. 6.

22 & 23 Car. 2, c. 9.

commons, in this present parliament assembled, and by the authority of the same, that the said recited act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the twenty-second and twenty-third of Charles the Second as relates to costs in personal actions, be and they are hereby repealed.

Recited acts
in part re-
pealed.

II. And be it enacted, that if the plaintiff in any action of trespass, or of trespass on the case, brought or to be brought in any of her majesty's courts at Westminster, or in the court of common pleas at Lancaster, or in the court of common pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of a trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious.

Costs not to
be recovered
in action of
trespass, or
of trespass
on the case,
where dam-
ages re-
covered are
less than
40s., unless
upon
judge's cer-
tificate, &c.

III. Provided always, and be it enacted, that nothing herein contained shall extend to or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or inclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon our left at the last reputed or known place of abode of the defendant or defendants in such action or actions.

Act not to
extend to
deprive
plaintiffs of
costs in ac-
tions for
trespass.

5 & 6 VICT. CAP. 97.

An Act to amend the Law relating to Double Costs, Notices of Action, Limitations of Actions, and Pleas of the General Issue, under Certain Acts of Parliament. [10th August, 1842.]

Whereas divers acts of parliament, public, local, and personal, contain enactments or provisions relating to the recovery of double, treble, or other costs in certain cases, and to the pleading of the general issue and the giving any special matter in evidence at any trial to be had for any matter done in * pursuance of or under the authority of the said acts, and to the giving of notice of action before any action shall be commenced; and whereas it is expedient that the law should be altered in such respects: be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of any clause, enactment, or provision in any act or acts commonly called public, local, and personal, or local and personal, or any act or acts of a local or personal nature, whereby it is enacted or provided that either

Repeal of
provision in
local and
personal
acts giving
double and
treble costs.

double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed; provided always, that in lieu thereof the usual costs between party and party shall and may be recovered, and no more.

II. And be it enacted, that so much of any clause, enactment, or provision in any public act or acts, not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: Provided always, that instead of such costs the party or parties heretofore entitled under such last-mentioned acts to such double, treble, or other costs shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer.

Repealing provisions in public acts giving double and treble costs.

III. And be it enacted, that so much of any clause or provision in any act or acts commonly called public, local, and personal, or local and personal, or in any act or acts of a local and personal nature, whereby any party or parties are entitled or permitted to plead the general issue only and to give any special matter in evidence without specially pleading the same, shall be and the same is hereby repealed.

Repeal of provision in local and personal acts allowing general issue.

IV. And whereas it is expedient that the law should be uniform with respect to notice of action in all cases where such notice of action is required; be it therefore enacted, that from and after the passing of this act, in all cases where notice of action is required, such notice shall be given one calendar month at least before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding.

Uniformity of notice of action.

V. And whereas divers acts commonly called public, local, and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the said acts respectively: And whereas the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only; be it therefore enacted, that from and after the passing of this act the period within which any action may be brought for anything done under the authority or in pursuance of any such act or acts shall be two years, or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision, or enactment by which any other time or period of limitation is appointed or enacted shall be and the same is hereby repealed.

General limitation of actions under local and personal acts.

VI. Provided always and be it enacted, that nothing herein contained shall extend, or be construed to extend, to any action, bill, plaint, or information, or any legal proceeding of any kind whatsoever, commenced before the passing of this act, but such proceedings may be thereupon had and taken in all respects as if this act had not passed.

Actions, &c. brought before passing of act not affected.

* REGULÆ GENERALES.

TRINITY TERM. 1 WILLIAM IV. 1831.

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form: Now for the prevention of such expense, it is ordered, that if any declaration in *assumpsit* hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule as may be applicable to the case; or, if any declaration in *debt* to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff. And it is further ordered, that on the taxation of costs as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

SCHEDULE OF FORMS AND DIRECTIONS.

For that whereas the defendant, on the — day of —, in the year of our Lord —, at London [*or in the county of —*], made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £—, — days [*weeks or months*] after the date thereof [*or as the fact may be*], which period has now elapsed; [*or if the note be payable to A. B.*] and then and there delivered the same to A. B., and thereby promised to pay to the said A. B., or order £—, — days [*weeks or months*] after the date thereof [*or as the fact may be*], which period has now elapsed; and the said A. B. then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Whereas one C. D. on the — day of —, in the year of our Lord, —,

at London [*or in the county of —*], made his promissory note in writing, and thereby promised to pay the defendant or order £—, — days [*weeks or months*] after the date thereof [*or as the fact may be*], which period has now elapsed; and the defendant then and there indorsed the same to the plaintiff, [*or, and the defendant then and there indorsed the same to X. Y., and the said X. Y. then and there indorsed the same to the plaintiff;*] and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

Count on a promissory note against payee by indorsee.

Whereas one *C. D.* on —, at London [*or in the county of —*], made his promissory note in writing, and thereby promised to pay to *X. Y.* or order £—, — days [*weeks or months*] after the date thereof [*or as the fact may be*], which period has now elapsed; and then and there delivered * the said note to the said *X. Y.*, and the said *X. Y.*, then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff; [*or, and the defendant then and there indorsed the same to Q. R., and the said Q. R., then and there indorsed the same to the plaintiff;*] and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due; of all which the defendant then and there had due notice.

Count on a promissory note against indorser by indorsee.

Whereas the plaintiff on —, at London [*or in the county of —*], made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £—, — days [*weeks or months*] after the date [*or sight*] thereof, which period has now elapsed; and the defendant then and there accepted the said bill, and promised the plaintiff to pay the same, according to the tenor and effect thereof and of his said acceptance thereof, but did not pay the same when due.

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

Whereas the plaintiff on —, at London [*or in the county of —*], made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to *O. P.* or order £—, — days [*weeks or months*] after the date [*or sight*] thereof, which period has now elapsed; and then and there delivered the same to the said *O. P.*, and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the plaintiff; of all which the defendant then and there had notice.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

Whereas one *E. F.* on —, at London [*or in the county of —*], made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to the said *E. F.* [*or to H. G.*] or order £—, — days [*weeks or months*] after date [*or sight*] thereof, which period has now elapsed, and the defendant then and there accepted the said bill, and the said *E. F.* [*or the said H. G.*] then and there indorsed the same to the plaintiff; [*or, and*

Count on an inland bill of exchange against the acceptor by indorsee.

the said *E. F.* or, the said *H. G.* then and there indorsed the same to *K. J.*, and the said *K. J.* then and there indorsed the same to the plaintiff;] of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Whereas one *E. F.* on —, at London [or in the county of —], made his bill of exchange in writing and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £—, — days [weeks or months] after the sight [or date] thereof, which period has now elapsed, and the defendant then and there accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by the payee.

Whereas the defendant on —, at London [or in the county of —] made his bill of exchange in writing and directed the same to *J. K.* and thereby required the said *J. K.* to pay to the plaintiff £—, — days [weeks or months] after the date [or sight] thereof, and then and there delivered the same to the said plaintiff, and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the defendant on —, at London [or in the county of —]; made his bill of exchange in writing and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the order of the said defendant £—, — days [weeks or months] after the sight [or date] thereof, and the said defendant then and there indorsed the same to the plaintiff, [or, and the said defendant then and there indorsed the same to *L. M.*, and the said *L. M.* then and there indorsed the same to the plaintiff;] and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* * then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against drawer by indorsee on non-acceptance.

And whereas one *N. O.* on —, at London [or in the county of —], made his bill of exchange in writing and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £—, — days [weeks or months] after the date [or sight] thereof, and the said *N. O.* then and there indorsed the said bill to the defendant, [or, to *R. S.*, and the said *R. S.* then and there indorsed the same to the defendant,] and the defendant then and there indorsed the same to the plaintiff; and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the defendant then and there had due notice.

Count on an inland bill of exchange against indorser by indorsee on non-acceptance.

Whereas one *N. O.* on —, at London [or in the county of —], made his bill of exchange in writing and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the defendant or order £—, — days [weeks or months] after the date [or sight] thereof, and then and there deliver the same to the defendant, and the defendant then and there indorsed the said bill to the plaintiff [or, to *R. S.*, and the said *R. S.* then and there indorsed the same to the plaintiff,] and the same was then and there presented to the said *P. Q.*

Count on an inland bill of exchange against payee by indorsee on non-acceptance.

for acceptance, and the said *P. Q.* then and there refused to accept the same : of all which the defendant then and there had due notice.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following words, viz. : *which period has now elapsed*, and, instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [*naming him*] *did not pay the said bill although the same was there presented to him on the day when it became due.*

Direction for declaration on bills where action brought after time of payment expired.
1st. On bills payable after date.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words viz. : *and the said drawee* [*naming him*] *then and there saw and accepted the same, and the said period has now elapsed*, and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [*naming him*] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

2d. On bills payable after sight.

If a note or bill be payable at sight, the form of the declaration must be varied so as to suit the case, which may be easily done.

Directions for declarations on bills or notes payable at sight.
On foreign bills.

Declaration on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

COMMON COUNTS.

Whereas the defendant on —, at London [*or in the county of* —], was indebted to the plaintiff in £—, for the price and value of goods then and there bargained [*or sold*] and sold [*or delivered*] by the plaintiff to the defendant, at his request :

Goods bargained and sold, or sold and delivered.

And in £—, for the price and value of work then and there done, and materials for the same provided by the plaintiff for the defendant, at his request :

Work and materials.

And in £—, for money then and there lent by the plaintiff to the defendant at his request :

Money lent.

And in £—, for money then and there paid by the plaintiff for the use of the defendant, at his request :

Money paid.

And in £—, for money then and there received by the defendant for the use of the plaintiff :

Money received.

And in £—, for money found to be due from the defendant to the plaintiff, on an account then and there stated between them.

Account stated.

And whereas the defendant afterwards, on, &c. in consideration of the premises respectively, then and there promised to pay the said several moneys respectively, to the plaintiff, on request : Yet he hath disregarded his promises, and hath not paid any of the said moneys or any part thereof; to the plaintiff's damage of £—, and thereupon he brings suit, &c.

General conclusion.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said *last-mentioned several moneys respectively*.

REGULÆ GENERALES.

TRINITY TERM. 1 WILLIAM IV. 1831.

It is further ordered, that with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal.

And it is further ordered, that upon every declaration, delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance.

And it is further ordered, that no judgment of *non pros.* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made in writing, upon the plaintiff, his attorney or agent, as the case may be.

And it is further ordered, that hereafter it shall not be necessary to issue more than two summonses for attendance before a judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shown to the contrary.

And it is further ordered, that no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process in the case of process which is not bailable, or until the expiration of six days from the time of the arrest in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

And it is further ordered, that declarations in *ejectment* may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like

manner as upon declarations served before the sessoin or first general return-day.

And it is further ordered, that before taxation of costs, one day's notice shall be given to the opposite party.

Notice of
taxation of
costs.

And it is further ordered, that no rule to show cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up *upon a judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas,

Pleading
several mat-
ters by
judge's or-
der.

avowries, or cognizances. Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of non assumpsit, or nil debet, or non detinet, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy and coverture, or any two or more of such pleas shall be pleaded together; but in all such cases a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

In what
cases judge's
order unnec-
essary.

And it is further ordered, that these rules shall take effect on the first day of next Michaelmas Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of October next.

Commence-
ment of
rules.

TENTERDEN.

J. VAUGHAN.

N. C. TINDAL.

J. PARKE.

LYNDHURST.

W. BOLLAND.

J. BAYLEY.

J. B. BOSANQUET.

J. A. PARK.

W. E. TAUNTON.

J. LITLEDALE.

E. H. ALDERSON.

S. GASELEE.

J. PATTESON.

MICHAELMAS TERM. 3 WILLIAM IV. 1832.

It is ordered, that in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th day of *October*, as if the declaration or preceding pleading had been delivered or filed on the 24th of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

Where time
to plead,
&c. expires
after 10th
August, the
same time is
to be reck-
oned from
24th Oct. as
if the decla-
ration, &c.
had then
been deliv-
ered. No
further rule
to plead.

It is further ordered, that every declaration shall, in future, be intituled in the proper court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows:—

Title of dec-
laration.

Declaration after Summons.

[*Venue.*]—*A. B.*, by *E. F.* his attorney, [*or*, in his own proper person], complains of *C. D.*, who has been summoned to answer the said *A. B.*, &c.

Commence-
ment by
summons.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

Pledges dis-
continued

HILARY TERM. 4 WILLIAM IV. 1833.

It is ordered, that from and after the first day of Easter Term next inclusive, the following rules shall be in force in the courts of king's bench, common pleas, and exchequer of pleas, and courts of error in the exchequer chamber.

Demurrer to be delivered, not filed. 1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the court, but the same shall always be delivered between the parties.

Points to be stated before demurrer signed. 2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the court or a judge, and leave may be given to sign judgment as for want of a plea.

Other points not stated may be argued. Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the court in the usual way.

No rule to join demurrer. 3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment.

Joinder in demurrer need not be signed. 4. To a joinder in demurrer no signature of a serjeant, or other counsel, shall be necessary, nor any fee allowed in respect thereof.

Making up issue and demurrer. 5. The issue, or demurrer book, shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court.

Setting down special case and demurrer. 6. No motion or rule for a concilium shall be required, but demurrers as well as all special cases, and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the king's bench and exchequer, and a secondary in the common pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party.

Delivery of paper books. 7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the king's bench, or common pleas, or lord chief baron, as the case may be, and the senior judge of the court in which the action is brought, and the defendant shall deliver copies to the other two judges of the court next in seniority; and, in default thereof by either party the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the king's bench and exchequer, or the secondary in the common pleas, as the case may be, a sufficient sum to pay for such copies.

Judgment recovered.—In a plea of judgment 8. Where a defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any;

and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to be recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court or a judge.

recovered,
the number
of roll must
be stated in
the margin.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Error.—
Writ of error not supersedeas till service with points to be argued.

Provided, that if the error stated in such notice shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue.

Execution if point frivolous.

10. No rule to certify or transcribe the record shall be necessary, but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pros*. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the court of error.

No rule to certify and transcribe.

11. No rule to allege diminution, nor rule to assign errors, nor *scire facias quare executionem non*, shall be necessary in order to compel an assignment of errors, but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the king's bench, in cases of error to that court, or within twenty days after the allowance of the writ of error in cases of error *coram nobis* or *coram vobis*, the plaintiff in error shall assign * errors; and on failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *non pros*.

Diminution, assignment, of errors, *sci. fa. quare executionem*.

12. The assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of the court.

Delivery of proceedings in error.

13. No *scire facias ad audiendum errores* shall be necessary (unless in case of a change of parties); but the plaintiff in error may demand a joinder in error, or plea to the assignment of errors, and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

No *sci. fac. ad audiendum errores*.

Joinder in error within twenty days.

Provided, that if in any case the time allowed, as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time, for the same purpose,

Where twenty days expire after 10th August.

after the 24th day of October, without reckoning any of the days before the 10th of August.

Further time may be allowed. Provided also, that in all cases such time may be extended by a judge's order.

Not to apply to errors in fines, &c. Provided also, that in all cases of writs of error to reverse fines and common recoveries, a *scire facias* to the terretenants shall issue as heretofore.

Setting down case for argument. 14. When issue in law is joined, either party may set down the case for argument with the clerk of the errors of the court of error, or the clerk of the rules in the king's bench (as the case may require), and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium.

Delivery of error books. 15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the court below, and of the assignment of errors, and of the pleadings thereon, to the judges of the king's bench, on writs of error from the common pleas or exchequer, and to the judges of the common pleas, on writs of error from the king's bench; and the defendant in error shall deliver copies thereof to the other judges of the court of exchequer chamber before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the king's bench (as the case may be), a sufficient sum to pay for such copies.

Proceedings in error need not be entered before argument. 16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument, but after judgment shall have been given in the court of error in the exchequer chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the court below, on a certificate of a clerk of the errors of the exchequer chamber of the judgment given, for which a fee of three shillings and four pence, and no more, shall be charged.

HILARY TERM. 4 WILLIAM IV. 1833.

Recital of of stat. 3 & 4 Will. 4, c. 42, s. 1. Whereas it is provided by the stat. 3 & 4 Will. 4, c. 42, s. 1, that the judges of the superior courts of common law at *Westminster*, or any eight or more of them, of whom the chiefs of each of the said courts should be three, should and might, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, *make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which rules, orders, and *regulations were to be laid before both houses of parliament as therein mentioned, and were not to have effect until six weeks after the same should*

have been so laid before both houses of parliament, but after that time should be binding and obligatory on the said courts, and all other courts of common law, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament;

Provided that no such rule or order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence, in any case wherein he then was or thereafter should be entitled so to do, by virtue of any act of parliament then or thereafter to be in force;—

It is therefore ordered, that, from and after the first day of *Easter Term* next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force.

First, GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial and on the judgment-roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge.

All pleadings are to be entitled of the day and year when pleaded, and to be so entered of record.

2. No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made, upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained.

No continuances to be entered.

Provided, that such regulation shall not alter or affect any existing rules of practice as to the times of proceeding in the cause.

Not to affect the times of proceeding.

Provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in banc, or at nisi prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Plea, *puis darrein continuance*.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the court or a judge shall otherwise order.

Affidavit to verify.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Judgment to be entered of the day when signed.

Provided, that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*.

Nunc pro tunc.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

Warrants of attorney not to be entered.

5. And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore; and by the said act of the 3 & 4 Will. 4, c. 42, s. 23, the powers

of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged :

Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each ; nor shall *several* pleas or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

Ex. gr. Counts founded upon the same contract, described in one as * a contract without a condition, and in another as a contract with a condition, are not to be allowed ; for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

So, counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract of sale, for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

So, counts for not accepting and paying for goods sold, and for the price of the same goods, as goods bargained and sold, are not to be allowed.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint ; for the debt and the security are different contracts, and such counts are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium upon a contract implied by law, are to be allowed.

Two counts on the same charter-party are not to be allowed.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed.

Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

In the like actions for nonfeasance, several counts founded on varied statements of the same duty, are not to be allowed.

Several counts in trespass, for acts committed at the same time and place, are not to be allowed.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters, *ex. gr.* for wages, work, and labor as a hired servant, *work and labor generally*, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of each debt is to be considered as amounting to a

several count within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided, that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

Account
stated.

The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging *more breaches* than one of the same contract in the same count.

Several
breaches.

Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule), are not to be allowed.

Instances of
pleas and
avowries,
&c.

Ex. gr. Pleas of *solvit ad diem*, and of *solvit post diem*, are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

Payment.

But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Accord and
satisfaction.
Release.

Pleas of an agreement to accept the security of *A. B.*, in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed.

Liability of
third party.

But pleas of an agreement to accept the security of a third person, in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

Agreement
to forbear in
consideration
of liability of
third party.

* In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there — pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

Lib. ten.,
easement,
right of
way, right
of common,
common of
turbary,
and estov-
ers. Right
of common.
Right of
way.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

Distress for
rent, and
damage *feasant*.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for debt, and for distress for damage *feasant*, are to be allowed.

Distress for
rent.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples, in this and other places specified, are given as some instances only of the application of the rules to which they relate; but the principles contained in the rules are not to be considered as restricted by the examples specified.

The cases
above men-
tioned as in-
stances only

6. Where more than one count, plea, avowry, or cognizance, shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon cause shown, that *some distinct subject-matter* of complaint is *bonâ fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application, which shall be allowed.

Departure
from these
rules, how
taken ad-
vantage of.

7. Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry and cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, if the court or judge, before whom the trial is had, shall be of opinion that no such distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which *he succeeds*, arising out of any count, plea, avowry, or cognizance with respect to which the judge shall so certify.

Costs of
counts and
pleas.

8. The name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the *body* of the declaration, or in any subsequent pleading.

Special
venue.

Provided, that, in cases where local description is now required, such local description shall be given.

Local de-
scription.

* 9. In a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication, or subsequent pleading intended to be pleaded in maintenance of the whole action, to use

Commence-
ment and
conclusion
of pleas, &c.

any allegation of "*precludi non*," or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings, pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in the maintenance of the whole action, provided, that nothing herein contained shall extend to cases where an estoppel is pleaded.

10. No formal defence shall be required in a plea, and shall commence as follows: "The said defendant, by —, his attorney, [*or*, in person, &c.] says that —" Commencement of plea.

11. It shall not be necessary to state in a second or other plea or avowry, that it is pleaded by leave of the court, or according to the form of the statute, or to that effect. Second plea.

12. No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions, as if a protestation had been made. Protestation.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country. Traverses.

Provided, that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial. Opposite party may plead over.

14. The form of a demurrer shall be as follows: "The said defendant, by —, his attorney [*or*, in person, &c. *or* plaintiff], says that the declaration [*or*, plea, &c.] is not sufficient in law," *showing the special causes of demurrer, if any.* Form of demurrer.

The form of a joinder in demurrer shall be as follows: "The said plaintiff [*or*, defendant] says that the declaration [*or*, plea, &c.] is sufficient in law." Joinder in demurrer.

15. *The entry of proceedings* on the record for trial, or on the judgment-roll (according to the nature of the case), shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatever. Entry of proceedings on record.

16. No fees shall be charged in respect of more than *one issue* by any of the officers of the court, or of any judge at the assizes, or any other officer, in any action of *assumpsit*, or in any action of *debt* on simple contract, or in any action on *the case*. Charge for issue.

17. When money is paid into court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*: — Payment of money into court. (a)

"C. D. } The — day of — .
ats.

A. B. } The defendant, by —, his attorney [*or*, in person, &c.], says that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £ —, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [*or*, in actions of *debt*, that he is not indebted to the plaintiff] to a greater

(a) The 17th and 19th rules are repealed, see post, 556.

amount than the said sum, &c. in respect of the cause of action in the declaration mentioned, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action."

No order to pay money into court except in certain cases.

18. No rule or judge's order to pay money into court shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21; but the money shall be paid * to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea; and the said sum shall be paid out to the plaintiff on demand.

Proceeding by plaintiff after payment of money into court.

19. The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same, by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, "that he has sustained damages [*or, that the defendant is indebted to him, as the case may be*] to a greater amount than the said sum;" and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

Commencement of declaration after plea of non-joinder.

20. In all cases under the 3 & 4 Will. 4, c. 42, s. 10, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:—

"*Venue.*—*A. B.*, by *E. F.*, his attorney [*or, in his own proper person, &c.*], complains of *C. D.* and *G. H.*, who have been summoned to answer the said *A. B.*, and which said *C. D.* has heretofore pleaded in abatement the non-joinder of the said *G. H.*, &c." (*The same form to be used mutatis mutandis in cases of arrest or detainor.*)

Character of assignees, &c. to be taken as admitted, unless specially denied.

21. In all actions by and against assignees of a bankrupt or insolvent or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied.

PLEADINGS IN PARTICULAR ACTIONS.

I. — *Assumpsit.*

Effect of non assumpsit.

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

Ex. gr. In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

Instances:
Warranty.
Policy.

In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

Carriers and
bailees.
Agents.

In an action of *indebitatus assumpsit*, for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those * facts which make such receipt by the defendant a receipt to the use of the plaintiff.

Goods sold.
Money had.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note.

Bills and
notes no
general is-
sue.

3. In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded.

In every ac-
tion of as-
sumpsit
matters in
confession
and avoid-
ance to be
pleaded
specially.

4. In actions on policies of assurance the interest of the assured may be averred thus: "That A., B., C., and D., [or, some or one of them,] were or was interested," &c. And it may also be averred, "that the insurance was made for the use and benefit, and on the account, of the person or persons so interested."

Statement
of interest
of assured.

II. — *In Covenant and Debt.*

1. In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

*Non est fac-
tum.*

2. The plea of "*nil debet*" shall not be allowed in any action.

Nil debet.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and

General is-
sue in debt.

Matters in confession and avoidance to be pleaded specially.

such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*; and all matters in confession and avoidance shall be pleaded specially as above directed in actions of *assumpsit*.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

Pleas in other cases.

III. — *Detinue*.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

Non detinet.

IV. — *In Case*.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

Effect of not guilty.

Other pleas.

Eg. gr. In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

Instances: Nuisance.

In an action on the case, for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

Right of way.

In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged.

Trover.

Slander.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

Escape.

In this form of action against a carrier the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

Carriers.

Matter in confession and avoidance to be pleaded specially.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*.

V. — *In Trespass.*

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c. must be designated in the declaration by name or abutments or other description, in failure whereof the defendant may demur specially. Abutments in declaration.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially. Effect of not guilty in trespass *qu. cl. fr*.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein. In trespass *de bon. asp.*

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified. Right of way.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified. Common of pasture.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively. Similar pleas.

Provided, nevertheless, that nothing contained in the 5th, 6th, or 7th of the above-mentioned general rules and regulations, or in any of the above-mentioned rules or regulations, relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of *Easter Term* next. Commencement of the rules.

TRINITY TERM. 1 VICT.

It is ordered, that in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

* Whereas it is expedient that certain rules and regulations made in Hilary Term, in the fourth year of his late majesty King William the Fourth, pursuant to the statutes of 3 & 4 Will. 4, c. 42, s. 1, should be amended, and some further rules and regulations made pursuant to the same statute.

It is therefore ordered, that from and after the first day of Michaelmas Term next inclusive, unless parliament shall in the mean time otherwise enact, the following rules and regulations, made pursuant to the said statute, shall be in force : —

First, it is ordered, that the 17th and 19th of the general rules and regulations made pursuant to the statute 3 & 4 Will. 4, c. 42, s. 1, be repealed, and that in the place thereof the two following amended rules be substituted, viz. : —

For the 17th Rule.

Payment of money into court. When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis* : —

Form of Plea.

C. D. }
ats. }

The — day of —.

A. B. } The defendant, by —, his attorney [*or*, in person, &c.], says, [*or*, in case it be pleaded as to part only, add as to £—, being part of the sum in the declaration, *or*, count mentioned, *or*, as to the residue of the sum of £—] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £—, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [*or*, in actions of debt, that he never was indebted to the plaintiff] to a greater amount than the said sum of, &c. in respect of the cause of action in the declaration mentioned [*or*, in the introductory part of the plea mentioned], and this he is ready to verify : wherefore he prays judgment if the plaintiff ought further to maintain his action thereof.

For the 19th Rule.

Proceedings by the plaintiff after payment of money into court. The plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in ; and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs so taxed ; or the plaintiff may reply that he has sustained damages [*or*, that the defendant was and is indebted to him, *as the case may be*] to a greater amount than the said sum ; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

General issue by statute. It is further ordered, that in every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he shall insert in the margin of the plea the words “by statute,” otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament : and such memorandum shall be inserted in the margin of the issue and of the nisi prius record.

Payments credited in particulars. In any case in which the plaintiff (in order to avoid the expense of the plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid

to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. of demand need not be pleaded.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums. Rule not to apply to claim of balance.

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar. Payment in reduction of damages or debt not to be allowed.

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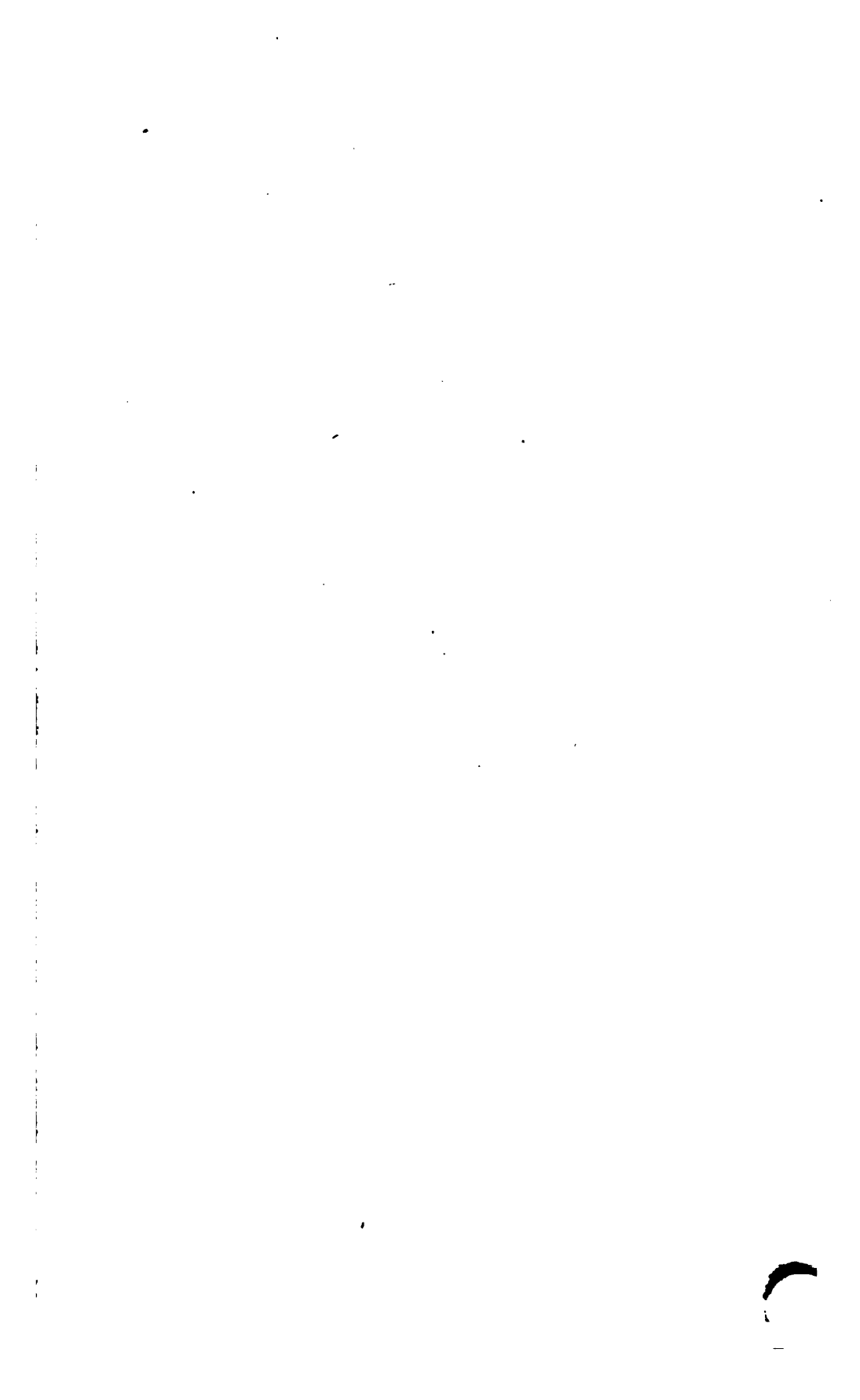
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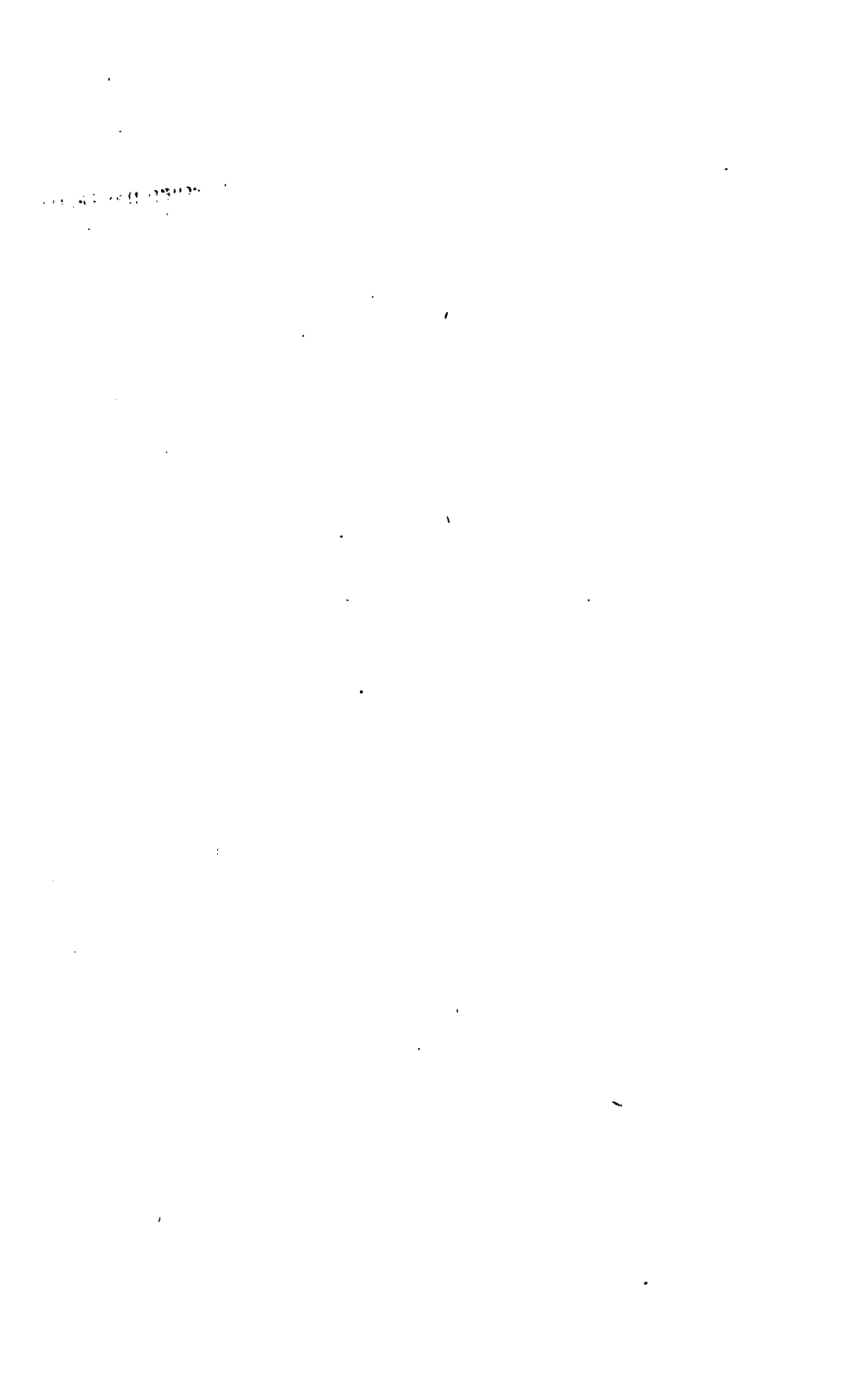
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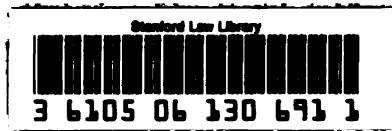
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